DK (Return-Ethic Serb- Upheld SK-Accommodation) Croatia CG
[2003] UKIAT 00153

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 20th October 2003
Date Determination notified:
20 November 2003

Before:

The Honourable Mr Justice Ouseley (President)
Mr S Batiste
Ms D Gill

Between:

APPELLANT

and

Secretary of State for the Home Department

RESPONDENT

For the Appellant:
For the Respondent:

DETERMINATION AND REASONS

1. This is another appeal which raises issues concerning the return of ethnic Serbs to Croatia. The Appellant, DK, is now 34. He is a Croatian citizen of Serb ethnic origin who arrived in this country in March 2000 and claimed asylum. He was interviewed fifteen months later and in October 2001, his claim was refused. In May 2002, his asylum and human rights appeals were dismissed by the Adjudicator, Mr R L Walker, and he appeals with the permission of the Tribunal against that decision. It had been the original expectation of the Tribunal that there were to be five "*test*" cases from Sutovic and Hartigan clients, but for one reason or another, those identified cases have not been pursued as test cases.

The Adjudicator's decision

2. The Adjudicator heard evidence from DK to the effect that he had lived his life in Knin. He had joined the Republic of Serbia Krajna police or army when the fighting between Serb and Croat broke out in 1990. In 1995, he,

with between 150,000 and 250,000 other Serbs, were driven from Krajina by the Croat armed forces in "*Operation Storm*"; they were displaced to Serbia and Bosnia. He went to Serbia with his parents, his wife and children. His grandfather was killed. The house in which he lived, which the Adjudicator considered as "*the Appellant's family home*" was destroyed. The family were registered as displaced persons. They are still in Serbia.

3. He returned to Knin for a short while in 1999, where he said that he had been arrested and ill-treated by the police; he had been recognised as a former Republic of Serbian Krajina policeman. He left Croatia again in late 1999, returning to Serbia for a few months before making his way alone to Hungary, then to France and eventually to the UK where he has a brother, also an asylum seeker, and a cousin. He could only find low paid work in Serbia, but in the UK he has trained as a plumber and seeks to continue to support his family.

4. The Adjudicator accepted that DK and his family, with other Serbs, had been driven from Knin in "*Operation Storm*", that his grandfather had been killed and that the family house had been deliberately destroyed by the Croats. The Adjudicator said that he had difficulty in accepting the evidence that DK had been in the RSK police or army, because his evidence had been very vague and he had produced no evidence to corroborate it. (The Adjudicator did not mean that corroboration was required as a matter of principle, but only that in the absence of supporting evidence, what DK himself said was too vague to meet the standard of proof.) The Adjudicator did not think that there was any real risk of DK being prosecuted for alleged war crimes because he had been released without charge by the Croatian police in 1999, at a time when the Tudjman regime was still in power. He had been prepared to go to Knin with his parents in 1999 with the specific aim of going to the police station in a small town where he said that everybody knew everybody else, to apply for identity cards and passports in order to prove to Serbia that they had had some assets in Croatia. This showed that his asserted fear of persecution was not genuine. The Adjudicator did not think that he was at risk of detention and ill-treatment; there had been no further ill-treatment as a result of DK's lodging complaints about his ill-treatment with the police and an international organisation.

5. Overall, the Adjudicator, while recognising that there were some of the many returning ethnic Serbs who had been persecuted on return, concluded that the Appellant had no well-founded fear of persecution. In any event there were other areas of Croatia to which he could go where there were higher percentages of Serbs. He thought that the Appellant was an economic migrant whose return to Croatia would breach no rights under either relevant Convention.

6. The Appellant sought to adduce additional evidence before the Tribunal which we looked at without ruling on its admission. It sought to take issue with the adverse credibility findings in relation to whether DK was a member of the RSK forces, if indeed the Adjudicator had reached such a

conclusion; it provided more material about the risk to him of an unfounded war crimes prosecution and the difficulties experienced by his parents in obtaining reconstruction assistance in respect of their house. It provided further evidence as to the difficulties which he would face in Croatia and which his wife and children would face if they tried to return to Croatia; he had no rights in Serbia. He also had two cousins here, recognised as refugees and an aunt and her family, which is why he had chosen to come here. The Appellant also produced an expert Report from Dr Brad Blitz, which we agreed to take into account together with other country material which in good part post-dated the Adjudicator's determination.

S&K

7. At the heart of the appeal, however, was the contention that the conclusions of this Tribunal in S&K [2002] UKIAT 05613*, notified on 3rd December 2002, should be re-examined. At the conclusion of the determination in S&K, the then President said:

> "However, unless the situation deteriorates to a significant extent or special circumstances can be shown in an individual case, no ethnic Serb should be able to establish a claim under either Convention."

8. That decision was intended to and did give authoritative guidance as to the approach to be adopted towards the position of ethnic Serbs returning to Croatia. Giving such guidance is an important part of the Tribunal's function, enabling the parties to know where they stand and assisting the achievement of consistent decision-making throughout the asylum and immigration process. Although S&K is a starred decision, it was not starred because of its guidance over Croatia, but because of an issue of statutory interpretation which arose in it. The system of starring decisions relates only to points of law and in that way marks them as binding authority for the Tribunal and Adjudicators. The value of the starring process and the giving of authoritative guidance was recognised by the Court of Appeal in both S and Others [2002] INLR 416, and again by Laws LJ when refusing a renewed application for permission to appeal in S&K on 25th May 2003, [2003] EWCA Civ 841.

21. In Manzeke v SSHD [1997] Imm AR 524 COA, Lord Woolf MR, dealing with the power the Tribunal to determine an appeal instead of remitting it, said:

> "This last provision is of significance, not only because it gives a clear steer to Tribunals that they should avoid remitting cases to special adjudicators, no doubt because such remission will involve delay, but also because it indicates that the Tribunal has, where possible, to conduct any determination which will enable it finally to dispose of an appeal itself.
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> Particularly when determining appeals brought where it is necessary to give consideration to the general situation in particular parts of the world, it is important for Tribunals, when appropriate, to give their views as to that situation, so far as relevant, to claims for asylum in that part of the world.

> In administering the asylum jurisdiction, the Tribunal (whether it be a special adjudicator or an Appeal Tribunal) has to consider not only whether the individual asylum seeker has the necessary subjective fear to be regarded as someone who is entitled to asylum, but in addition it has to be satisfied that that fear is well-founded. Whether or not that fear is well-founded involves applying an objective standard, a standard which will depend upon the state of affairs in that particular country as well as the circumstances of the individual asylum seeker.
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> It will be beneficial to the general administration of asylum appeals for special adjudicators to have the benefit of the views of a Tribunal in other cases on the general situation in a particular part of the world, as long as that situation has not changed in the meantime. Consistency in the treatment of asylum seekers is important insofar as objective considerations, not directly affected by the circumstances of the individual asylum seeker, are involved."

9. Mr Mullins, for DK, did not seek to say that S&K was simply wrong on the material then before it, though he did challenge the conclusions which had been reached. He did not put his case so much on a deterioration in circumstances, though he contended that there had been a worsening of conditions. Nor was his case that there were exceptional circumstances; almost all of his argument would be good for any ethnic Serb returning to Croatia, drawn as it was from generalised evidence about the difficulties faced by Serbs in a number of ways, some of which applied to DK and some of which did not. He contended that there was now evidence that an assumption upon which S&K had proceeded, as to the availability of benefits for returning failed asylum seekers from the UK, was wrong. The UNHCR was not of the same encouraging view in relation to such returning Serbs. The evidence now showed that the hopeful picture envisaged by the Tribunal in S&K was not in reality being borne out at the level of local implementation. With the benefit of hindsight, it could now be seen that the good intentions of the new Croatian Government had not been implemented. He criticised the Tribunal's approach to Article 3: it should have seen a continuing breach of that Article where the ill-treatment, here the burning down of the family house and the violent displacement, had not been remedied. It was wrong to take a snapshot of the situation now and to fail to see the current position as part of a continuum, a continuing breach of Article 3 by Croatia. In those circumstances, it was appropriate to look again at the whole picture in Croatia; the new information could not simply be treated in isolation. He was entitled to ask the Tribunal to take a different view from that expressed in paragraph 40 of S&K. In Mr Mullins' submission, given the past and continuing breach of Article 3, DK should only be returned to Croatia if the situation he would face there is such that his return would be made "*with dignity*".

10. Of course, the authoritative guidance given in S&K needs to be looked at again if there is sound evidence that the anticipated position has proved to be significantly different in reality; that is really a form of change in circumstance. The same would apply to a significant misapprehension as to the facts. The question is whether that is the position, examined through the circumstances of DK and the general country material which has been produced.

11. Mr Wilken, for the Respondent, submitted that it was necessary to examine what had been decided in S&K and that the Appellant had failed to appreciate its true scope. The Appellant's points were similar to those in S&K, and were really appeal points in that case; he was covering ground already well-trodden up to the end of 2002. Accordingly, we turn to the decision in S&K.

