Asylum and Immigration Tribunal

Heard at Field House
On 9 May 2006
Prepared 9 June 2006

Determination Promulgated
On 20 September 2006
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Before

SENIOR IMMIGRATION JUDGE GLEESON
SENIOR IMMIGRATION JUDGE McGEACHY
MRS J HARRIS

Between

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Respondent

For the appellant : Mr G Denholm, Counsel
Instructed by Sunny Leong & Co Solicitors
For the respondent: Mr P Deller,
Home Office Presenting Officer

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

Roma-Albanian couples cannot access the protection either of the Roma enclaves or the Albanian community and unless either party will normally be perceived as a member of the other community, the parties to such a relationship are at general risk of persecution or serious harm from individuals in both communities because the risk is from non-state actors and there is, in general, insufficient protection from either Serbia and Montenegro (Kosovo) state bodies or from K-FOR and other NGOs.

This determination updates and replaces (in relation to Roma-Albanian relationships) the Tribunal's decisions in FM (IFA–mixed marriage–Albanian-Ashkaelian) Kosovo CG [2004] UKIAT 00013, *SK and others (Roma in Kosovo-update) Serbia and Montenegro CG* [2005] UKIAT 00023, *BS (IFA –mixed ethnicity) Kosovo CG* [2002] UKIAT 04254, *FD*

(Kosovo-Roma) Kosovo CG [2004] UKIAT 00214 *and AB (Ashkaelia) Kosovo CG* [2004] UKIAT 00188.

DETERMINATION AND REASONS

1. This is the reconsideration with permission of the decision of Immigration Judge Glossop who dismissed the appeal of KX and his partner or wife, AB, against refusal to recognise them as refugees and the setting of removal directions to Serbia and Montenegro (Kosovo). The Immigration Judge rejected both the asylum and human rights grounds and made a separate finding that KX was not married to AB, the woman described as his wife. The core of this claim is that the appellant and AB are in a mixed Albanian-Roma marriage and claim to be at risk of persecution on that account. They are both citizens of Serbia and Montenegro (Kosovo).

2. At the first stage reconsideration hearing a Tribunal (Senior Immigration Judge Freeman, Senior Immigration Judge Jordan and Dr J O De Barros) found as follows:

   > *"[KX's] claim to face risk as the 'partner' of a Roma woman could not reasonably be dismissed on the basis that they are not married given the length of time they have been living together. However the appeal could not succeed on the basis of risk to the 'partner' herself given that she chose to withdraw her [asylum] application and let her case proceed as a dependant of [KX]."*

3. The appeal therefore proceeds to full reconsideration. Following *AH (Scope of s103A reconsideration) Sudan* [2006] UKAIT 00038 the Tribunal must deal with all matters in the original grounds of appeal, whether by approving the Immigration Judge's handling of them or remaking the decision itself. The burden of proof remains upon the appellant.

4. This appeal is argued under the Refugee Convention, and Articles 3 and 8 ECHR. For Article 3 and the Refugee Convention, the standard of proof is essentially the same (real risk or reasonable degree of likelihood), including for the ECHR rights *(Kacaj (Article 3, Standard of Proof, Non-State Actors) Albania* [2001] UKIAT 00018*, at paragraphs 7-8). For all the issues before us, the date at which risk on return is to be established is the date of hearing.

5. The original grounds of appeal also include Article 2 ECHR but this was not pursued at the hearing before us. In the original grounds of appeal, the appellant contended that the Secretary of State had been selective in his choice of the facts considered. He argued that the Secretary of State's decision was against the weight of the evidence. He reasserted his persecution claim and argued that it was unreasonable to expect documentary evidence about his wife who was a traveller and without fixed address. He asserted that she is of Roma ethnicity (which is now accepted) and that they could not relocate internally to avoid local difficulties, because he would still be attacked by the Albanian community elsewhere for having married a traitor (the perception amongst the Albanian community being that all Roma were Serb supporters and collaborators). The levels of discrimination and ill-treatment to which Albanians in mixed Albanian-Roma marriages were subjected were serious

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enough to constitute persecution. He also challenged the legality and proportionality of the decision to remove.

6. The principal appellant, KX is of Albanian ethnicity and appearance and his wife, (AB) is a Roma gypsy both by ethnicity and appearance. The Secretary of State no longer disputes her ethnicity. Only KX's appeal remains live, AB having withdrawn her asylum claim. The Immigration Judge found that, KX and AB's marital arrangements being somewhat unclear, they were not to be regarded as in a mixed marriage. Leave to appeal was granted on the basis that it was arguably an error of law to find that the parties were not in a relationship akin to marriage.

Second stage reconsideration hearing

7. The present hearing is the full reconsideration of KX's appeal: AB now falls to be considered only as his dependant. KX is an ethnic Albanian and suffered in Kosovo in 1998 during the civil war but this was not a live issue before the Immigration Judge. The sole issue at the reconsideration hearing was agreed by the parties as being:

"Whether [KX] and [AB] would face a real risk of persecution on return to Kosovo on account of
(i) [AB's] ethnicity as a Roma gypsy, and
(ii) Their mixed marriage (that being an additional risk category recognised by UNHCR and indeed other parts of the objective evidence including the CIPU report)."

Evidence before Tribunal

8. The Tribunal had the benefit of oral evidence from AB, and full argument on the authorities. We also had before us a country expert report from Dr Alex Standish (dated 18 March 2006), the October 2005 UN security Council report, the CIPU Country Report of April 2005, and Operational Guidance Notes (OGNs) of May and June 2006, the US State Department Report for Serbia and Montenegro, for 2005 (published in March 2006), an Amnesty International report of July 2005, and, from UNHCR, a March 2000 background note on ethnic Albanians from Kosovo, an August 2004 report on the same issue, and the position papers published in August 2004, January and March 2005, and June 2006, together with the fifth annual report of the Kosovo ombudsperson and five Articles from European Roma Rights Council (ERRC) dated between August 2004 and February 2006.

9. Some of this material (the June 2006 OGN, and UNHCR position paper for June 2005) came to hand after the hearing. It is all in the public domain. We considered whether to invite further submissions but as the newer material merely supports the picture which emerges from the earlier material, concluded that this was unnecessary. We have, however, included it on *E and R* principles.

Agreed facts and matters

10. At the beginning of the hearing, both appellants were present in court. Both are Muslim. The Tribunal observed, as had the Immigration Judge and the country experts, that there was plainly a significant difference in skin tone between them, with AB's skin tone significantly darker than that of KX. They appear to have gone through a form of marriage in Kosovo, but are not registered in Kosovo as spouses, because of the difficulties which arise from their being of different ethnicity.

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11. Mr Deller confirmed that the facts could be treated as undisputed but suggested that there was limited country guidance at present on mixed ethnicity relationships. Mr Denholm had not come prepared to argue the risks to Roma in general. He had however prepared a skeleton argument which set out the undisputed facts as follows::

> *"(a) [KX] is an ethnic Albanian; [AB] is a Roma gypsy.*
> *(b) They married in August 1998 but the marriage is not formally registered.*
> *(c) They did not cohabit in Kosovo because of a perceived threat to them based upon their relationship.*
> *(d) [KX] fled Kosovo in late 1998 and the parties were reunited in Macedonia before travelling on to the UK.*
> *(e) They arrived in the UK in September 1999.*
> *(f) They have lived together as man and wife ever since.*
> *(g) They intend to live together on return to Kosovo."*

12. Their relationship is therefore now of some eight years standing, for six and a half of which they have cohabited in the United Kingdom. No oral evidence was called initially; we proceeded immediately to submissions against those agreed facts. However, by agreement, we did take oral evidence from AB just before lunch. She is now a fluent English speaker. The evidence was taken at the Tribunal's instance, both KX and his wife being present in Court. When asked, neither Mr Denholm nor Mr Deller objected.

