AA IA (Article 8- Medical facilities) Kosovo CG [2003] UKIAT 00123

# IMMIGRATION APPEAL TRIBUNAL

Heard at Field House
On : 12 September 2003
Prepared: 12 September 2003

Date Determination notified:
30/10/2003

Before:

Mr H J E Latter (Chairman)
Mr P Rogers, JP
Mr N Kumar, JP

Secretary of State for the Home Department

**APPELLANT**

and

**RESPONDENTS**

Representation
For the applicant : Miss R. Dunbavin, Home Office Presenting Officer
For the respondents : Mr I. Ali, counsel, instructed by Welfare Rights Advice Service

## DETERMINATION AND REASONS

1. This is an appeal by the Secretary of State against the determination of an Adjudicator, Mr P.E.A. Forrest, who allowed the respondents' appeals against the decisions made on 31 July 2001 giving directions for their removal from the United Kingdom following a decision that they were not entitled to asylum. In this determination the Tribunal will refer to the respondents to this appeal as the first and second applicant.

2. The first applicant arrived in the United Kingdom on 20 August 1998 claiming asylum the following day. The second applicant arrived on 30 September 1999 claiming asylum on 12 November 1999. The first applicant was born in 1972 in Gjakova in Kosovo, a town near to the Albanian border. He left Kosovo because of a fear of persecution from the Serbian authorities, leaving with a group which travelled to Macedonia. He then paid 5000 Marks to travel by lorry to the United Kingdom. The second applicant was born on 23 February 1980. She met her husband in April 1997 when he was visiting Driss. They were

married on 15 November 1997 in a Muslim ceremony registered in Gjakova. They lived with the first applicant's parents until he left in August 1998. The second applicant was forced to leave Kosovo following the ethnic cleansing carried out by the Serb authorities. At the end of April 1999 two Serbian policemen arrived at her home, tied up her father and mother and attempted to rape her. Neighbours heard the noise and intervened to prevent this. However, the second applicant was terrified and traumatised, having nightmares and being unable to come to terms with the incident. She left Kosovo with other members of her family and made her way to the United Kingdom.

3. The claims for asylum by both the first and second applicants were refused by the Secretary of State. In the light of the change of circumstances in Kosovo the Adjudicator was not satisfied that there was any real risk of persecution or indeed treatment contrary to Article 3 on return to Kosovo. Their appeals were dismissed on this basis. His findings in this respect are not challenged before the Tribunal.

4. The Adjudicator went on to consider the appeal under Article 8. This was based on an assertion that there would be an interference with the private and family life of the applicants if returned to Kosovo, particularly in the light of the effect that would have on the second applicant's mental and psychological condition.

5. The Adjudicator heard oral evidence from both the first and second applicants. The first applicant said that his wife was suffering from depression and was not yet cured. She was unable to receive medication at that time as she was breast feeding. She had been recommended to see a counsellor. The second applicant said that she felt safe in the United Kingdom but still suffered from nightmares and was very scared about returning to Kosovo. She had two miscarriages which she believed to be caused by stress. She had been on medication for depression and was offered counselling. She had stopped taking medication when she became pregnant and since giving birth to her daughter, Melissa, on 16 October 2002. In cross-examination she confirmed that her depression had started before her first pregnancy which had been an ectopic pregnancy. She continued to be depressed. Her fear related to her own health and the situation not getting any better in Kosovo. The Adjudicator also had before him documentary evidence including case law and a medical report prepared by Dr T.J. Gill. In this report Dr Gill stated that the second applicant had been registered with him since 24 December 1999. He confirmed that she had been admitted to Northampton General Hospital in March with an ectopic pregnancy which required laparoscopic surgery from which she had made a good recovery. She had complained of panic attacks since her ectopic pregnancy and miscarriage. There was a further miscarriage in May 2001. She was suffering from depression and was provided with fluoxetine. As she wished to conceive again other medication was not appropriate for her depression. The Adjudicator had before him an ICMPD Information

Fact Sheet on Mental Health in Kosovo. He noted that mental health care still faced serious difficulties there and that the needs of a severely traumatised population were very high. The mental health centre in Gjakova had been open for one year. There were home care services to the city and surrounding villages but this was for a population of about 300,000.