12. The President pointed out in paragraph 6 that the Tribunal had chosen a number of cases in which the decisions appealed against included both asylum and human rights grounds, so that a variety of factual situations which were likely to recur could be considered and the determination relied on in other appeals. It is apparent from paragraph 10 that there is a strong similarity in the arguments which were raised in S&K and again in this case. The allegations relied on to constitute either persecution or contravention of a Claimant's human rights were, broadly, physical violence, hostility and discrimination based on ethnicity.

> "Their homes in Croatia have either been destroyed or taken over by Croats or any tenancy rights which they may have had have been removed. They have lost and cannot regain employment. There is chronic unemployment and economic hardship but the Serbs are at the bottom of the heap. The present regime has failed to recognise and so to '*convalidate*' their pension rights which should have continued to accrue while the Serbs were in control. While it is recognised and to an extent accepted that central Government is trying to uphold minority rights and encourage the return of ethnic Serbs who had fled Croatia and who for good reason failed to return while the HDZ under Tudjman was in control, it is contended that the Government's instructions are being frustrated at local level by continuing discrimination, by judicial and bureaucratic incompetence and failures and by unwillingness or inability to remedy the situation. In addition ... there is, it is said, a real risk that prosecutions for alleged war crimes will be pursued on the basis of collective responsibility notwithstanding that individuals cannot themselves be proved to have done anything which could properly be regarded as a war crime."

14. Mr Blake submitted for the Claimants in S&K, as recorded in paragraph 11, that the Serbs were persecuted and their human rights had been breached by the ethnic cleansing under Tudjman. They had lost all that they had and there was no real prospect of improvement, because of discrimination and a failure to implement the expressed intentions of the Government. This constituted degrading treatment; a sustained breach of core human rights did, in those circumstances, amount to persecution. Reliance was placed on two authorities, to which we in DK have been referred, namely the East African Asians case [1973] 3 EHRR 76, a decision of the European Commission on Human Rights, and Cyprus v Turkey (ECtHR 10th May 2001). The Tribunal considered the issue of whether discrimination on racial grounds in those circumstances amounted to degrading treatment in breach of Article 3. At paragraph 24, the Tribunal recorded the extensive background country material and expert reports to which they had been referred.

15. In paragraph 26 of its determination, the Tribunal in S&K referred to the essential complaints common to all the cases with which it was dealing. These were the discriminatory loss of homes and livelihood, the

discriminatory denial of social and economic rights in the areas to which return was envisaged, with no special efforts being made to redress the wrongs suffered and to help their return to society, the discriminatory denial of judicial assistance in reclaiming homes occupied by Croats, and the loss of stability and security because of the prospect of a marginalised and ostracised existence in a largely ethnically cleansed country, in which only a small fraction of the Serbs who previously lived there now did so. One of the specific cases raised the issue of the risk that returning Serbs might face unfair war crimes trials.

16. The Tribunal then set out briefly the history of ethnic tensions in Croatia, the ethnic cleansing of the Serbs and the change in policies following the death in December 1999 of Tudjman and the election in February 2000 of a new President, Mesic, for three years. The nationalist Croat Party, the HDZ, was soundly defeated in those elections. The Tribunal recorded that it was accepted that the new Government had made real efforts to overcome the legacy of hatred and had taken positive steps in legislation and other ways to try to remove the obstacles to return and discrimination against ethnic minorities such as Serbs. It recorded next the concerns that too little was being done and that the good intentions of central Government were being frustrated by local officials. It referred to the concerns expressed in the January 2002 Human Rights Watch Report and the problems faced by those Croatian Serbs who had returned. The Amnesty International Report of September 2002 noted that the return of the country's pre-war Serb population continued to be marred by discriminatory laws and political obstruction. War crimes were not investigated or prosecuted thoroughly or impartially, in particular against possible Croat Claimants. The Organisation for Security and Co-operation in Europe, through Ambassador Semneby, gave a presentation in September 2002 in which the difficulties of repossessing private property, of receiving adequate remedies for terminated occupancy rights and of convalidating documents regarding pension rights were identified. The conclusions of a visiting NATO delegate and MP in September 2002 were that doubts remained about the sustainability of returns because in many areas hard-line nationalists continued to run local Government and would frustrate any return policy, and that even where that was not so, the necessary infrastructure was lacking and the inability of Serbs to repossess their properties created problems. However, the Tribunal noted that returns were being encouraged by the UNHCR notwithstanding these difficulties and, in a letter of 17th May 2002, noted the Government's positive steps to assist in reconstruction and its plans to assist those whose tenancy rights had not been determined. The Tribunal recorded, and it is relevant to Mr Mullins' submissions, that that was criticised as "*jam tomorrow*". The May 2002 OSCE Status Report was issued and difficulties were referred to.

17. In paragraph 33, the Tribunal concluded as follows:

> "We have, we hope, cited enough to identify the real difficulties and discrimination that undoubtedly face Serbs if returned. The Government has the right intentions but is still being frustrated at lower levels. However, the Government is undoubtedly taking steps to improve the situation and in June

2002 the UNHCR/Stability Pact for South Croatian Europe under the heading '*Return Programme of the Government of Croatia*' states:

> '*UNHCR continues to support directly the return Programme of the Government of Croatia, accepting and assisting with the processing of return applications. …*'

While [returning] numbers are small in the context of the total of Serbs who fled, it is clear that the UNHCR is still encouraging return. And later in the same report it notes that the Government of Croatia has '*agreed to accept all persons who sign a waiver that they will accept collective accommodation if their housing is not habitable or if there is no host who will accept them. In particular, the Government of Croatia indicated that it would prioritise Croatian Serbs being evicted from BH (Bosnia-Herzegovina) for return and provision of accommodation*'. It is further noted that the Croatian Government had '*undertaken to assist returnees in their reintegration by providing a basic assistance depending on monthly income for a six-month period following confirmed returnee status, although in practice, a lack of funds has caused delays. The assistance includes cash grants, medical coverage and other legal and social benefits*'. It may be said with some force that the situation on the ground is not so satisfactory since there are bureaucratic delays and obstructions because of local officials' reluctance to follow the Government's lead. We recognise that, but remain of the view that, whatever the pressures on it and notwithstanding its obvious concern to cease to have to be concerned to assist those who would otherwise be refugees, the UNHCR would not encourage return if persuaded that there would be persecution contrary to the Refugee Convention or, indeed, treatment contrary to Article 3 of the European Convention on Human Rights.

18. The Tribunal considered the concerns that the numbers returning might have been exaggerated, that many who returned might have left again and that those who remained might, in the main, be elderly. It recognised that the percentage of ethnic Serbs in the population had reduced from about 12 percent to nearer 4 percent and considered the implication of that for the likely reaction to returning Serbs. The draft report from the Department for International Development, to which Dr Blitz contributed, based on his most recent visits to Croatia in the summer of 2001, was also referred to: there were useful reforms, but considerable problems remained for minorities seeking access to justice and in relation to the return of refugees. Discrimination in housing and war crimes was seen as the most significant barrier to regional stability and put returning Serbs at risk. The Tribunal commented that the persistent discrimination against non-Croats was recognised, but the draft Report's comments were seen as "*now somewhat out of date*". Changes that had taken place since 2001 in relation to war crime prosecutions against Croats under the pressure of Croatia's desire to join the EU and the obligations which that would entail. The HDZ, although it was seeing a resurgence of support in 2002, was itself no longer as a whole the extreme nationalist and right-wing party of the Tudjman era. The Tribunal regarded some of the expert material placed before it as too pessimistic. It accepted the Respondent's summary of the background evidence as set out in Annex 2 to Mr Wilken's skeleton argument. The evidence showed a functioning and fair judiciary, an effective police force, redress in the Courts for breaches of personal security and the availability of legal routes for redress through the higher Courts and ECtHR.

19. The Tribunal considered war crimes prosecutions briefly, it being conceded that unless there was particular reason to believe that an individual would be prosecuted, the war crimes prosecutions system could not be relied on as a barrier to return. It referred to the monitoring of prosecutions by the OSCE and the UNHCR. Trials in absentia, which arose in that case but which do not arise in DK, were considered.

20. Overall, in paragraph 40, the Tribunal concluded as follows:

> "As will no doubt be apparent, we are satisfied that there has been no worsening of the situation since we decided S and in any event the material before us does not persuade us on the low standard required that there is a real risk that in general Serbs if returned to Croatia will suffer persecution or a breach of any Article of the European Convention on Human Rights. We recognise that the situation is far from pleasant and the deprivation and misery that will be faced. That stems from the war and the destruction caused by it. But that by itself cannot mean that surrogate protection is needed or that there will be a breach of human rights. We regard the steps taken by the Croatian Government, despite the difficulties at local level and the obstacles that still undoubtedly exist, as sufficient to provide the necessary protection. It follows that we accept the submissions made by Mr Wilken, set out in detail in his skeleton argument and more particularly in Annex 2 to it. Even though there is discrimination coupled with the difficulties particularly of housing, employment and convalidation to which we have referred, we are satisfied that the threshold of Article 3, in particular of degrading treatment, has not been crossed. Equally, although we recognise that the Article 8 threshold is lower, we are not persuaded that it has been crossed. But even if it has, we are satisfied that removal is justified by a proper control of immigration."