Oral evidence of AB (KX's wife)

13. We now summarise the matters which emerged from AB's evidence-in-chief, cross-examination, and clarificatory questions asked by the Tribunal. AB confirmed her name and address. She is a Roma woman, with an obviously Roma appearance and accent. She said that she had been afraid all her life. She became very tearful when speaking of her fear. She described the position of Roma in Kosovo as 'low people'. When they walked in the street they would be shoved, threatened and told, "You Roma, we will kill you, we will destroy you." Albanians never mixed with Roma, not in the last hundred years, past or future and they never wanted to do so. The Roma also did not mix with Albanians and the couple would not be welcome in a Roma town.

14. AB told us that she was well known in her home area, but that anywhere in Kosovo she would be identifiable as a Roma woman. AB was afraid to go back to Kosovo because of problems arising from her marriage to KX, which was opposed by both communities. AB was asked to explain her fear. She said that she had run away with an ethnic Albanian and if they returned they would simply be killed. In Kosovo, the law was not democratic like that in the United Kingdom; the law was administered by the families. There was no protection and the families went by the Kanun of Lek. There was nowhere she could go to hide and no protection for her.

15. Both she and her husband had been promised to persons in their own communities since birth. They had undergone a form of marriage but not had not dared to register their union for fear of both their communities taking revenge on them. The village had found out about her relationship with KX, because he was so excited when they got together that he told his best friend, who then did not keep the secret. His best friend became angry and said to KX, "You were promised to another girl

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and you have mixed with the Roma, how could you do that?" He told the whole of KX's village which was near the Roma enclave where AB lived; the relationship led to AB's family being suspected of Serb sympathies.

16. Almost immediately, the friend's wife had told AB's mother. That was when the trouble started. Her mother was not happy, especially as she already had a husband picked out for AB. The people from AB's Roma enclave did not like KX and disapproved of the relationship. Realising the secret was out, KX then came to AB and said, "They all know about us." He then went to the mountains to hide. They did not see each other again in Kosovo and she did not hear from him until she left.

17. It was just a few weeks after that that they came for her father. In July 1999, when they took her father, KX's village knew about her relationship with KX and thought AB's whole family were Serb spies because she was having a relationship with KX. Her relationship had put all her family members at risk and caused the disappearance of her father. Some of the people who came and took her father were identifiably from KX's village and, although they wore masks, she recognised them. They wore the KLA arm badge. They broke down the caravan door, pushed her mother aside, took her father and said "come on you spy". The men who came to take her father had mentioned KX's name. They called AB some bad names and walked towards her; her mother told her to run. She knew that they had intended to rape her.

18. Her great fear was that the Albanians, or indeed the Roma, could come and "do whatever" to the couple. Once you broke the Kanun of Lek you were basically dead; if either the Albanians or the Roma caught up with the couple, they would kill her or rape her in front of her husband. The Albanians would harm her and the Roma would harm her husband.

19. In cross-examination, AB was asked if she knew of any other Albanian-Roma relationship in Kosovo. AB did not. During their time in Kosovo, AB and KX had not been able to live together but since they reached the United Kingdom they had done so. She would rather die in the United Kingdom than return to Kosovo because she would be at risk everywhere.

20. In answer to questions from the Tribunal, AB said that she did not know whether her mother was still alive. She had three brothers and another two sisters but she did not know what had happened about them. She was not aware that she could try to trace family members through the Red Cross. She had not seen anyone from Kosovo; KX was all she had.

Appellants' submissions

21. For the appellant, Mr Denholm relied on his skeleton argument (which is a useful guide to the background evidence) and made the following oral arguments. He asked us to consider the decision of Schiemann LJ in the Court of Appeal in *Katrinak v The Secretary of State for the Home Department* [2001] EWCA Civ 832 which held that it was possible for a man to be persecuted by what was done or threatened to his wife:

> "23. If I return with my wife to a country where there is a reasonable degree of likelihood that she will be subjected to further grave physical abuse for racial

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> reasons that puts me in a situation where there is a reasonable degree of risk that I will be persecuted. It is possible to persecute a husband or a member of a family by what you do to other members of his immediate family. The essential task for the decision taken in these sorts of circumstances is to consider what is reasonably likely to happen to the wife and whether that is reasonably likely to affect the husband in such a way as to amount to persecution of him."

22. Mr Denholm observed that Roma were still regarded as having been collaborators with the occupying Serbs and pointed out the modification in UNHCR guidance given on mixed-ethnicity relationships contained in "UNHCR Position on the Continued International Protection Needs of Individuals from Kosovo" for the years 2004 and 2005. (We now also have the advantage of seeing the 2006 Position Paper which was published in June 2006).

23. In 2004, at paragraph 6, UNHCR maintained its position that members of the Serb, Roma, Ashkaelia and Egyptian communities should continue to benefit from international protection in countries of asylum "return of these minorities should take place on a strictly voluntary basis deriving from fully informed individual decisions". In March 2005, UNHCR separated the position for Roma from those of Ashkaelia, Egyptian, Bosniak and Gorani communities as follows:

> "14. Against the described developments and constraints for ethnic minorities UNHCR is concerned in particular for Kosovan, Serb and Roma communities as well as for ethnic Albanians in a minority situation. Therefore the Office maintains and reiterates the position that members of these groups should continue to benefit from international protection in countries of asylum under the 1951 Convention or complementary forms of protection depending on the circumstances of claims. For these groups and individuals, return should only take place on a strictly voluntary basis in safety and dignity in a coordinated and gradual manner such return to be sustainable needs to be supported by reintegration assistance.
>
> 15. With regard to Ashkaelia, Egyptian as well as Bosniak and Gorani communities, these groups appear to be better tolerated in spite of a single, but very serious incident against the Ashkaelian community in Vushtrri/Vucitrin during the March 2004 attacks. In the light of that incident the August 2004 advice from UNHCR included the Ashkaelian and Egyptian communities among those with a continuing need for international protection. However in the light of the developments since then UNHCR's position is currently that these groups may have individual valid claims for continued international protection which would need to be assessed in a comprehensive procedure."

24. Under 'other groups at risk' UNHCR guidance identified:

> "Persons in ethnically mixed marriages and persons of mixed ethnicity; persons perceived to have been associated with the Serbian regime after 1990."

That category remains in the current report.

25. Mr Denholm then dealt with the Tribunal authorities put forward by the Secretary of State on the mixed-race question. He sought to distinguish *FM (IFA-Mixed Marriage-Albanian-Ashkaelian) Kosovo CG* [2004] UKIAT 00081. That decision, like this, was one where there was no dispute on facts or credibility. The appellant was an Albanian man who married a woman, each of whose parents was of mixed

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Ashkaeli/Albanian ancestry. He was suspected of collaboration because of the family history. He compounded matters by being seen giving a lift to two Ashkaelia men and a Serb man. The Tribunal accepted that there would be local difficulties for the couple but found that the couple would not be identifiably in a mixed marriage if they were to relocate elsewhere in Kosovo. Mr Denholm contended that it was implicit in *FM* that if the couple had been in an identifiably mixed marriage there would have been a risk (paragraph 26 on page 8 and paragraph 38 to 47).