6. The Adjudicator was referred to a number of authorities which he as considered in paragraph 42–52 of his determination. As the Adjudicator rightly pointed out in paragraph 53, the issue he had to consider was whether, in the particular circumstances of these applicants, there would be a breach of the United Kingdom's obligations under the Human Rights Convention. He commented that the applicant had been the victim of an attempted rape by Serbian policemen which had affected her deeply. She was traumatised and deeply distressed as a result. She suffered from panic attacks and post and pre-natal depression. She had been unable to receive the necessary medical treatment due to her pregnancy. She said that treatment would be virtually unavailable to her were she to be returned to Kosovo.

7. The Adjudicator then went on to consider whether return would be disproportionate. He reminded himself of Article 8(2). He took the view that the only relevant legitimate purpose was the economic wellbeing of the country. He commented that the first applicant had been working for Debenhams for the past two years. They had a well settled family life and were making a contribution to the economic well being of the country. Unless it could be shown that they were interfering with the freedoms and right of others, it would appear that they did not come within any of the categories mentioned in Article 8(2). In these circumstances it would be disproportionate for the family to be returned to Kosovo in the light of the second applicant's present and foreseeable medical condition. The appeal was allowed on Article 8 grounds.

8. In the grounds of appeal it is argued following the judgment of the Court of Appeal in Ullah and Do [2002] EWCA Civ 1856, that the obligations of the United Kingdom government were not engaged when the interference with private or family life occurred because of events in or the situation in the receiving state. In the alternative, the grounds argue that the Adjudicator was wrong to conclude that treatment would be virtually unavailable to the second applicant in Kosovo and further the Adjudicator misdirected himself by considering that it was only the economic wellbeing of the country which was the relevant legitimate aim in Article 8(2).

9. Miss Dunbavin adopted these grounds in her submissions. She argued that in the light of the Ullah and Do the applicants could not rely on the absence of proper medical facilities in Kosovo to support a claim that removal would be an interference with the second applicant's right to private life, and in particular her right to physical and moral integrity. In

any event, the objective evidence did not support the Adjudicator's conclusions. A review of the WHO Mental Health Project in July 2002 made a positive evaluation of the progress in the mental health sector in Kosovo. Although mental health provision was underdeveloped, treatment for psychological conditions, including posttraumatic stress disorder was available and the numbers of patients treated for psychiatric disorders by the Kosovo Rehabilitation Centre for Torture Victims had increased substantially from 2001 to 2002: see paragraphs 5.47-8.

10. Miss Dunbavin further argued that, in light of the most recent medical report which was dated February 2003, the second applicant's current symptoms of anxiety and depression did not amount to full blown PTSD although there were symptoms such as nightmares and evidence of reliving her previous experiences. Dr Damle recommended an anti-depressant. She did not find her to be suicidal.

11. Mr Ali submitted that the Adjudicator's determination had been correct at the date of decision. He had heard the appeal on 3 December 2002 and his determination had been prepared on 12 December 2002, being promulgated on 13 January 2003. He argued that as the judgment had not been given in Ullah and Do until 16 December 2002 after the Adjudicator's determination was prepared, the Adjudicator's conclusions had been right. Certainly the Adjudicator can hardly be criticised for not taking into account a judgment which had not been delivered at the date of hearing but nonetheless a judgment by the Court of Appeal represents what the law is and it is the law by which the Adjudicator's determination must be considered. Mr Ali went on to argue that in any event the Adjudicator's conclusions were correct. He was entitled to find that there would be an interference with the second applicant's private life by the very fact of her being removed from the United Kingdom and returned to Kosovo. The Adjudicator had looked at all the relevant information and his findings were properly based on his assessment of the evidence. He had taken into account the second applicant's medical situation and the effect return would have.

12. Since the grant of leave there have been further Court of Appeal judgments which the Tribunal must take into account in addition to Ullah and Do. The first is a Blessing Edore [2003] EWCA Civ 716. In this judgment the Court of Appeal held that the proper approach when considering the issue of proportionality was to consider whether the Secretary of State's decision was within the range of reasonable responses open to him on the facts of the appeal. In Razgar [2002] EWCA Civ 840 the Court of Appeal confirmed that this was the proper approach subject only to the situation when the essential facts found by the Adjudicator were so fundamentally different from those determined by the Secretary of State as to substantially undermine the factual basis of the balancing exercise performed by him. In those circumstances it would be for the Adjudicator or the Tribunal to carry out the balancing exercise, but when deciding how much weight to give

to the need to maintain an effective immigration policy considerable deference should be paid to the Secretary of State's views.