22. There are very strong factual similarities between DK and one of the specific cases considered in S&K: SK had lived in Knin until 1995, when he had been expelled to Bosnia in "*Operation Storm*"; he had been in the RSK military forces; SK's house near Knin was burnt down and the flat in Knin taken over by Croats. His father had so far been unsuccessful in his application for repossession of the flat; he would have nowhere to live and no resources.

23. The Tribunal concluded, in relation to S&K, in paragraph 45, that:

> "Despite the hardship that the claimant will undoubtedly suffer resulting from the fighting in his country, he does not show any special circumstances which mean that he can establish that he should be given the benefit of either Convention. For the reasons which we have given, therefore, we take the view that the adjudicator's conclusion was wrong and this appeal must be allowed."

24. The Court of Appeal, Laws LJ, refused permission to appeal.

The new material

25. For the purposes of this appeal, we have been provided with all the background material which was provided to the Tribunal hearing S&K. We have not been referred to any passages in it and we have not looked at it. Dr Blitz's report contains a summary of the background material over the period from 1990 to the present day. There may or may not have been a new point of detail in what is said in his report about the treatment of the

Serbs by the Croat majority, both up to "*Operation Storm*" and in the subsequent discrimination which they faced in seeking to repossess property under the Tudjman regime. On the other hand, the significant aspect of the Tribunal's decision in S&K and here relates to the changes that have taken place and were prospectively envisaged under the new regime of Mesic. Most of what Dr Blitz has to say about the position in the Mesic/Racan era relates to the position after 2002 or to material available after 2002, although he does refer to the position in 2001.

26. However, in view of the relatively narrow compass of the points in S&K as at the date of its decision, with which Mr Mullins takes issue, we can focus on the new material or subsequent events in examining his arguments. That is because the thrust of his argument relates to the way events have turned out in reality and to new material which it is said shows that a false assumption was made. The issue of the approach to Article 3 as a continuum and with Article 14 can be looked at in the light of our conclusions on the position as it now would be for ethnic Serbs returning to Croatia, and for this Appellant in particular. Mr Mullins confirmed that of the new background material, apart from Dr Blitz's report, he had drawn our attention to those documents and passages which he relied on in particular. There is therefore a certain amount of new background material which we have looked at and the material in Dr Blitz's report which is itself a helpful synthesis of current literature. He has undertaken limited telephonic research, about which we comment later, and has not been to Croatia since the summer of 2001.

27. We now turn to that new material, starting with the Appellant's bundle. We were referred to an interview of 26th September 2003 with Ambassador Semneby, Head of the OSCE mission to Croatia. Ambassador Semneby had described himself as relatively optimistic about the improvements in the position in Croatia and referred to important developments such as the adoption of the Constitutional Law on National Minorities. There had been amendments to the Law on Areas of Special State Concerns, incorporating the issue of refugee tenancy/occupancy rights onto its agenda. "*We are seeing things which are almost inconceivable a year ago, as well as significant advances in legislature. Implementation, however, is poor*." Mr Wilken's case reflected the first sentence, Mr Mullins' the second. Ambassador Semneby estimated that there were about 5,000 houses occupied, or whose owners had not been able to repossess them. The deadline to resolve this issue by the end of 2002, which the Government had imposed upon itself, had not been met. Nor had it fulfilled provisions by which owners, who were unable to repossess their properties, would receive compensation for the time spent waiting. There were almost 40,000 unresolved reconstruction requests. There were problems of tenancy rights for those who had left their apartments. Although there had been a major improvement, in the fact that the Government now had that issue on its agenda and had adopted a programme in relation to it, the OSCE was still waiting for that project to be implemented. The cost of the programmes was recognised. The state of the economy was very important for "*sustainable return*". They were moving from examining those restrictions which made return impossible to examining those conditions

which were required for this sustainable return. "*Without economic development, return is difficult but not impossible; however, without housing care it is impossible.*" The Ambassador considered that security issues were, for the most part, satisfactory and that progress in resolving the issue of housing was visible, following which the OSCE would turn its attention to the economic situation and sustainability of return. He pointed out that ensuring conditions for economic revitalisation was an important area for the potential return of refugees. He emphasised that although there were certain isolated incidents, physical safety, for the most part, was completely satisfactory throughout the entire country. There had been very close co-operation with the police on this issue. He expressed the view that the return of refugees should not be seen by public opinion in Croatia as a threat, but as a way of overcoming the burden of the past and moving towards membership of the European Union.

28. The OSCE mission to Croatia reported in August 2003 that it had recently monitored several failed evictions and failed procedures for repossession of private property previously allocated by the Government to Croats. It appeared to be the case that a number of evictions, supported by court orders and by the presence of police supposedly to assist in repossession, had failed because of the arrival of a significant crowd in support of the occupants, which the police had not endeavoured to disperse, and the leaders of which had not been arrested. There was further material from the OSCE which highlighted the difficulties in property repossession cases and the tactics adopted by the occupier to postpone eviction through the courts. One problem relates to money that has been spent on the property allegedly and whether the occupant has somewhere else to go.

29. The Institute for War and Peace, reporting in October 2003, suggested that the HDZ would be likely to run the ruling coalition close in the November 2003 parliamentary elections. It was thought that it might even win. It was feared by that report that the prospect of Croatia joining the EU was receding as it failed to hand over the war crimes fugitive, General Gotovina. It was suggested that there was a resurgence of the right wing. It is to be noted, however, that that report does not suggest that the resurgent HDZ had the extreme right wing and nationalist views which it had had before 2000. The report did not suggest that the change in its broad outlook had not continued.

30. A US State Department Report on religious freedom in Croatia of 2002 referred to the challenges which the return of refugees posed for the Croatian Government, which the report said had made progress in a number of areas. The report did not suggest that there was religious discrimination as such against Serbs or Serbian Orthodox clergy, but a pattern of often open and severe discrimination continued against ethnic Serbs. This report was released on 7th October 2002. There were reports of vandalism of Serb cemeteries and a number of incidents of harassment, with the suggestion that there were many more unreported incidences, although the number of those which took place which were reported appeared to be growing. The report said "*Both OSCE observers and*

religious leaders note that overall ethnic and religious relations are improving slowly".

31. Mr Wilken criticised the Appellant's reliance on the DFID Report of 2001 because not only had that been before the IAT in S&K and considered by it, but the IAT had held that even in December 2002 that report and other material dealing with the position in 2001 was somewhat out of date.

32. In addition to the Appellant's background material to which we have made reference above, there is a substantial volume of objective material running to some 490 pages submitted by the Respondent upon which the Appellant also drew. Most of the material in that volume relates to the position after 2002, or is material which was not available for the Tribunal hearing S&K. We have read the material parts of the documents to which our attention has been drawn by the parties in their skeleton arguments and oral submissions. It includes OSCE material from November 2002 and July 2003, US State Department Reports and notes of March and July 2003, a Human Rights Watch Report of September 2003 and an Amnesty International Report of 2003. The volume also contains Home Office Bulletin 1/2003 with extensive annexes from various sources including Amnesty International, Human Rights Watch, OSCE, US State Department, UNHCR and other general news reports. General press reports in relation to housing and the economy of Croatia are included, together with general press reports relating to the political situation and elections.

33. It is unnecessary to set out all the extracts from those various documents to which we were referred. The relevant passages and contentions can be seen in annex 2 to Mr Wilken's skeleton argument and in paragraphs 17-58 of Mr Mullins' skeleton argument. That skeleton argument draws together passages from both the Human Rights Watch Report upon which he relied, and passages from Dr Blitz's report. It is sufficient for the purposes of this determination to summarise the contentions of the parties on the background and expert material.

34. Mr Mullins contended that the effect of "*Operation Storm*" had been so extensive in removing Serbs from Krajina that Knin, which before the war had been a city of 15,000 people and overwhelmingly Serb, now had a population of just over 3,000. (Other material suggested that the pre-war population was 30,000, but that may relate to a different definition of Knin.) In April 2003, nearly 250,000 Croatian Serbs remained in exile, according to the UNHCR. Ethnic Serbs were subjected, according to the US State Department Report of 2002, to sporadic harassment, intimidation and violence which, suggested Mr Mullins, would nonetheless have a disproportionate effect on the fear of Serbs over returning. He accepted that the police continued to react as they should do to such issues, but there was a concern about the level of reporting to police. Outside East Slavonia, many Serb communities were policed by forces which were 100 percent Croat. Mr Mullins and Dr Blitz referred to the discriminatory legislation introduced in the Tudjman era to permit the acquisition or occupation of Serb homes and to prevent or hinder the repossession and reoccupation of such properties. 5,200 Serb properties were still occupied in July 2003,

according to the Human Rights Watch Report of September 2003. Yet more were occupied in addition without any Government decision authorising that occupation. Many of the Serb properties were occupied by Croats who themselves had been refugees.