26. In *KB (mixed ethnicity, Roma/Albanian) Kosovo CG* [2003] UKIAT 00013, a mixed-race appellant was light skinned and the Tribunal concluded that there was no ethnic risk as he would be seen as wholly Albanian. In *AB (Ashkaelia) Kosovo CG* [2004] UKIAT 00188 , paragraph 17 to 18, the Tribunal held as follows: –

> 17. The Appellant is not a Kosovo Albanian but he is married to one. Plainly the main groups of mixed marriages that can cause security difficulties in Kosovo are marriages between ethnic Albanians and ethnic Serbs, and the Roma who are more perceived by the Albanians as being allied to the Serbs. This is because of the continuing tension between the two communities and the need particularly for the ethnic Serbs and Roma to concentrate in their own communities for security and protection. A mixed marriage between an Albanian and a Serb could mean difficulties in both communities and greater exposure to risk.
>
> 18. The situation for Ashkaelia is however rather different. They have associated themselves traditionally with the Albanian community. The Appellant has lived in the majority Albanian community for much of his life. Having an ethnic Albanian wife would make it easier for him to identify himself with the Albanian community in the way described in the objective evidence. The evidence that they have experienced difficulties themselves in the past in Kosovo is very limited and vague. In any event UNHCR advice is only that claims from people in mixed marriages should be carefully considered. This we have done. ”

27. In *BS (IFA, Mixed Ethnicity) Kosovo CG* [2002] UKIAT 04254 at paragraph 5, the Tribunal found that if a person could pass as a member of the majority community there would be no risk. Mr Denholm argued that the corollary would be if you could not pass and the marriage was identifiable as a mixed ethnicity marriage, there was a risk.

28. Accordingly, he contended that the authorities did not assist the Secretary of State; it was implicit in all these decisions that those in identifiably mixed ethnic marriages were at risk. UNHCR guidance was consistent on that point. The Roma enclaves would give safety to Roma but mixed marriages denied the participants the protection of both communities.

29. In *FD (Sufficiency of Protection, Roma, Munteanu) Romania CG* [2004] UKIAT 00001 the Tribunal was dealing with the child of a mixed Roma-Serb marriage (he referred to paragraphs 8, 14, 28), not with the marriage itself. The evidence in that case was that the problems were localised.

30. The most recent UNHCR guidance was, he submitted, in very strong language, and plainly worded with reference to the Refugee Convention risk. Conditions in enclaves were grim to the point of being life-threatening and *FD* did not deal with mixed ethnicity marriage.

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31. Mr Denholm then turned to Mr Standish's evidence as to the perceptions of both communities in particular at page 94, paragraphs 22 to 26. Marriages between Roma and Albanians were treated as though they were Albanian-Serb marriages by reason of the perception that Roma were Serb collaborators. He asked us to compare paragraphs 32-39 of the Standish report with paragraph 3.11.2 of the May 2006 OGN, and to note the difficulty for a Roma woman, who would be considered *marime* (impure) for marriage to a "*gadzjo*" (a non-Roma man) as her responsibility was to ensure the continuation of her own community. The couple were unlikely to be able to take advantage of Roma enclaves.

32. Mr Denholm also referred to a report from the Voice of Roma in the original bundle before the Immigration Judge (pages 10-11). At paragraph 30 of *FD*, the Tribunal had considered mono-ethnic enclaves; however, Mr Standish's report was based upon material published after the promulgation of the determination. Whereas in general, Roma who were concerned about their personal security situation could seek shelter in a Roma enclave, where there was a greater prospect of collective protection than outside, and conditions in camps (although overcrowded and poor) did not fall below the Article 3 threshold, such protection was not available to a mixed race couple. The Tribunal was not bound to follow UNHCR guidance but the Tribunal's conclusion of lack of risk in mixed marriages in Kosovo was erroneous and too widely expressed.

33. Mr Denholm argued that in *FD,* the Tribunal had not made findings which bore directly on the Refugee Convention risk here. The decision was in wide terms. The evidence relating to events in January 2003 (pages 92 to 93) were couched in moderate language. The risk was one, however, of serious physical harm (page 33). Marriages such as this one were extremely rare and practically all of those who were in that position had left Serbia and Montenegro. He repeated that he had not prepared for the hearing on the basis that the risk to ethnic Roma *per se* was to be revisited and no oral evidence had been called because KX's representatives were not under the impression that *FD* was to be revisited. Mr Standish had been instructed on that basis.

34. The group into which this couple fell, he said, was a tiny group of people and there simply was no readily identifiable information in the public domain because it was such an extreme taboo. The local feeling was very strong as recorded by UNHCR even absent specific examples.

35. Mr Denholm asked the Tribunal to consider the family and private life which KX and AB had developed in the United Kingdom since their arrival in October 1999. They had finally been able to live together openly. The Secretary of State had delayed in making his decision on asylum and in serving it (the letter of refusal was in June 2003 but was not served until November 2004). He relied on *Secretary of State for the Home Department v Akaeke* [2005] EWCA Civ 947 in relation to the delay issue. Nine years' delay in that appeal had been described as 'a public disgrace'. The delay here was significant; had the appellant KX been returned promptly, he could have made an entry clearance application to rejoin AB (though that part of Mr Denholm's argument is difficult to follow since neither party was settled).

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36. In *J (Serbia and Montenegro)* [2003] UKIAT 00151, Dr Storey held that unreasonable delay was always a factor, although not necessarily determinative. The family were in settled accommodation in the United Kingdom, argued Mr Denholm. AB now spoke good English and they had no children. They had both studied in the past but were not currently studying. To return them to Kosovo now would be a severe interference with their private and family life because of the uncertainty and difficulties in Kosovo and the significant levels of discrimination they would undoubtedly face. Mr Denholm relied upon the Tribunal's decision in *GS (Article 8, public interest not a fixity) Serbia and Montenegro* [2005] UKAIT 00121*;* the public interest in these appellants being removed should not weigh heavily in the balance, having regard to the Secretary of State's conduct. The couple had been in the United Kingdom for many years now pending the Secretary of State's decision and at the very least, if returned would face extreme discrimination, ostracism and difficulties in accessing services if returned.

37. Mr Denholm also relied upon *MM (Delay, reasonable period, Akaeke, Strbac) Serbia and Montenegro* [2005] UKAIT 00163, which indicated, after a survey of Tribunal and other jurisprudence, that delays of over twelve months were unacceptable and unreasonable. KX had responded promptly to everything sent to him; the levels of delay relating to him were such as to render the couple's circumstances 'truly exceptional'. Theirs was an unusual relationship, unique in Counsel's experience. The situation in Kosovo, he argued, was so extreme as to engage Article 8 because the breach which KX feared was a flagrant one (*Ullah and Do*).

38. Mr Denholm then addressed human rights; there had been a delay of more than twelve months and the parties were not precluded from asserting human rights, as regards the situation in Kosovo. The interference with family life in Kosovo short of flagrant breach of Article 8 by the Kosovan authorities still went to the proportionality of any decision carried out by the United Kingdom. If the breach in Kosovo were flagrant, the appellant would be entitled to succeed under the principles set out in *Ullah and Do.*

39. The materials before the Tribunal were up to date, particularly the evidence of the Ombudsperson which showed that Albanian-Roma relationships were not in any better position since the end of the war. Paragraph 44 of the Ombudsperson's Report indicated a lack of willingness and ability to protect people in this delicate position and the CIPU Country Report referred to the 2004 anti-Roma violence. The EHRR evidence set out the up-to-date situation for Roma in Kosovo; Mr Denholm also asked the Tribunal to consider the September 2005 CIPU Country Report. Mr Denholm asked the Tribunal to allow KX's appeal, both in asylum and human rights.