13. The court also considered the circumstances in which Article 8 could be engaged an expulsion case. In paragraph 22 the court said that the applicant's case in relation to his private life in the deporting state should be examined. Where the essence of the claim was that his expulsion would interfere with private life by harming his mental health, that would conclude a consideration of what was said about his mental health in the deporting country, the treatment he would receive and any relevant support which he enjoyed there, and secondly it would be necessary to look at what was likely to happen to his mental health in the receiving country, what treatment can be received there and what support he can expect to enjoy. If serious harm to his mental health would be caused or materially contributed to by the difference between the treatment and support he is receiving in the deporting country, and what would be avialable in the receiving country, the territoriality principle would not be infringed and the claim was capable of falling within Article 8. The degree of harm must be sufficiently serious to engage Article 8. There must be a sufficiently adverse affect on physical and mental integrity and not merely on health.

14. This case was further considered in Januzi [2003] EWCA Civ 1187 where the Court of Appeal having referred to this passage in Razgar emphasised that in the context of an Article 8 claim it was necessary to make a comparison between the conditions enjoyed by the applicant in this country and the conditions which would affect him when transferred to another country.

15. It is clear that the second applicant has suffered from depression arising from the effect of her treatment in Kosovo when she was the victim of an attempted rape. She also suffered the experience of seeing many Albanians killed: see paragraph 25 of the Adjudicator's determination. Since her arrival in the United Kingdom she has had the misfortune to suffer two miscarriages, one following an ectopic pregnancy. Her depression was treated by the prescription of fluoextine. It would have been possible for other medication to be prescribed but for the fact that she wished to become pregnant again. The Adjudicator accepted her evidence that she was deeply worried about returning to Kosovo. This is reflected in the psychiatric report of 11 February 2003. This refers to the applicant's history of depression and to the fact that her feelings of desperation were quite overwhelming before the baby was born. She tried to kill herself twice by taking overdoses, the last overdose being more than twelve months ago. She did not go to hospital but did disclose what she had done. She was not on any antidepressant medication when seen by Dr Damle. She recommended a small dose of antidepressants and supportive psychotherapeutic contact. She described the applicant as presenting with mixed anxiety and depressive reaction. She was depressed and isolated. She appeared to be quite determined to learn English and to

settle down if allowed to. She had hopes of going on to college to be a teacher.

16. The Adjudicator came to the view that treatment would be virtually unavailable in Kosovo. It is certainly the case that psychiatric facilities are limited but it is clear both from the CIPU Report and from the Topical Information Fact Sheet, Mental Health in Kosovo, that treatment is available. Indeed the Adjudicator referred to the determination in Ismail [2002] UKIAT 03998 where the Tribunal found that there was no evidence to suggest that an applicant could not receive pharmaceutical treatment for depression in Kosovo. In the view of the Tribunal there is no reason for believing that the second applicant would not be able to receive antidepressants in Kosovo. It is clear from the reports that her main support comes from her husband. He would be returning to Kosovo with her. Comparing the second applicant's position in the United Kingdom with what the position would be in Kosovo, the Tribunal are not satisfied that there is any adequate evidential basis for a finding that there would be a sufficiently adverse affect on the second applicant's mental and psychological state arising from removal such as to amount to an interference with her private life.

17. The Tribunal now go on to consider in the alternative the issue of proportionality. It was the Adjudicator's view is that the only relevant category in Article 8(2) was the economic wellbeing of the country. He was plainly wrong in this conclusion. The legitimate aim of primary relevance is the prevention of disorder or crime. Disorder in this context does not of course just mean disorder in the sense of a breach of the law such as disorderly conduct but disorder in the way society is regulated. This includes having a fair and effective immigration policy. When assessing whether removal is proportionate, it is right to take into account the fact that both applicants made clandestine entries into the United Kingdom but to set this against the fact that at the time ethnic Albanians were at considerable risk in Kosovo. Nonetheless, the situation has now changed. There is no appeal against the Adjudicator's findings that they would not be at risk of persecution. The Tribunal takes into account the fact that the applicants do have a settled family life in the United Kingdom, the first applicant is working and there is young child of the family. But nonetheless in our judgment these factors do not offset the need of the Secretary of State to maintain a fair and consistent immigration policy. In these circumstances the decision to issue removal directions was within the range of reasonable responses open to the Secretary of State. Insofar as the full circumstances relating to the family have not been considered by the Secretary of State, the Tribunal's view would be that removal is proportionate to a legitimate aim within Article 8(2).

18. In these circumstances, for the reasons the Tribunal have given, the appeal by the Secretary of State is allowed.

**H.J.E. LATTER**
**VICE PRESIDENT**