35. Dr Blitz accepted that, in March 2001, the Croat Government committed itself to addressing key problems including the issue of return. A number of important reforms had been introduced between 2001 and 2003, including a new constitution and the Constitutional Law on the Rights of National Minorities in December 2002 to ensure proportional representation of minorities in administration, the judiciary, but not all public institutions such as the police. The Law had yet to be implemented and was criticised for not reflecting the fact that the proportion of Serbs in the population was only one third of what it previously had been.

36. The theme of Dr Blitz's Report and of Mr Mullins' submissions was that although there had been expressions of good intent by the Mesic-Racan Government, the practical implementation of the reforms had been very slow. Thus, the previously discriminatory Tudjman era Law on Areas of Special State Concern had been changed so as t o give the ODPR power to deal with claims made by former refugees and to give priority to the claims of returning owners. The Government had urged Serbs to return. In 2002 Bosnian Croats had begun to be evicted from Serb homes in Krajina. In Zagreb, public money was to be used in 2003 to rebuild Serbian homes. Dr Blitz's Report did not identify actual deterioration in the position of Serbs since mid-2002.

37. However, the slow pace of change and continued discrimination meant that shelter and repossession of housing was seen as a significant barrier to the sustainable return of refugees; the OSCE estimated that one third of returns were unsustainable, but as Mr Wilken pointed out, it follows that two thirds are sustainable. The Government had only just begun to construct homes for Serbs; the demand for shelter required 27,000 houses by 2006. Of the few houses built in Serb areas, few were reserved for Serbs. Discriminatory laws were likely to prevent the refugees passing on any property to their children as they would be unable to repay state loans. (These last two points were derived from telephone calls by Dr Blitz to OSCE officials, but there was no record of the precise questions asked or of the answers given.) The repossession of homes occupied often by Bosnian Croats has been very slow, although mechanisms are theoretically in place. The target of returning all houses by the end of 2003 could not be met. Conversely, there had been considerable success in evicting Serbs from Croat properties. Tenancy rights had been lost as Serbs fled, their accommodation had been occupied by Croats, often displaced themselves, and under Tudjman there had been discrimination over the re-instatement of former tenants. It was said in the Human Rights Watch Report of September 2003 that the Government did not regard this as an issue. Legislative changes, made in 2003, were assessed to be very unlikely to help the former tenants and only a minority would benefit from subsidised housing construction.

38. Although the Government claimed to have constructed 118,500 houses since the end of the war, only a small fraction of those had been for Serbs. There were 26000 outstanding applications for reconstruction, of which the vast majority were Serbs. It was recognised that the position had improved since the middle of 2002, as the reconstruction programme for Croats concluded and funds began to be spent on Serb houses. Until 2000, Serb houses destroyed by Croat forces had been ineligible for reconstruction assistance. It was only in mid July 2003 that legislation had been passed, too late to be effective, which put Serbs on a better footing to claim reconstruction assistance for war damage, where, for a number of years damage, to their property in Government controlled areas could have been described as a terrorist act and thus ineligible for reconstruction assistance.

39. Unemployment was very high, employment opportunities hard to find and there was discrimination against Serbs who found themselves excluded from many areas of public sector employment. Social welfare benefits were available to only a small proportion of the population without employment. (The figures relied on for these purposes by Dr Blitz which appear, like much of Mr Mullins submissions to have come from the HRW Report of September, are not necessarily self-consistent. Knin varies in size from 15,000 to 30,000; unemployment percentages vary between total and able-bodied population; "*paid positions*" may or may not equate with economically active, and the figures relate to 2001 anyway.) The Serbs who had returned to the Knin area and stayed were generally the elderly and the proportion of Serbs was very much lower than it had been. Some of the socio-economic material again is from unrecorded telephone calls. However, he says that Knin is a particular blackspot for repossessions and there is a lack of temporary accommodation.

40. Dr Blitz produced an email from someone working at OSCE shortly before the hearing. It said that those returning should report to the Regional Office for Displaced Persons, Returnees and Refugees (ODPR). For six months, the holder of a green ID card issued by that Office is entitled to welfare benefits and health care, after which they are eligible for social welfare, if they have no property or income. The deadline for submitting an application for reconstruction assistance expired at the end of 2001, but there were 10,000 applications and it would be a very long time before all were dealt with. There were Government housing programmes for those who came within the three priority groups: but those whose property was occupied or who had no property were in the lowest category of priority and even those in the first category were still having to wait a long time. There was no unemployment benefit. He referred to the extensive employment discrimination against Serbs in Knin. The most vulnerable returnees, in his opinion were those aged between 45 and 55, too old to have a job and too young to obtain a pension. Much of what this official describes reflects the position as it was in S&K.

41. There was discriminatory enforcement of the laws dealing with war-crimes. As at mid 2003, almost all of the indictments involved non-Croat crimes whereas Serbs were facing prosecution for often trivial assaults. Group

indictments and in absentia prosecutions continued. General Gotovina, indicted in The Hague, remained at large in Croatia.

42. Mr Mullins emphasised the view of the European Commission in July 2003, that there had been progress in the return process and in the legislative framework necessary to enable Serbs to re-integrate; but it was implementation that was the problem. Mr Mullins also cautioned that the OSCE had an interest in painting an up-beat picture when it said in its July 2003 Report that only 62 percent of minority returns had proved to be sustainable and that 27 percent of those returning were in effect commuting from their country of refuge. The difficulties had discouraged more Serbs from returning.

43. Not long after the Tribunal's decision in S&K, Sutovic and Hartigan sent an email to a senior protection officer in the UNHCR South Eastern Europe based in Geneva. It referred to their proposed appeal to the Court of Appeal. It referred to the known intention to close the collective centres and to the fact that no reliance had additionally been placed in S&K therefore on the fact that they were already full. They then asked, seemingly as if it had not been the issue in the case, as to what would happen to someone who returned to Zagreb without family or friends and had nowhere to stay. This individual was asked if there had been any change since the UNHCR position as at May 2002.

44. The Official replied that the UNHCR normally dealt with voluntary returns and that there still did seem to be space in the collective centres for ODPR to provide temporary accommodation for those who needed it. He recognised that repossessions were not taking place at the desired speed but that there was increasing pressure from the international community in that regard. Later he corrected that information to say that the ODPR would not assist or provide accommodation for those who were not returning as refugees; their other rights in respect of reconstruction or repossession would be respected and the UNHCR could be approached on a case by case basis in respect of vulnerable returnees. If people returned voluntarily rather as deportees, they might be regarded as refugees and so have access to temporary accommodation.

45. An official of the CIPU contacted Hans Lunsdorf, UNHCR Assistant Chief of Mission in Zagreb, who replied having spoken to the head of the ODPR. The latter did not think that the implications of this were as far reaching as suggested by Sutovic and Hartigan. Although the letter is not very clearly phrased, it confirms that those who never enjoyed either refugee status or temporary protection (which does not include temporary admission), would get no temporary accommodation upon return. There appears to be a point about when it was that such persons left Croatia. Persons who had temporary protection and then lodged an asylum application would be treated as refugees on return. UNHCR would approach the ODPR on a case by case basis on a humanitarian basis for those who returned as failed asylum seekers, especially if they had property which required

repossession, to seek temporary accommodation for them. This material was not referred to in the Court of Appeal.

46. There was a further exchange of emails. This showed that there had been no change in the different approaches adopted by the Croatian Government towards those who returned as refugees and those who were deported as not in need of international protection, and the latter normally fell outside the sphere of the UNHCR. It provided further information: there had been a media campaign in areas outside Croatia where Serb refugees were concentrated as a result of which there were 19,000 reconstruction applications by the end of 2001 from Croatian Serb refugees out of a total of 38,000. 8,000 properties had been rebuilt or repaired by the end of 2002 though the process would not be concluded by 2003. It was likely that of the 8,000 built in 2003, 6,000 would be Croatian Serb properties. The Croatian authorities were giving priority to those returnees who were actually living in Croatia. Returnees would have to spend a considerable time with host families or in collective centres which was not always feasible. There was also a problem with the strict approach adopted toward documentation.

47. Mr Swift of CIPU wrote again to Mr Lunsdorf in June 2003, with a number of questions about failed returning asylum seekers to which the replies were as follows. They confirmed that failed asylum seekers were not entitled to returnee status and that the UNHCR, which had never received a request for help from such a person, had very limited resources with which to help. It would require strong humanitarian circumstances for the UNHCR to intervene in such a case. It made no difference whether or not someone returning as a failed asylum seeker did so voluntarily or as a deportee. He would be expected to arrange his own accommodation with friends or family until his property was restored. However, all Croatian citizens had access to welfare benefits as did those aliens with permanent resident status. NGOs did not assist non-refugee returners. This sequence of emails underlines the importance of seeing what was asked, how it was answered and knowing the seniority and authority of the official contacted.

48. This issue had taxed the UK Government in January 2003. The Zagreb Embassy sought to discuss how such a person might have access to refugee returner benefits; it was thought that some appropriate document might be identified. But that avenue is no longer being explored and nothing has come of it.