Secretary of State's Submissions

40. For the Secretary of State, Mr Deller accepted that in the light of UNHCR report there were difficulties for mixed marriages; KX would be treated as an ethnic Roma but Mr Deller accepted that he would not have access to the enclaves. He accepted that the couple would be returned together. He accepted that it would not be possible for this couple to assimilate, because it was obvious when one looked at them that they were a mixed race couple. The question therefore was whether this couple could find a place of safety within Kosovo without having access to either

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Albanian villages or Roma enclaves. The Tribunal should not infer that a general risk had been found in the determinations before it, which dealt with the general societal perception of Roma; the objective material did not indicate that there was a general risk for a mixed race couple.

41. The Tribunal needed to focus on as to what was feared today, and from whom. The Immigration Judge had failed to focus on current risk; there was a general perception of treating Roma as Serb collaborators. That was a real risk from which Albanians were also put at risk by association with Roma. Mr Deller reminded us that not all Roma lived in enclaves and not all of them were at risk (*FD* paragraph 51*, SK* paragraph 16). The parties needed to demonstrate a risk before they were required to consider relocation to the enclaves. The Tribunal now had much more evidence before it, in particular in relation to the inter-ethnic violence in March 2004. In *FD* (paragraph 57 ff) the Tribunal had found that there was, in general, sufficiency of protection from K-FOR and thus no need for internal relocation.

42. The evidence did not demonstrate any risk beyond a general presumption of Roma associations equalling collaboration with the Serbs. The wife's family had been targeted as collaborators which meant that there was a possible risk in her home area (pages 66-67 of the appellant's bundle). The risk to newcomers in areas outside their home areas should be more than a theoretical possibility. The cases of *Appellant S 395/2002 v Minister for Immigration and Multicultural Affairs* [2002] High Court of Australia, [2004] INLR 233, (discreet homosexuals) and of *Hysi v Secretary of State for the Home Department [2005] EWCA Civ 711* (mixed race child who could pass as Albanian) were not relevant as this was not, he accepted, a situation where the couple could 'pass' in either community. The skin colour difference was apparent.

43. The situation in Kosovo, he added, was now back to simmering tension after the explosive events of March 2004 and to return KX and his family today would not cause a Convention breach.

44. Mr Deller asked the Tribunal to consider whether there was any family and private life in the UK protected by Article 8 ECHR at all. Following the decision of the Court of Appeal in *Amjad Mahmood* [2000] EWCA Civ 315, a couple could not dictate their place of residence and he emphasised again that they would not be returned separately. No strong links had been demonstrated with the United Kingdom and Article 8(1) was not engaged in the domestic sense since there was no proposed interference with the couple's bond of affection, which could continue to exist outside the United Kingdom. The Secretary of State would respect the family life asserted and the couple would be returned to Kosovo together.

45. The Tribunal should hesitate before finding that Article 8(1) was engaged in the foreign sense. Mr Deller reminded the Tribunal of the provisions of the decision in *Razgar* [2004] UKHL 27; this couple's ties to the United Kingdom amounted to this, that they had the experience of being in the country for a period of time and studying here (as a result of which AB now spoke excellent English). There was nothing extraordinary about the delay relied upon; thousands of Kosovans had been evacuated during the years 1998 and 1999 and there had been considerable legislative and procedural change since then, in particular the introduction of human rights legislation in October 2000. There was no *Akaeke*-style pursuit of

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these proceedings by KX (and no policy in force on entry of which the appellant could have had the benefit under *Bahktear Rashid* [2005] EWCA Civ 744). The Secretary of State's conduct had not been praiseworthy in relation to the delay but was not seriously bad.

46. There were no factors here which were sufficiently exceptional to begin to meet the standard of 'truly exceptional' set in *Huang & Ors v Secretary of State for the Home Department [2005] EWCA Civ 105* and no valid reason had been put forward why the public interest should be regarded as having been diminished in priority. In order to succeed, KX would have to show that the family life which the couple now shared could not exist at all in Kosovo and therefore that there would be a flagrant denial of their human rights. He asked the Tribunal to dismiss the appeal on all grounds.

Discussion and reasons

47. The Tribunal reserved its determination which we now give. We reminded ourselves of the agreed issues:

> *"Whether [KX] and his wife would face a real risk of persecution on return to Kosovo on account of*
> *(i) [AB's] ethnicity as a Roma gypsy, and*
> *(ii) Their mixed marriage (that being an additional risk category recognised by UNHCR and indeed other parts of the objective evidence including the CIPU report)."*

48. It is accepted on both sides that this couple will return together to Kosovo, that they are married (or at least in a relationship akin to marriage) and have private and family life together in the United Kingdom which began only when they reached here in 1999. it is also accepted that their core account is credible and that they did experience the difficulties which caused them to flee in 1998 (KX) and 1999 (AB) respectively. The couple has been together since at least August 1998 and it is accepted that they intend to live together on return, although they were unable to do so before leaving Kosovo.

Country background evidence on mixed marriages

49. We began by considering the respondent's current position as set out in his Operational Guidance Notes on Kosovo. There has not been a Country of Origin Information Report since 2004. Since this case was heard, however, there are updated versions of both the OGN (June 2006) and UNHCR position paper on Kosovo (June 2006). We have therefore considered the relevant passages in the latest versions in place of those to which the parties referred us. The tenor (and the wording) of the passages in the latest reports does not differ materially from that before us at the hearing, so, after consideration, we decided that there was no need to invite comment on the newer reports or to recall the hearing for further submissions.

50. The June 2006 OGN accepts at paragraph 3.6.16 that:

> "**3.6.16 Conclusion.** Societal discrimination against Roma in Serbia and Montenegro is widespread and some Roma may be subject to physical attacks. However, in general this discrimination does not amount to persecution and the authorities are willing to offer sufficiency of protection although the effectiveness of this protection may be limited by the actions of individual police officers/Government

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officials. However, internal relocation is an option and it is not unduly harsh for Roma to relocate to another part of Serbia and Montenegro where they will not face persecution."

51. That conclusion is based on the *KK* decision which found that there was a sizeable Roma community into which a Roma at risk could place himself with adequate security and appropriate safeguards. At paragraph 3.10, the OGN deals with the risk to those perceived to have been associated with the Serbian régime after 1990 such as this appellant's family. It records UNHCR's continuing view that such persons might have a well-founded fear of persecution (March 2005). Nevertheless, the Secretary of State concludes as follows: –

> "**3.10.6** ***Conclusion*** Ethnic Albanians accused of/or perceived to have collaborated with the Serb authorities may face discrimination and ill-treatment in Kosovo. However, in the majority of cases sufficiency of protection is available and internal relocation is an option, therefore claimants from these categories of claim are unlikely to qualify for asylum or Humanitarian Protection. However, it should be noted that such cases are unlikely to be clearly unfounded.
>
> **3.10.7** Relatives of those who are accused of/or perceived to have collaborated with the Serb authorities may also face discrimination and ill-treatment in Kosovo, however, in the majority of cases sufficiency of protection is available and internal relocation is an option. Therefore claimants who apply on the basis of a relative's involvement/ or perceived collaboration with the previous Serb régime are unlikely to qualify for asylum or Humanitarian Protection. However, it should be noted that such cases are unlikely to be clearly unfounded."