49. Dr Blitz provided both general and specific conclusions: the consequence of years of discrimination and partial reforms meant that the "*vast majority*" of Serbs would not be able to enjoy a "*sustainable return*" to Croatia. They remained disadvantaged in housing, shelter and economic subsistence. He referred to interviews and telephone interviews with refugee organisations and human rights bodies who concluded that it would not be "*advisable*" for someone in DK's position to return. It appears that that advice presupposes that his wife and children would join him from the outset. He would not be registered as a refugee; his parents had been unable to obtain reconstruction assistance in four years and

returned regularly to Serbia; he would have no home, shelter or extended family to whom he could look.

50. Mr Wilken for the Respondent emphasised different aspects. First, he said that all the material which pre-dated S&K was irrelevant. Second, he submitted that the background material showed two subsequent changes: significant progress in the provision of reconstruction assistance to those Serbs whose houses had been destroyed in the conflict, and while he recognised that returning failed asylum seekers would not be entitled to collective centre accommodation, provision could be made on a case by case basis. He relied in particular on the OSCE report of July 2003, the interview of September 2003 given by the OSCE Ambassador Semneby and the June 2003 letter from Mr Lunsdorf.

51. We have already referred to the last two items, and briefly to the first. For much of the debate, it is a question of which parts are emphasised rather than one view being right and the other wrong. One emphasises progress and optimism, the other emphasises the problems which remain, set backs and a gloomier outlook.

52. The executive summary to the OSCE July 2003 Report states:

> "During the reporting period from November 2002 to July 2003, the Croatian Government's efforts within most parts of the Mission's mandate were characterised by increasing determination in comparison to previous reporting periods. While this report again highlights long-standing Mission concerns in core areas, there are enough preliminary indicators to suggest that this reporting period could be a turning point with regard to the Government's stated commitment to address the issues within the Mission's mandate.
>
> There has been progress in the *legislative and administrative framework for return*, but implementation of many decisions remains laggard, due in part to the absence of a suitable working body for Government and international community interaction.
>
> There has not been any significant increase in the pace of return of *occupied private property* after the adoption of legislative changes in August 2002. In April the Government adopted a decision on compensation to owners of occupied housing who still cannot repossess their homes, but the payment of such compensation had not yet started by the beginning of July. Problems remain with regard to multiple or illegally occupied properties, including cross-border cases in Bosnia and Herzegovina. Other problems relate to the lack of enforcement of eviction orders and looting of properties prior to the departure of temporary occupants.
>
> Government efforts at *property reconstruction* are advancing well and reconstruction assistance is becoming widely available to minority beneficiaries. The Mission and its international partners have encouraged the Government to complete the remaining 26,000 reconstruction applications by the end of 2003, the bulk of which are from Serbs.
>
> The Government's acknowledgement in early 2003 that a remedy should be found for returnees who previously lived in apartments with *occupancy/tenancy rights* was a significant positive development."

53. The OSCE Report also contains an overview on return, reintegration and restitution of property:

> "Notable action taken by the Government in June to initiate a system of housing care for former holders of occupancy/tenancy rights who wish to return to Croatia is an important step in resolving a significant barrier to return.
>
> Yet the return of refugees and displaced persons of Serb ethnicity is now taking place at a slower pace than in previous years. During the first six months of 2002, 6,026 minority returnees were registered, while during the first five months of 2003 the number was only 3,070. Further, current research suggests that while most Croat returnees have re-established themselves, only about two thirds of present minority refugee return can be considered '*sustainable*'. Minority Serb returnees and displaced persons cite housing problems and the lack of employment possibilities along with legal, administrative and psychological obstacles as hindrances to their return and reintegration into Croatian society.
>
> The housing problems experienced by minority returnees and potential returnees are largely a consequence of the need to reconstruct up to 20,000 houses for Serb applicants, the slow process of private property repossession, and the absence, until recently, of any solutions to the issue of terminated occupancy/tenancy rights. While the Prime Minister's call in June for all refugees to return to Croatia was a notable step forward, this needs to be followed up by a more concerted demonstration of political will and action in order to overcome the discriminatory legacy of the pre-2000 Government and to establish a more positive atmosphere conducive to the return of refugees and displaced persons among receiving communities.
>
> By contrast, the return of the Croat majority to their pre-war domiciles is essentially completed."

54. The problems, in particular the legal problems associated with the return of property from occupants to the legal owners, were referred to. The OSCE accepted that the slow and incomplete implementation of relevant procedures by administrative and judicial bodies, and the lack of action to enforce eviction rulings meant that it was certain that the Government would not be able to meet its stated objections for the physical return of property by the end of 2003. In relation to property reconstruction, it was reported that the relevant Ministry intended to construct about 8,000 houses in 2003 and thought that most of those would be available to minorities because most Croat beneficiaries had already received assistance.

55. The Human Rights Watch Report of September 2003 said that the estimated number of returns of Croatian Serbs, approximately 100,000, as given by the Croatian Government and the UNHCR overrated the actual number of returnees, because many departed again after a short stay in Croatia, and many of those who did stay were elderly. There were persistent problems at local level, but it said that the role of central Government was just as important in failing to create a political climate conducive to return. However, the material set out in the Report to sustain that conclusion relates to events of 2000 and 2001. The Report criticises the authority's consistent giving of higher priority to the needs of ethnic Croats over the rights of Serb refugees. But much of this relates to the position in 2000-2002. It recognises that in June 2003, the Prime Minister of Croatia for the first time publicly invited Serb refugees to return. It also recognises that assistance in reconstruction began at the end of 2002 for the Serbs, even though it had been provided much earlier to

Croats. This change began in the second half of 2002 because the reconstruction benefiting Croat owners had been virtually completed. It said:

> "In June 2003, the number of heavily damaged or destroyed Serb properties under state-sponsored reconstruction was several times higher than in the entire preceding seven post-war years."

Some 1,500 houses for Serbs were under construction and it had been stated by the Deputy Prime Minister in mid-2003 that Serbs owned 75 percent of the houses to be reconstructed during 2003. The Human Rights Watch Report welcomed this improvement in the previously discriminatory process.

56. Mr Wilken submitted that there was a significant and positive change since S&K in the numbers of ethnic Serbs now receiving reconstruction assistance. This was reported in the OSCE July 2003 Report, the USSD and HRW Reports. So far as the return of private occupied property was concerned, Mr Wilken recognised that the OSCE had concluded that the pace of the return of occupied private property had not changed significantly since August 2002 and whilst 2,559 occupied residential properties had been repossessed since August 2002, 5,500 were still occupied. This reflected the legal provisions and slow implementation. The Human Rights Watch reported that there had been no material change in repossession by ethnic Serbs since August 2002. That report said that in the last year the rate of repossession had fallen and only a handful of repossessions were taking place, and that was due to the provision of housing care for temporary occupants or the reconstruction of their property.

57. The OSCE reported in July 2003 that returns were impeded by the lack of redress for those Serb refugees who had previously lived in socially owned apartments. Changes in legislation in 2000 and 2002 had not produced any practical results, because the Serb applicants were accorded the lowest priority in the allocation of housing. A new proposal had been adopted in June 2003 which was intended to assist and which had been welcomed by the OSCE, some of whose suggestions had been incorporated into the proposal. What remained to be seen, however, was how the proposal was implemented in fact.

58. Mr Wilken emphasised the growing strength of the Croatian economy, drawing upon the US Commercial Service Report, which appears to be 2001, which refers to the growing strength and diversity of the Croatian economy. This, he said, was important because economic success provided for employment and the means whereby reconstruction work and welfare could be financed.

59. The September 2003 interview with the Head of the OSCE Mission recorded him as saying that security issues were for the most part satisfactory. "*... There are certain isolated incidents, but physical safety, for the most part, is completely satisfactory throughout the entire country. We have very closely co-operated with the police on this issue.*" He

referred to the development of a community policing programme, changes in the Danube region to the ethnic make-up of the police to reflect the Serb community there, and the appropriateness of the response made to ethnically related incidences.

60. The Respondent acknowledged the contra-indications in the United States State Department Report for 2002 and that it had, in the past, also presented a significantly more pessimistic picture of violence against Serbs than provided by the OSCE. Mr Wilken pointed out that the criticism of trials in absentia was that they wasted time and money because if somebody convicted was later arrested, they would be re-tried. The appeal system for war-crimes, whilst there were delays, did show that there were successful appeals against conviction. The US State Department Report of 2002 showed that some amnestied activities had been wrongly prosecuted, but also that amnesties had been granted to several returning ethnic Serb refugees. There had been an endeavour to decrease the political basis behind prosecutions of Serbs for war crimes.

61. There was recognition in the OSCE Report that implementation of the proposals for minority representation in state administration would be difficult and the means had not yet been identified. The December 2002 Constitutional Law on the Rights of National Minorities had been welcomed by the OSCE and ethnic minority groups generally.

62. There remained problems for those who sought the recognition by the Government of their legal and administrative documents from the period 1991 to 1996. This continued to impede the return and reintegration of ethnic Serb refugees. It meant that a wide range of problems including pensions, disability insurance, and the ability to establish their work record could not be resolved. The State Pension Fund still discriminated improperly against ethnic Serbs seeking recognition of their work experience.