52. The June 2006 OGN deals with mixed marriages at 3.11 –

> "**3.11 Kosovans of mixed ethnicity and those in ethnically mixed marriage**
> **3.11.1** Many claimants will apply for asylum or make a human rights claim based on ill treatment amounting to persecution at the hands of the general ethnic Albanian population and/or their own minority group due to their mixed ethnicity or involvement in an ethnically mixed marriage.
>
> **3.11.2 Treatment.** People in mixed marriages with people from ethnic minorities or children from such families may face similar difficulties as those groups. Unlike other minority groups, mixed families may be excluded from all communities and may be unable to resort to the relative security of mono-ethnic enclaves. UNHCR reiterated their position in June 2006 that persons in ethnically mixed marriages and persons of mixed ethnicity may have a well founded fear of persecution.
>
> **3.11.3** The ability to speak fluent Albanian is likely to be a factor in the degree to which any minority group are able to integrate with the majority community.
>
> **3.11.4 Sufficiency of protection** ...
> **3.11.5** In general there is sufficiency of protection for Kosovans of mixed ethnicity and those in ethnically mixed marriages. UNMIK/KPS/K-FOR are able and willing to provide protection for those that fear persecution and ensure that there is a legal mechanism for the detection, prosecution and punishment of persecutory acts. In general, an ethnically mixed claimant who speaks Albanian and can physically pass as an Albanian will be less at risk than those who do not speak Albanian and are easily distinguishable as being from a minority group.

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3.11.6 Internal Relocation UNMIK regulations and the constitutional framework provide for freedom of movement throughout Kosovo; however, inter-ethnic tensions and real and perceived security concerns restricted freedom of movement for some minorities. There is in general freedom of movement for ethnic Albanians in Kosovo (outside of the Serb enclaves) and caseworkers should consider that internal relocation is normally possible, for claimants that can pass as an ethnic Albanian, to another part of Kosovo, where a claimant's ethnic background is unlikely to be known and hence where there is not a real risk of persecution, notwithstanding UNHCR and UNMIK's reservations about the return of this group to Kosovo at this time. .. However, some claimants with mixed ethnicity and/or those in ethnically mixed marriages who are easily distinguishable as a member of a minority group may face limitations on their ability to internally relocate….

3.11.8 Conclusion Kosovans of mixed ethnicity and/or those in mixed marriages may face discrimination and ill-treatment in Kosovo from either the ethnic Albanian population or from members of their own minority group or sometimes both. However, in the majority of cases claimants will identify with and be accepted as one of the ethnicities that make up their mixed ethnicity and will be treated as such by the other ethnic groups in Kosovo. In most cases language will be the key factor in identifying which group a particular claimant can be identified with.

3.11.9 Those who speak Albanian and can pass as an ethnic Albanian
In general an applicant of mixed ethnicity who speaks Albanian and can pass as an ethnic Albanian to strangers (looked like an Albanian etc) is unlikely to be identified as being of mixed ethnicity outside of his home area. Therefore, the applicant would be able to internally relocate to another area of Kosovo where his ethnicity would not be known. Claimants from this category of claim are therefore unlikely to qualify for asylum or Humanitarian Protection and are likely to be clearly unfounded.

3.11.10 Those who can not speak Albanian but who can pass as a member of a minority ethnic group
Those who do not speak Albanian but who can pass as a member of a minority ethnic group are unlikely to be identified as being of mixed ethnicity outside their home area and will be treated in the same way as other members of that minority group. Caseworkers should assess each claim in line with the relevant section of the OGN and in line with the policy for that particular ethnic group. For example a mixed ethnicity Gorani/Albanian who speaks Gorani and can pass as a Gorani will be treated as a Gorani within Kosovo and so should be assessed in line with the policy advice on Gorani contained in section 3.16 of this OGN.

3.11.11 Those who can not speak Albanian and who can not pass as a member of a minority ethnic group
A few claimants of mixed ethnicity who do not speak Albanian will also not be able to pass as a member of minority ethnic group and are likely to be identified as being of mixed ethnicity and as a result be in a worse position that those of minority ethnic groups. However there is generally a sufficiency of protection available through UNMIK/K-FOR/KPS and therefore claimants from this category of claim are unlikely to qualify for asylum or Humanitarian Protection but are unlikely to be clearly unfounded."

53. UNHCR guidance for June 2006 sets out those it still considers to be at risk of persecution (maintaining the exclusion of Ashkaelia and Egyptians, who are considered not to be at risk any longer) :

"Kosovo Serbs, Roma and Albanians in a minority situation

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> 24. Given the present fragile security situation in Kosovo and serious ongoing limitations to the fundamental human rights of Kosovo Serbs, Roma and Albanians in a minority situation, UNHCR maintains its position that persons in these groups continue to be at risk of persecution, and that those minorities having sought asylum abroad should be considered as falling under the provisions of Article 1 A (2) of the 1951 Convention and the 1967 Protocol relating to the Status of Refugees. Where a State feels unable to grant refugee status under the law, but the individual is not excluded from international protection, a complementary form of protection should be granted. The return of individuals belonging to these groups should only take place on a strictly voluntary basis. Individuals who express a wish to return voluntary should be able to do so freely and with the full knowledge of the current situation in Kosovo."

54. UNHCR also includes in the vulnerable persons group the following –

> "**Other vulnerable categories of persons**
> 26. In the current complex situation of Kosovo, individuals from groups not mentioned above may also have a well-founded fear of persecution for reasons covered by the 1951 Convention and the 1967 Protocol. These individuals may originate from ethnic minority groups not specified as being at high risk, or may belong to other vulnerable categories of persons. Examples may include but are not limited to
> • *Persons in ethnically mixed-marriages and persons of mixed ethnicity;*
> • *Persons perceived to have been associated with the SCG authorities after 1990…*
> 27. Furthermore, asylum-seekers who do not qualify for 1951 Convention refugee status may still be protected against return if non-*refoulement* obligations under international or regional human rights law apply." *[Emphasis added]*

55. UNHCR discusses whether relocation to Serbia proper, rather than Kosovo is an option and concludes that it is not. We are not seised of conditions in Serbia proper since it is not suggested that this couple would be returned, other than to Kosovo. Conditions there are not at all easy: no humanitarian assistance is available, there are already 225000 internally displaced persons and 115000 refugees in the area, and no housing is provided for most (except 5374 places in collective centers), forcing Kosovo Roma to shelter in makeshift huts, corrugated metal containers and other substandard shelters, and often live without electricity, running water, sanitation or any public services.

56. At a meeting on "The Rôle of Municipalities in the Decade of Roma Inclusion" organised by the Ministry for Human and Minority Rights in May 2005, the Representatives of the Serbian authorities stated in terms that 75% of the Roma, Ashkaeli and Egyptian population in Serbia lived in extremely difficult living conditions in abject poverty. UNHCR recorded that only 11 per cent of Roma settlements in Serbia allowed for a dignified life; there had been a series of evictions caused by the current privatisation process, with no legal obligation to identify alternative housing solutions. Roma, Ashkaelia and Egyptians in Serbia proper were at high risk of homelessness, physical injury, health problems, insecurity, the removal of children from school and the loss of employment. It may be that this issue, if considered in an appropriate case involving exceptional circumstances, nevertheless falls below the Article 3 standard but we are concerned here with the evidence as to risk for Roma. Ashkaelia and Egyptians in Kosovo, rather than in Serbia and Montenegro as a whole.

Expert report of Alex Standish

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57. Mr Standish's report of 18 March 2006 contained the proper recognition of his duty as an expert to this Tribunal and sets out his history and qualifications. He had not met the appellant or his wife; he had seen only the documentary evidence and his comments were based upon his first hand knowledge of Serbia and Montenegro and the background evidence as it then stood. He explains that the Maxhupet, the ethnic group to which Roma in Kosovo belong, mainly speak Romani. Ashkaeli and Egyptians are Albanian speakers (see above for the improved protection that brings them). At paragraph 23, Mr Standish confirms the rarity of mixed marriages in Kosovo, especially in the rural areas. Research undertaken at the Population Studies Centre at the University of Pennsylvania before 1993 revealed that in Kosovo, Albanians were an especially 'closed' group being 365 times more likely to marry in than out.

58. After 1990, there was also a political dimension to marriage outside the ethnic Albanian community. Prejudice against Albanians who married out was fuelled by a highly influential book published in Kosovo in 1997 (Expulsions of Albanians and Colonisation of Kosovo, Pristina 1997). Marriage outside the ethnic Albanian community was well-documented as a serious risk factor for ethnic Albanians, their minority group partners and their children. That conclusion was supported by a report to the UN General Assembly in November 1999 by the UN Special Rapporteur responsible for monitoring human rights in the Southern Balkans, Mr Jiri Dientstbier. Mr Standish sets out the objective evidence (earlier versions of that already considered). He notes the additional difficulties for those minority persons in mixed marriages who speak accented Albanian or do not look Albanian. He notes the report of the Human Rights Monitor appointed by the UN, the Kosovo Ombudsperson Mr Marek Antoni Nowicki, who considers that members of certain minority groups have in practice no access to the courts and that there had only been 'slight improvements since the last reporting period' :

> "In the absence of a human rights Court and a special chamber within the Supreme Court dealing with Constitutional Framework-related issues, the Ombudsperson continues to be the only functioning human rights protection mechanism in place. Due to the limited powers that his mandate brings with it, however, the Ombudsperson cannot fill the gap left by the absence of such courts."

59. Mr Kofi Annan's Report to the UN Security Council on 7 October 2005 recorded that:

> "Combating serious crime…has proven to be difficult for the KSP [Kosovo Police Service] and the justice system. It is hampered by family or clan solidarity and by the intimidation of witnesses and judicial officials. For inter-ethnic crimes, the law enforcement mechanism is also weak…far too few perpetrators are ever brought to justice…When perpetrators remain at large, a sense of impunity prevails. Where there is freedom of movement for the perpetrators, it is hard to convince the victim that he or she enjoys the same freedom."

60. That does not support the OGN position that the authorities are ready and willing to protect people in the situation of this appellant and his wife. An OSCE Report entitled "The Response of the Justice System to the March 2004 Riots" dated December 2005 concluded that:

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"The justice system failed to send out a clear message to the population condemning this type of violence. Such a response does not serve as a sufficient deterrent from engaging in public disorder on a similar massive scale and therefore does not fulfil the full potential of the preventive function of the justice system…Witness intimidation in Kosovo has affected numerous criminal proceedings in the past, particularly those of a sensitive or high profile nature."

61. The OSCE records widespread failure by KPS officers to give evidence when properly summoned and inadequate charges not reflecting the gravity of the offence. The result was lenient sentences, at the level of the minimum penalty or even below, with "improper use of mitigating and aggravating circumstances in unreasoned decisions". Of 51000 individuals alleged to have participated, only 209 have been convicted and mostly for minor offences. In conclusion, Mr Standish recognises that credibility is for the Tribunal to determine but that the ethnicity of AB was no longer in dispute. While reminding the Tribunal of the impunity problem he sums up as follows:

"65. Since security for ethnic and religious minorities is a province-wide problem and cases of violence and intimidation have been documented across Kosovo, I do not consider that internal relocation could offer any degree of additional security to an ethnic Albanian who is married to a woman who could be identified as Roma, whether by her physical characteristics or her accent. In view of the small size of Kosovo's population (around two million, or less than 30% that of central London), and the very tight-knit nature of ethnic Albanian society, I think that it is unlikely that a person who is in a mixed Roma-ethnic Albanian marriage could conceal the fact. A newcomer in any post-conflict Kosovo community is likely to attract very considerable scrutiny and the local Albanian authorities can be relied upon to investigate such individuals on the grounds that they might be collaborators with the Serbs or suspected war-criminals. In addition, widespread internal displacement of people from villages and smaller towns throughout Kosovo has also increased significantly the risk of meeting former neighbours and acquaintances, thus raising the likelihood of identification of a person seeking to conceal his or her identity or ethnic origins."

62. We next considered the authorities in the respondent's bundle. We have not been referred to the decision of the High Court of Australia which is included (*Appellants 395/2002 v Minister for Immigration and Multicultural Affairs [*2004] INLR 233). That is a case on the need for a homosexual couple to act discreetly. It is not relevant here; the presenting problem is that because of their different appearance and accents, the appellants cannot settle discreetly in another area of Kosovo.

63. We then considered the United Kingdom determinations in the Secretary of State's bundle. *KB (mixed ethnicity, Roma/Albanian) Kosovo CG* [2003] UKIAT 00013*, SK (Roma in Kosovo – update) Serbia and Montenegro* [2005] UKIAT 00023 *and BS (IFA, Mixed Ethnicity) Kosovo CG* [2002] UKIAT 04254 all deal with the difficulties facing children of a mixed relationship (in particular, whether they can 'pass' as either ethnicity and how that affects their position). *SK* deals with the position of an Albanian-speaking man with only Roma ethnicity and is a useful statement of the position at 10 December 2004 but does not really assist us with the mixed marriage issue. Those decisions do not therefore assist us as to the difficulties involved for the principals in a mixed ethnicity marriage.

64. Unfortunately, we also do not gain much assistance from the decisions which deal with mixed-ethnicity marriages. *FD,* a decision of Ouseley P, is based on the old

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evidence which does not draw a distinction between Roma, Ashkaelia and Egyptians as ethnic groups. *FM (IFA-Mixed Marriage-Albanian-Ashkaelian) Kosovo CG* [2004] UKIAT 00081 and *AB (Ashkaelia) Kosovo CG* [2004] UKIAT 00188 *both* relate to Ashkaeli-Albanian relationships, to which on today's evidence different considerations apply. There is much less hostility in Kosovo today to Ashkaelia than to Roma, and they are Albanian speakers, increasing their ability to vanish into the community and avail themselves of such protection as Kosovo can provide. The appellant in that case was of mixed race and it is not a mixed marriage case.

65. The Court of Appeal decision in *Hysi* [2005] EWCA Civ 711 relates again to a mixed ethnicity child of Roma-Albanian origin. The decision assumes in his favour that he is a man who can pass as Albanian. Again, the decision does not assist us with the difficulties faced by KX and AB, who cannot pass as a couple in either of their original ethnic groups because of their obvious difference in skin tone and linguistic differences.