63. Mr Wilken submitted that once the full scope of the matters considered in S&K was understood, it was clear that there had been no worsening of the position. Insofar as there had been a change in circumstances, the changes were generally positive. There had been progress on physical security, reconstruction of property, economic development and various forms of discrimination. As to the position of returning failed asylum seekers, there was no advice from the UNHCR that such persons should not be returned. Their established position was available in writing and had not changed since S&K. They were encouraging Serb refugees to return. It would be wrong for informal conversations between Dr Blitz and a UNHCR official to be used to undermine the public and established position of the UNHCR. So much would depend on the precise questions asked, the context of them and the precise answers given.

64. Mr Wilken characterised DK's case as being that of an economic migrant and said that, in effect, Dr Blitz was of that view because he was referring to the difficulties which would be faced in terms of benefits and housing or employment. The sustainability of return was not itself the question. What

mattered was whether there would be a real risk of persecution or whether a real risk that the Article 3 threshold would be breached. Otherwise, the United Kingdom would be compelled to underwrite the standard of living in other countries. Even if there were discrimination against ethnic Serbs, what mattered was whether the way in which they were treated reached the high threshold required for a breach of Article 3.

Article 3 submissions

65. It was only Article 3 which was relevant in the light of the decision in R (Ullah) v SSHD [2002] EWCA Civ 1856, [2003] 1 WLR 770. There had been very recent authorities which bore upon the threshold which had to be met for Article 3 purposes. In "*N*" v SSHD [2003] EWCA Civ 1369, a decision of the Court of Appeal dated 16th October 2003, the Court examined the threshold for Article 3. "*N*" had AIDS; her life expectancy if forced to return to Uganda where there was no prospect of her receiving adequate therapy would be under twelve months. She would have access only to a small hospital unable to deal with AIDS related illnesses; she would have to live in overcrowding conditions unable to work. Her boyfriend was in the United Kingdom but she appeared to have no living relatives in Uganda. The Adjudicator had concluded that her case for protection under Article 3 was overwhelming in the light of the case of D v United Kingdom. In paragraph 38, Laws LJ contrasted a claim to be protected from torture or other mistreatment in violation of Article 3, especially if meted out at the hands of the state with "*a claim to be protected from the harsh effects of a want of resources, albeit made harsher by its contrast with facilities available in the host country ... .*" This was to his mind something else altogether. The case of D, he said, should be very strictly confined, but he held that the application of Article 3 "*where the complaint in essence is a want of resources in the applicant's home country (in contrast to what has been available to him in the country from which he is to be removed) is only justified where the humanitarian appeal of the case is so powerful that it could not in reason be resisted by the authorities of a civilised State*". The facts had to be not only exceptional but extreme. Dyson LJ agreed, notwithstanding that her prospective circumstances would be extremely distressing leading to a painful and distressing death. Carnwath LJ dissented.

66. In R ("*T*") v SSHD [2003] EWCA Civ 1285, a decision of the Court of Appeal dated 23rd September 2003, the Court considered Article 3 in the context of asylum support. The Court declined to lay down any simple test which could be applied in every case; each case had to be judged in relation to all the circumstances. It emphasised, however, that the threshold was a high one and the condition of the person in question had to have the requisite degree of severity. The different cases of T and S gave some indication as to what was required. S, who succeeded in relation to Article 3, had no access to charitable support and had been unable to fend for himself for some time. He slept rough and was forced to beg for food; there was evidence of psychological disturbance and significant weight loss. He had become unable to eat more than a few mouthfuls of food when it was available. T, on the other hand, whose case failed, had had difficulties

resting or sleeping at Heathrow Airport because of noise and light; his washing was confined to public lavatories with limitations which that entailed. He had minor medical ailments and was worried about being attacked and having his papers stolen. However, the Court concluded that at the relevant time he had shelter, sanitary facilities and some money for food.

67. Mr Wilken also relied on the decision as to admissibility in the case of O'Rourke v United Kingdom, ECtHR, (App 39022/97, 26th June 2001). The claimant had been evicted and was forced to sleep on the streets, notwithstanding a medical condition. The Court did not consider that the applicant's suffering following eviction attained the requisite level of severity for Article 3, but pointed out, however, that the applicant was largely responsible for his own deterioration because he had failed to accept offers of night shelter or temporary accommodation.

68. Mr Wilken submitted that there was no evidence of a lack of rental accommodation in Croatia and it would not breach the United Kingdom's Convention obligations to return someone to a country where he would have no socially funded accommodation. There was a large grey economy in Croatia and DK had acquired a plumbing qualification in this country. This would be of use to him in a country being reconstructed.

69. Mr Mullins contended that discrimination was a factor to take into account in the assessment of whether treatment breached Article 3. That was not the same as saying that with a breach of Article 14, the threshold of Article 3 would be reduced. He submitted that the barriers erected in 1995 and 1996 remained and that there had been no serious attempt to remove those barriers. The AIDS cases were of no assistance as they dealt with life and death situations. Mr Mullins drew parallels between the position of ethnic Serbs in Croatia and Greek Cypriots enclaved in the Turkish Republic of North Cyprus. The latter had been considered in Cyprus v Turkey, a decision of the ECtHR of 10th May 2001 (App 25781/94). The Court concluded that there had been a violation of Article 3 in that certain Greek Cypriots in North Cyprus had been subjected to discrimination amounting to degrading treatment. The Court and the Commission also took the view that there was no need to pronounce separately on a complaint of a breach of Article 14 in view of the reasoning which led it to find a violation of Article 3. In paragraph 314, the Court said "*It considers that there is no need to pronounce separately on what is in reality a restatement of a complaint which is substantially addressed in that finding.*" It did, however, appear, from paragraph 306, that the Court viewed with favour the Commission decision in the East African Asians case 1973, that differential treatment of a group of persons on the basis of race, because of the special affront to human dignity which that involved, might be capable of constituting degrading treatment when differential treatment on some other ground would raise no such question.

70. In support of his continuum argument in relation to Article 3, Mr Mullins referred to Dulas v Turkey (App 25801/94), a judgment of the first section of the ECtHR given on 30th January 2001. The applicant was over seventy

when her home and property had been destroyed before her eyes and, deprived of shelter and support, she had been obliged to leave the village and community where she had lived all her life. No steps were taken by the authorities to give her assistance. The Court found that she had been suffering of sufficient severity for the actions of the Turkish Security Forces to breach Article 3. Mr Mullins submitted that the breach of Article 3 there was akin to the circumstances faced by DK in 1995. There had been no redress provided because the house remained unreconstructed. The breach, therefore, should be regarded as continuing, because the current situation is such that he would not be able to return "*with dignity*". It should not be analysed as if the cause of the destruction of the property were now no longer relevant and a merely prospective view taken of the circumstances which he would face on return. The fact that the destruction of the property was at the hands of the Croatian State Forces, reinforced by discriminatory legislation enacted shortly afterwards, distinguished DK's circumstances from those of the destitute in cases such as S and T, or indeed N.

71. Mr Wilken submitted that it would be wrong to approach the application of Article 3 to DK's circumstances in the way contended for by Mr Mullins. DK would be returning to a country where there was a changed regime, both in personnel, in legislation and in outlook. Many years had passed since the house had been burnt down and there were now endeavours to reconstruct Serb houses. In any event, his circumstances would not now approach the Article 3 threshold and the question to be asked was whether on return he would face circumstances sufficiently severe to engage the Article 3 obligations of the United Kingdom. The possibility of an Article 14 case did not lower the threshold for Article 3, and it was difficult to see, as Laws LJ said when refusing permission to appeal in S&K, how there might be an Article 14 case when read with Article 3, but not an Article 3 case standing alone. Further, the house was not his but his parents, and it did not appear that any very great efforts had been made to press for its reconstruction. It is obviously easier to press for reconstruction, as the background material shows, if the need is demonstrated by the presence of someone in the country. Even though he might not be entitled to the temporary accommodation otherwise given to returning refugees, he would still be entitled to welfare benefits as a Croatian citizen. Moreover, he had the displaced persons card which showed that he had been displaced from Croatia to Serbia.

Conclusions

72. We now turn to our conclusions. We deal first with the significance of S&K. This case considered the position of Serbs returning to Croatia in great depth, less than a year ago, in the course of dealing with individuals who were to be regarded as representative of many of the circumstances common to Serb asylum seekers from Croatia. A substantial amount of country background and expert material was assembled and debated. The determination itself followed another case which, taken with the successfully appealed decision in S and others, considered all the background material. S&K was the subject of an unsuccessful application

for permission to appeal. It is the acknowledged function of this Tribunal to give authoritative guidance on the type of issues which arise here, in the interest of consistency and fairness. It is both necessary and sensible for a subsequent Tribunal to continue to regard such a decision as providing authoritative guidance, unless it can be shown no longer to warrant being so regarded. Those who seek to argue for a different approach may face a heavy task of persuasion. Authoritative guidance does not cease to be so upon any new document being produced, or a new conversation being held with an official.

73. The Tribunal would expect to see any argument that such a case should be re-examined, as Mr Mullins submitted should happen here, to be supported by cogent evidence of a change of circumstances, or of an assessment as to what would happen in the future being confounded by actual experience. Individual circumstances which did not fall within the general character of those which had been considered are in a different category as well. However, it would be wholly undesirable if an advocate were to attempt to persuade the Tribunal to take a different view on the same or insignificantly different material.

74. Mr Mullins did not so much rely on any deterioration in circumstances but on a changed perspective or expectation now, compared to the position when S&K was decided. Much of the material upon which he relied was not new nor did it show, and it was not intended to show, that as at the date of the Tribunal's decision in S&K, there had been an erroneous appreciation of the situation then observable on the ground, with one exception. This related to the position of those who returned from the United Kingdom as failed asylum seekers, with which we shall deal later. We are not persuaded, and it was not suggested that we should be, that there was anything wrong with that appraisal insofar as it related to what was actually happening at that time. Much of Dr Blitz's Report simply reflected material which had been considered and evaluated in S&K. Much of the background material had likewise been available then, and contained nothing which undermined the S&K conclusions.

75. It is apparent from the citations above from S&K that it dealt with at least one individual, SK himself, who was in many ways in a similar position to DK; the contrary was not suggested. The range of issues in S&K covered many which arose or were raised in this appeal: housing reconstruction, repossession and tenancies, discrimination, welfare, the economy, the level of returns and the age profile of returning refugees, war crimes and so on. This case did not raise any significantly new issue other than the position of failed asylum seekers and temporary resettlement assistance. It is also clear that, as with S&K, the background material was to a very large extent, entirely general and would be applicable to very many individual cases; this is exactly what one would expect from background material. In the absence of special features in any individual case, what was sound for the generality would be applicable to him. It is entirely sensible for cases to be examined in this way. It can be seen in the way in which Mr Mullins raised as part of the picture which he wished to paint of serious continuing discrimination, a number of housing issues which do not directly apply to

DK, such as repossessions and tenants' rights. It is inevitable that a general conclusion in relation to those arguments in this case, will be relevant to any case which may raise a different form of housing issue.

76. We consider in the light of the way in which the argument proceeded and in the light of the full material which we have considered relating to the position evolving since S&K, that this determination can be considered to provide the same authority for Serbs returning to Croatia that S&K did.

77. We have considered the background material, including Dr Blitz's report, relied on by both parties and we do not find in it anything to suggest that the conclusions reached generally by the Tribunal in S&K should be regarded as unsound or overtaken by events. The Tribunal was under no illusions about the real difficulties and hardships faced by those who returned. It specifically acknowledged the continuing discrimination in housing, employment and convalidation. It seemed to us that the material by and large bore out what the Tribunal had anticipated.

78. There was no evidence to suggest a resurgence of the HDZ as an extreme, nationalist party; the evidence suggests that its journey away from those extremes has not been reversed. There was clear evidence to show that the physical security of Serbs was satisfactory and that the incidents of violence which still occurred were dealt with appropriately if they were reported. There are many barriers to Serbs becoming policemen and in a number of areas where Serbs live, the police are Croats to a man. Religious freedom was reasonably respected.

79. It is clear that a proportion of returning refugees do not stay, that the proportion of Serbs in the population at present is about a third of what it was, that many former Serb areas are now no longer such areas and that there is preponderance of elderly among those who return and stay. But the majority, some two thirds, make what OSCE describe as sustainable returns. There has been no change in the position of the UNHCR over its encouragement of Serb refugees to return, and in mid 2003, the President urged the Serbs to return. The economy seems to be improving, although we accept that tourism may well not provide employment in Knin and that there is job discrimination against Serbs. But the strength of the economy matters because of the resources needed to fund post-war reconstruction and there will be a gradual increase in job opportunities.

80. The principal problem identified in the OSCE Report over returns and sustainable returns relates to housing. There has been discrimination against Serb refugees and priority given to Croat refugees in a number of respects. However, the picture was one of improvement and change for the better. It is clear that reconstruction of Serb houses is now where most of the housing reconstruction money is going, and their houses are being rebuilt; it may well be that that is because the Croat houses have all been rebuilt, which demonstrates discrimination, but even so, the reality is that the Serb houses are being now rebuilt as the major part of the housing reconstruction programme. There is evidence that the authorities concentrate their endeavours on those refugees who have returned and

have a house which should be rebuilt; there is therefore an iterative process in which returns encourage reconstruction or other housing assistance and that in turn encourages sustainable returns. There has been discrimination in the repossession of houses, with very little of the vigour displayed in repossessing houses occupied by Croats which was displayed towards those Serbs occupying Croat houses. But there is slow progress. There is at least recognition at the level of legislation that tenant rights and convalidation of pension rights and work records need to be tackled and evidence that at local level there has been no implementation. We accept the point that what a Government may say can reflect a change in outlook for the better, but that that may not really assist until the discrimination or other problem has been removed through effective implementation. We would see the picture as being one of slow progress, with good intentions somewhat ahead of implementation in a variety of aspects, and with better progress in the field of reconstruction which is the one which most directly affects DK.

81. The position over war crimes prosecutions has not markedly changed; there are still trials in absentia, but that does not prevent a fresh trial upon arrest. Serbs face discrimination in the frequency of arrest and prosecution; some may be trivial harassing arrests from which the Croats do not suffer. They may be intended to discourage returns. However, the increase in arrests in 2003 still only affects a very small number of people; there is a trial process which is not said to be unfair and there is an appeal system which has led to some convictions being overturned. Some Croats are prosecuted; it is necessary to judge that figure in the light of the difficulty of persuading Serb victims to give evidence.

82. One of the problems with both Dr Blitz's Report, and with those parts of Mr Mullins' submissions which rely upon it, is that it treats as happening now that which is no longer current. What he has to say about economic and social welfare and unemployment relates to 2001, even though it is in a 2003 Report. Much of what he has to say about war-crimes is historic in nature and he goes on to say that since 2002, a new Prosecutor has reviewed pending war crimes cases and has not admitted any new in absentia prosecutions. There is HRW material which shows that that stance has not always been followed. A substantial number of Serbs had been released after a short period. There continued to be discrimination in the prosecution of war crimes. He appears to accept that there have been few cases of Serbs actually being sentenced for war crimes and instead referred to the atmosphere of hostility surrounding trials and the intimidatory tactic of arbitrary arrest and detention of Serbs so as to reinforce the impression that whatever the Government may say, they are not welcome back. It is to give the wrong impression for Mr Mullins to say that group indictments have been used in a number of cases since 2000; there is no example of their use anew since the end of 2001. True it is that the new activated some of the 2000 dormant indictments in 2000, but the number activated was in fact quite small, and the numbers arrested fell in 2002 to 34. The arrests came because prosecutors had been asked to review outstanding war crimes cases. There had been an upsurge of arrests in 2003; in the first half of the year 27 people were arrested, 21 of them

were Serbs. Trials of Croats have produced mixed results, partly because of the fear associated with giving evidence in Croatia against Croats. Again it is right that as at July 2003, there were 1,467 war crimes cases of which 99 percent involved non-Croat suspects but the actual experience of arrests is quite different in numbers.

83. We do not therefore consider that the position as set out in paragraph 40 of S&K has changed in any significant way, so as to lead to a different conclusion for those returning as refugees. It remains good nine months on.

84. We asked Mr Mullins how he put his case that there was a real risk of persecution upon return to Croatia. He relied upon discrimination in the field of welfare and benefits; there were few job prospects; the grey economy was not sanctioned by the state and should be ignored. Welfare payments were difficult to predict and were very low. Serbs were targeted in war crimes prosecutions. Returns were unsustainable. We could see nothing in the generality of those complaints, even though there was force in some of them that could amount to a real risk that on return, DK would face persecutory treatment of the necessary severity. These factors echo those relied on as common factors in all the S&K cases; see paragraph 39 of the Tribunal's decision. Save for his position as a failed asylum seeker, there is no evidence that the UNHCR is of the view that there is persecution. His position as a failed asylum seeker goes more to Article 3 ECHR and that is how the case was in substance argued.

85. We have in this context considered the new evidence which DK put in concerning war crimes. Although we are satisfied that Serbs in general may face discriminatory prosecution, the numbers are sufficiently small for there not to be a real risk to Serbs in general; there is evidence that those who are actually prosecuted face a fair trial process and do so for offences which go beyond the harassing arrest for the trivial. It is right that war crimes should be prosecuted. The complaint that the Croats are not prosecuted equally may be justified but it does not show that the few trials which there are of Serbs amounts to persecution. DK suggested that he would be at a greater risk because his name appeared on a list of those alleged to have forcibly displaced Croat villagers from their village in 1991. This is an internet list of an uncertain date as to its original posting, from the Croatian Information Centre. He denies that it correctly refers to him because he has never been to that village and had not heard of it until he saw the list. We shall assume that it is a reference to him and consider it, even though there is no explanation as to why it could not have been provided to the Adjudicator, other than that it was only discovered by Dr Blitz. It only emerged in his third statement prepared shortly before the Tribunal hearing. We do not consider that this advances his case significantly. He has been back to Knin in 1999 when he went to the police in order to obtain documents; he had suffered some ill-treatment but had not been long detained and had felt confident enough to complain and there had been no reprisals. There is no evidence that this sort of list plays any part in the prosecution of war crimes or in the harassment of Serbs.