66. in considering internal relocation, we are guided by the decision of the House of Lords in *Januzi v Secretary of State for the Home Department and ors* [2006] UKHL 5. The correct approach for the Tribunal is set out in the decision of Lord Bingham at paragraph 21 –

> "21…[the San Remo experts in 2001] considered that where the risk of being persecuted emanates from the State (including the national government and its agents) internal relocation "is not normally a relevant consideration as it can be presumed that the State is entitled to act throughout the country of origin". UNHCR Guidelines of July 2003 similarly observe (paragraph 7I (b)):
>
> > "National authorities are presumed to act throughout the country. If they are the feared persecutors, there is a presumption in principle that an internal flight or relocation alternative is not available."
>
> There can, however, be no absolute rule and it is, in my opinion, preferable to avoid the language of presumption. The decision-maker, taking account of all relevant circumstances pertaining to the claimant and his country of origin, must decide whether it is reasonable to expect the claimant to relocate or whether it would be unduly harsh to expect him to do so. The source of the persecution giving rise to the claimant's well-founded fear in his place of ordinary domicile may be agents of the state authorised or directed by the state to persecute; or they may be agents of the state whose persecution is connived at or tolerated by the state, or not restrained by the state; or the persecution may be by those who are not agents of the state, but whom the state does not or cannot control. These sources of persecution may, of course, overlap, and it may on the facts be hard to identify the source of the persecution complained of or feared. There is, as Simon Brown LJ aptly observed in *Svazas v Secretary of State for the Home Department* [2002] EWCA Civ 74 [2002] 1 WLR 1891, paragraph 55, a spectrum of cases. The decision-maker must do his best to decide, on such material as is available, where on the spectrum the particular case falls. The more closely the persecution in question is linked to the state, and the greater the control of the state over those acting or purporting to act on its behalf, the more likely (other things being equal) that a victim of persecution in one place will be similarly vulnerable in another place within the state. The converse may also be true. All must depend on a fair assessment of the relevant facts."

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67. Further assistance is available in the decision of Lord Hope at paragraphs 46-48. It is quite wrong under Article 1A (2) of the Refugee Convention to approach the appeal by comparing the conditions in the United Kingdom and the proposed place of relocation in the country of origin. The comparison must be between the home area and the proposed place of relocation, both in the country of origin. At paragraph 47, Lord Hope says this :

> " 47. The question where the issue of internal relocation is raised can, then, be defined quite simply. As Linden JA put it in *Thirunavukkarasu v Canada (Minister of Employment and Immigration)* (1993) 109 DLR (4th) 682, 687, it is whether it would be unduly harsh to expect a claimant who is being persecuted for a Convention reason in one part of his country to move to a less hostile part before seeking refugee status abroad. The words "unduly harsh" set the standard that must be met for this to be regarded as unreasonable. If the claimant can live a relatively normal life there judged by the standards that prevail in his country of nationality generally, and if he can reach the less hostile part without undue hardship or undue difficulty, it will not be unreasonable to expect him to move there."

68. What we must consider therefore is –

(1) whether there is a risk of persecution in the claimant's 'ordinary place of domicile';
(2) if so, whether it is from agents of the state authorised or directed by the state to persecute; from agents of the state whose persecution is connived at or tolerated by the state or not restrained by the state; or by those who are not agents of the state, but whom the state does not or cannot control. it is for the decision maker to decide on the material available where, on that spectrum, the particular case falls;
(3) the closer the link between the persecution and the state, the greater the control of the state over those acting or purporting to act on its behalf, the more likely that a victim of persecution in one place will be similarly vulnerable elsewhere, and the converse may also be true;
(4) all of the above findings depend on a fair assessment of the relevant facts; and
(5) the Tribunal must ask itself whether it is unduly harsh to expect a claimant who is being persecuted for a convention reason in one part of his country to move to a less hostile part before seeking refugee status abroad;
(6) relocation will not be 'unduly harsh' if the claimant can lead a relatively normal life in the proposed place of relocation, judged by the standards prevailing in his country of origin, and can reach the less hostile part without undue hardship, or undue difficulty.

General conclusions

69. We have been able to derive only very limited assistance from the Tribunal's existing jurisprudence and that of the higher courts on the question of mixed marriages. Such evidence as underlies the existing decisions now looks very out of date; we therefore have to decide the relevant issues for ourselves in the light of the current evidence.

70. In relation to Roma-Albanian relationships, we draw the following conclusions from the above evidence –

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(1) Roma in Kosovo in general live in conditions of considerable difficulty, with discrimination and victimisation and some risk of violence, but which, unless exceptional circumstances are shown, will not amount to a risk of persecution engaging the Refugee Convention or of serious harm engaging Article 3 ECHR.
(2) Nevertheless, the majority Albanian population continues to suspect all Roma continue of being Serb collaborators and 'traitors'; the domestic protection available is the Roma enclaves, and Roma with access to those enclaves are, absent special circumstances relating to them personally, safe to the *Horvath* standard.
(3) Roma-Albanian marriages are very rare because both the Roma and Albanian communities are strongly opposed to intermarriage and may take revenge on the member of the other community with a degree of impunity, enforcing the Kanun of Lek.
(4) An Albanian who marries a Roma person will be treated by the Albanian population in the same way as Roma are treated. An Albanian man who becomes involved with a Roma woman will be considered to have demeaned himself and can expect to be isolated by his local community, or suffer a revenge attack;
(5) Roma do not usually speak Albanian and when they do it will be accented. Having regard to skin colour differences and differences of accent, it will be extremely unusual for a Roma woman to be perceived from her physical appearance and language abilities as Albanian or an Albanian man be perceived as Roma. A Roma woman is expected to support her community by marriage to, and children with, a Roma man. She is at risk of violence, including sexual violence, from her own community if she establishes a relationship outside the Roma community and seeks to remain within the enclave. She is also at risk of violence from Albanians outside the enclave as they will disapprove of the relationship of an Albanian man with a 'low person' and perceived traitor from the Roma community;
(6) Any risk of harm to Roma and those treated as Roma, whatever its level, comes not from the state or its agents (whether by instruction or connivance). Instead, Roma suffer discrimination from the ordinary population of Kosovo which the state is unable completely to control, but which ordinarily falls below the high standards required to establish persecution or cruel, inhuman or degrading treatment or torture. In general the enclaves provide protection to the *Horvath* standard;
(7) In general, there is no internal relocation option in Kosovo for couples in a Roma-Albanian mixed relationship: because of the hostility from both communities, they cannot access the Roma enclaves for protection or look to the Albanian community for shelter unless one of them can 'pass' as a member of the other community on sight, and when speaking. The test is not whether they can do so with significant effort and deceit, but whether an ordinary member of the community in which the person wishes be perceived as belonging would not notice that they were a member of the other community.
(8) If a couple arrives as strangers in a place where they are not known, there will be understandable local interest in them. In effect, they will be investigated to see why they are no longer living in their original area. Differences of ethnicity are very likely then to be identified, putting them at risk in the new

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community where they have sought refuge. Those who are associated with identifiable Roma are likely to be treated as Serb collaborators and possible war criminals. There is a significant risk of violence against them if that link is made.

(9) There is not, at present, a sufficiency of protection for victims of inter-ethnic violence in Kosovo. Although there are attempts to protect, the judicial route is not always open and when it is, lesser charges are preferred, there are difficulties with witnesses, and the penalties imposed are at or below the minimum sentence for those lesser offences. UNMIK itself says that the risk of persecution engages the Refugee Convention, and UNHCR agrees.