86. DK also produced a supplementary statement after his appeal had been dismissed by the Adjudicator. He sought to provide fresh evidence to counter the strong doubts expressed over his claimed membership of the RSK police. He said that he had now been able to obtain documentation from his family in Serbia, who had thought that it had been lost. We remain sceptical at this fortuitous arrival and deprecate the ready assumption that the Tribunal provides an opportunity to have a second attempt to achieve more favourable credibility findings, particularly in the light of the finding that he was simply an economic migrant. However, we have considered it and assumed to be genuine; after all there is nothing intrinsically surprising in a man of his age having served in uniform in the conflict in Croatia. But there is nothing in the background evidence which suggests that membership of the RSK forces would attract discriminatory prosecution or harassment. The evidence of trials suggests a far more specific approach. We again refer to his experiences in 1999 in Knin, a town where, as he said, everybody knew everybody.

87. Taken with the other background evidence about the treatment and physical security of Serbs, and what we have set out over war crimes generally, we see no reason to disagree with the conclusions of the Adjudicator. DK is an economic migrant who has no genuine fear of persecution and does not face a real risk of it either. He would prefer not to face the hardships of return. There is no obligation on the United Kingdom, under either Convention, to underwrite the economic and social difficulties of another country.

88. We do not accept Mr Mullins' argument that the burning down of the family house and the continued absence of reconstruction or compensation should be seen as a continuum, a breach of Article 3 which continues to this day. We are prepared to accept for these purposes that the burning of the house and the subsequent enforced flight would amount to a breach of Article 3, along the lines of Dulas v Turkey. What we reject is the continuance of that breach. First, the test is not whether the breach continues or has been remedied; the question is whether DK would face a real risk of treatment which breached his Article 3 rights. It is by its nature a prospective test and although the past can colour the appraisal of the prospect, we do not consider that the want of reconstruction of his family house itself constitutes a breach of Article 3, and it is to that that we should look rather than to the circumstances which led to its destruction. That is closely related to the second point; there have been changes in the circumstances which warrant looking at the position as it now is, and which break the continuum. There has been a change in regime; the Tudjman regime which carried out the ethnic cleansing has gone, and one of a very different outlook and aim has taken its place. Significant efforts are now being made, belatedly for sure, to reconstruct Serb houses. The return of Serbs is encouraged. Time has passed. There is no reason to take a different view from that which was applied to SK. It follows, from what we have said in this paragraph, that we also reject the suggestion that, unless DK is able to return to Croatia "*with dignity*", the past breach of Article 3 should be regarded as continuing.

89. Mr Mullins' best point was that it was now clear that the Tribunal had proceeded under the misapprehension that there was no distinction in terms of UNHCR assistance with temporary accommodation between those returning as refugees and those returning as failed asylum seekers. It is correct that no such distinction was drawn either by or for the Tribunal, notwithstanding all the expert assistance with which it was weighed down, and all the earlier discussion of these issues in S and others. The problem had come to the notice of Sutovic and Hartigan before the application for permission to appeal in S&K was heard, as the date of the email inquiries shows, but it was not raised. We conclude, however, that the upshot of the various exchanges is what is set out in the June 2003 letter from Mr Lunsdorf: those who return as failed asylum seekers do not receive the benefit of UNHCR assistance prior to return, or temporary accommodation from the ODPR, and it is highly unlikely that any exceptional humanitarian assistance would be available to DK from UNHCR.

90. This is a less favourable position than the one assumed in S&K. We are not persuaded, however, that there is any basis for reaching a different conclusion in general for failed asylum seekers. (Paradoxically, it would appear that if DK were to succeed, he could be returned straightaway on this basis, for he would receive UNHCR assistance.) We are not sure what impact on this his proven Displaced Person status in Serbia would have were he to return to Croatia directly, or indirectly via Serbia, but for present purposes we shall ignore it; it is not a point which the email exchanges address.

91. Our reasons are as follows. First, there is no UNHCR advice that those in DK's position should not be returned, despite all the exchanges. We do not regard Dr Blitz's references to a telephone conversation with the UNHCR Return and Integration Officer Knin as a sound enough basis on which to infer that the UNHCR draws any such distinction; the conversation, question and answer and context, were not recorded and there is no follow up correspondence. This is not to question the competence or integrity of Dr Blitz; it goes to the weight which can be put upon indirect impressions and interpretations of such conversations, when dealing with these issues. In any event the report does not make clear whether it is talking of DK alone or of DK and his family, returning from Serbia, where his wife and children have been for some time; it appears to be the latter but that does not then allow for DK to return alone and to settle down before his family returns.

92. Second, the UNHCR Officer's view is expressed in terms of the "*advisability*" of the return and the hardships faced. There is nothing in what is said in general to suggest that the high threshold required for a breach of Article 3 would be reached. Even if one took a lower threshold than that implicit in "N", and saw a different threshold in "S and T", there is no real risk of DK's Article 3 rights being breached. DK would be entitled to the welfare rights of a Croatian citizen; there is no evidence that Serbs suffer discrimination in that respect. This may not be what he would like, but we have seen nothing to suggest that someone in that position would suffer destitution and a breach of Article 3. There would be a level of

hardship, but not so significantly different degree from that rejected in S&K as to be sufficient to give rise to a breach of Article 3.

93. Turning to DK's particular circumstances, he has a new skill and although there is employment discrimination against Serbs and we make no assumption that Knin is a thriving economy, we consider that a man of 34, with a skill or access to benefits should be able to get by, however uncomfortable and hard his circumstances may be. There may or may not be employment opportunities elsewhere in Croatia other than Knin, but we recognise that it is there that other factors may lead him to stay and we make no assumption that he would move elsewhere. There is no evidence that accommodation, notably private rented accommodation, including accommodation with Serb or other families, would be unavailable even if there is no ODPR temporary accommodation. His presence would be of assistance in bringing more effective pressure to bear in gaining priority for the reconstruction of the family house; it is plain that priority is given to those who have returned over those who have not, in the allocation of reconstruction resources. He is not in that age group described as the most vulnerable, too old to have any job prospects and too young to enjoy a pension.

94. We have assumed that the letter from his father to the Croatian authorities from Knin in August 2003, and produced with DK's "*third*" statement shortly before the IAT hearing was sent and correctly describes an unacknowledged application for reconstruction sent in 1999; it is surprising that this does not appear to have been drawn to the attention of the Adjudicator and no explanation for that omission is forthcoming. However, what it shows is that notwithstanding their visits to Knin, his parents have not pressed their claim; it has taken four years for a chasing letter to be sent, even though the original letter was sent whilst the Tudjman regime was in power and it was not until 2003 that there was any communication with the more favourably disposed regime of Mesic. We do not think that any conclusions can be drawn that reconstruction assistance would be unlikely to be forthcoming, even taking the letter at face value.

95. DK raised a point in his supplementary witness statement and which he elaborated upon in his third statement shortly before the Tribunal hearing. This was in response to the Adjudicator's conclusions that there would be no breach of his Article 8 rights were he to be returned to Croatia. He enjoyed no Article 8 rights here. There was little further argument from Mr Mullins and it did not feature large in his case. It is perfectly clear, allowing for the belated evidence even though it could and should have been before the Adjudicator and there is no explanation for its omission, that there would be no breach of DK's Article 8 rights. His brother was referred to in the supplementary statement as an asylum seeker in the UK, but his position is not mentioned in the later statement. He has two cousins living in the United Kingdom, but gives no details of any life with them. He lives with an aunt and her family. It can be said that he has some sort of family life here, but his aim is to live here not with them but with his wife and children whom he has left behind in Serbia. Insofar as he has any family life here, the interference with it in his return to Croatia is not

disproportionate to the maintenance of effective immigration control. He also referred to the difficulties which his wife and children would face in joining him in Croatia, because of the absence of papers proving that they are Croatian citizens; he says that the Croatia authorities are putting obstacles in the way of their obtaining them. DK's explanation is that the Croatian authorities are insisting on both parents being present in Croatia before citizenship papers will be issued to his children. If DK were to return, that should assist in solving the problem. His latest evidence is not very explicit as to the efforts made or as to the reasons for the difficulties or as to the role of the UNHCR, in view of the fact that his family in Serbia appears to fall within the scope of those who receive UNHCR assistance, were they to seek to return instead of seeking to avoid a return. Either way, we do not consider that the difficulties which are imposed by this voluntary separation and in the way of their reunion from Serbia in Croatia involve any breach of the United Kingdom's Convention obligations.

96. This appeal is accordingly dismissed.

MR JUSTICE OUSELEY
PRESIDENT