Decision on the present appeal

Refugee Convention and Article 3 ECHR

71. In both communities, this couple were promised to others and are in breach of local laws and the Kanun of Lek. They were unable to live together in Kosovo and have both incurred the wrath of their communities by failing to enter into the marriages which had been arranged for each of them in their own communities. AB's father disappeared and AB and her mother were threatened as a result of the relationship. KX's friends rejected him and people from his village were involved in the attack on AB's home. AB fears rape or worse if they return to their home area, and KX fears attack also. AB's family are perceived as Serb sympathisers and in their home area, which would follow them into both communities. On the evidence, there is a risk of persecution or serious harm for KX and AB in their home areas.

72. The harm feared is from non-state actors, which increases the burden on the appellant to show that there is no effective internal relocation option for the couple. They cannot be expected to return and live separate lives again; they have lived together now for over eight years and are an established couple. Neither of them can 'pass' as a member of the other community; KX's skin is too fair and he does not look or speak like a Roma man; AB's Albanian is accented and she neither looks nor sounds like an Albanian woman. Neither can be expected to conceal their origins and their mixed-ethnicity marriage will be obvious to outsiders.

73. We have no confidence that they would not be the subject of retribution if they were to return to their home areas. This couple, who are of obviously differing ethnicity , where AB does not speak accentless Albanian but is identifiable as Roma both by her appearance and speech, would be in the smaller group of those who cannot access the enclaves.

74. if the appellants are not safe in their home area from harm or persecution (*Januzi* / Article 8) then the question is whether it is unduly harsh to expect this young couple to live elsewhere in the area or in Kosovo as a whole. The question then is whether internal relocation is unduly harsh. We find that it is. Neither the wider Roma community in the enclaves, nor the Albanian majority will accept them because KX is Albanian and his wife AB is an obvious Roma who speaks only accented Albanian and now, of course, they have to explain their absence from Serbia and Montenegro since 1999. The problem is the political dimension to this relationship between a member of a community perceived to have collaborated with the Serbs during the recent conflict, and a member of the community now in the majority, but at the time, victims of Serb ethnic cleansing.

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75. The evidence is clear that as a couple, both will be perceived as Serb collaborators wherever they go together and that is a category which remains at real risk throughout Kosovo. The shelter of the Roma enclaves is closed to them; the Albanian community will not welcome traitors and collaborators. It follows that no internal relocation option exists for this couple at present; the risk is not of inconvenience, discrimination or abuse, but of the persecutory treatment still meted out to perceived Serb collaborators in post-war Kosovo. The background evidence establishes a general risk to collaborators throughout the territory, against which there is very little State protection, and certainly not to the standard set in *Horvath* [2000] Imm A R 205.

76. It follows that the appellant KX is entitled to succeed under the Refugee Convention and Article 3 ECHR.

Article 8 ECHR

77. In relation to Article 8 ECHR, in normal circumstances the appellants would not succeed. There is no disrespect to their relationship in requiring them to conduct it in Kosovo. They have made very little impact on the local community and have few links with the United Kingdom other than with each other.

78. However, their evidence, which we accept, is that they cannot conduct their relationship at all in Kosovo at present. They were not able to register their marriage or even to cohabit, and as soon as the relationship was known, they had to appear to part in order to survive the anger of both communities. We have found that there is still no place of safety where they could conduct their married life in Kosovo. On that basis, return to Kosovo now would amount to a flagrant denial of their Article 8 rights which renders it disproportionate to remove them on Article 8 grounds.

79. The Tribunal has already found that there was a material error of law in the Immigration Judge's determination. We substitute a decision allowing the appeal on all grounds.

Decision

The original Tribunal made a material error of law.
The following decision is accordingly substituted:

1. **The appeal is allowed on asylum grounds**
2. **The appeal is allowed on human rights grounds**

Signed Date: 10 August 2006

Senior Immigration Judge Gleeson

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SCHEDULE OF MATERIALS BEFORE THE TRIBUNAL

AUTHORITIES

1. ***Horvath v. Secretary of State For The Home Department*** [2000] UKHL 37; [2000] 3 All ER 577; [2000] 3 WLR 379
2. ***Secretary of State for the Home Department v Razgar*** [2004] UKHL 27
3. ***Januzi v Secretary of State for the Home Department and others*** [2006] UKHL 5
4. ***Katrinak v Secretary Of State For Home Department*** [2001] EWCA Civ 832
5. ***Secretary of State for the Home Department v Bahktear Rashid***[2005] *EWCA Civ 744*
6. ***Secretary of State for the Home Department v Amjad Mahmood*** [2000] EWCA Civ 315
7. ***Secretary of State for the Home Department v Akaeke*** [2005] EWCA Civ 947
8. ***Hysi v Secretary of State for the Home Department*** [2005] EWCA Civ 711
9. ***BS (IFA, Mixed Ethnicity) Kosovo CG*** [2002] UKIAT 04254
10. ***KB (mixed ethnicity, Roma/Albanian) Kosovo CG*** [2003] UKIAT 00013 CG
11. ***FM (IFA-Mixed Marriage-Albanian-Ashkaelian) Kosovo CG*** [2004] UKIAT 00081
12. ***AB (Ashkaelia) Kosovo CG*** [2004] UKIAT 00188
13. ***FD (Kosovo - Roma) Kosovo CG*** [2004] UKIAT 00214
14. ***GS (Article 8, public interest not a fixity) Serbia and Montenegro*** [2005] UKAIT 00121
15. ***MM (Delay, reasonable period, Akaeke, Strbac) Serbia and Montenegro*** [2005] UKAIT 00163
16. ***SK (Roma in Kosovo – update) Serbia and Montenegro*** [2005] UKIAT 00023
17. ***Appellant S 395/2002 v Minister for Immigration and Multicultural Affairs*** [2002] High Court of Australia (9 December 2003)

BACKGROUND EVIDENCE

18. **Alex Standish** Report (18 March 2006)
19. **UN Security Council** Report (October 2005)
20. **Home Office CIPU**
    (a) Country Report Serbia and Montenegro (April 2005)
    (b) Operational Guidance Note Kosovo (May 2006)
    (c) Operational Guidance Note Serbia (Including Kosovo) (June 2006)
21. **US State Department** Report for Serbia and Montenegro 2005
22. **Amnesty International:** Kosovo Protect the Right to Health and Life (July 2005)
23. **UNHCR Material**
    (a) Background note on ethnic Albanians from Kosovo in continued need of international protection (March 2000)
    (b) Kosovo minorities still need international protection says UNHCR (August 2004)

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(c) Position on the continued international protection needs of individuals from Kosovo (August 2004)
(d) Possibility of internal relocation within Kosovo for individuals of mixed ethnicity (January 2005)
(e) Position on the continued international protection needs of individuals from Kosovo (March 2005)
(f) Position on the continued international protection needs of individuals from Kosovo (June 2006)

24. **Kosovo Ombudsperson Institution** (Fifth Annual Report)
25. **European Roma Rights Commission** (ERRC)
    (a) Criminal complaint re: lead poisoning in Kosovo (August 2005)
    (b) Report (August 2004)
    (c) Report (June 2005)
    (d) ERRC/ENAR/ERIA statement Roma rights in Kosovo (September 2005)
    (e) ERRC written comments to UNHCR (February 2006)

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