REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 75188

AT AUCKLAND

Before:	C M Treadwell (Chairperson) S Joe (Member) A Schaaf (Member)
Counsel for Appellant:	K Gore
Appearing for NZIS:	No Appearance
Date of Hearing:	17 September, 9 December 2003 and 25 August 2004
Date of Decision:	8 December 2004

DECISION

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[1] This is an application for reinstatement of an appeal against a decision of a refugee status officer of the Refugee Status Branch of the New Zealand Immigration Service (NZIS) declining the grant of refugee status to the appellant, a national of Serbia, from the Kosovo region, of Albanian ethnicity.

[2] Because the application is to be allowed, the substantive appeal also falls to be determined.

INTRODUCTION

[3] The appellant is an unmarried 31 year-old man from the city of Mitrovica in the north of Kosovo, Serbia.

[4] The appellant arrived in New Zealand on 17 April 2002 and applied for refugee status on 24 April 2002. He was interviewed by a refugee status officer on 22 August 2003. His application was declined on 30 June 2003. It is from that decision that the appellant lodged an appeal on 2 July 2003.

[5] The appellant's refugee appeal hearing was set down before the Authority and was heard over two days, on 17 September and 9 December 2003.

WITHDRAWAL OF THE APPEAL

[6] On 17 February 2004, before the Authority had published its decision, it received from the appellant the following letter, indicating his wish to withdraw his claim for refugee status in New Zealand and to be repatriated to Kosovo.

> "My name is [appellant's name] and I am a refugee from Kosovo Yugoslavia. I was born on [date given]. As you must know the whole way of my journey from my arrival in New Zealand to the point that my application as a refuge is now, it may be easier for you to understand all I will state in this letter. On my written statement that was handed to you on 12 August 2002 I state that after the war in Kosovo, I returned to my home town of Mitrovica as I wanted to find out what happened to my father and our property. My father was lost and our house was destroyed. Since then I did not stop searching for him and for nearly 5 years now through agencies for missing people, red cross, and other authorities that are looking for missing people, I am delighted to inform you that eventually I found my father well and as he is telling me he settled in Istanbul, Turkey. He is financially supported from the Turkish government since he arrived there. The reason for writing this letter is, that as soon as I found my father I decided to withdraw by application for refugee status, terminate it from being processed and return to my country. My father has told me that as soon as I get there he will come and will take me to Turkey as well for he knows that I would not be safe in Kosovo. I with no doubt would have loved to stay in New Zealand, be a proud citizen of hers, enjoy life, and the beauty that surrounds it. But because of my father, I please ask you that I want to be served with a removal order. I do appreciate that you would take action as soon as possible. Thank you."

[7] On 18 February 2004, Counsel advised that, whilst he had not been aware of the appellant's desire to withdraw the appeal, he agreed that the Authority should proceed with its determination of the appeal. The Authority deferred any further action for a further 24 hours to allow counsel time in which to contact the appellant, should he wish to. Nothing further was heard from either counsel or the appellant, and the Authority duly issued a Minute dated 19 February 2004, recording the withdrawal of the appeal.

APPLICATION FOR LEAVE TO REINSTATE APPEAL

[8] It is well-settled that there is an unqualified right to withdraw an appeal at any time prior to delivery of the appeal decision. Leave does not need to be sought and the withdrawal is effective as soon as it is communicated. That

occurred on 17 February 2004.

[9] Whether a withdrawn appeal can be reinstated was the subject of consideration by the Authority in a Minute issued in *Refugee Appeal No 72462* (12 April 2001). After reviewing the authorities in various jurisdictions, the Authority endorsed the principle in *R v Medway* [1976] 1 All ER 527 (CA), adopted by the New Zealand Court of Appeal in *R v MacKay* [1980] 2 NZLR 490, 491 (CA). In *Medway*, at 543b-e, it was held that the applicant must establish:

> "... that the abandonment was not the result of a deliberate and informed decision, in other words that the mind of the applicant did not go with his act of abandonment. In the nature of things it is impossible for foresee when and how such a state of affairs may come about; therefore it would be quite wrong to make a list, under such headings as mistake, fraud, wrong advice, misapprehension and suchlike, which purports to be exhaustive of the types of case where this jurisdiction can be exercised. Such headings can only be regarded as guidelines, the presence of which may justify its exercise….
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> [T]he test of the jurisdiction to allow the withdrawal of a notice of abandonment is whether or not the abandonment can be treated as a nullity in the sense we have just employed...."

[10] Citing this passage with approval, the New Zealand Court of Appeal in *MacKay* held:

> "With respect we are satisfied that the foregoing statement correctly represents the law as it should be applied in this country. There is a helpful note concerning the matter in *Archbold* which is referred to in the *Medway* case, where it is said:
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> > '... an appellant cannot, in the strict sense, withdraw a notice of abandonment ... He can, however, place before the court sufficient facts to satisfy it that the abandonment was a nullity. Where he has been given bad legal advice the court will only treat his notice of abandonment as a nullity if it is satisfied that, in consequence of the advice, he was acting under a fundamental mistake when he purported to give the notice: see *Archbold's Criminal Pleading, Evidence and Practice* (39th ed, 1976) para 897, p 614.' "

[11] It follows that the withdrawal of an appeal may, in certain circumstances, be retracted with the leave of the Authority. Those circumstances are as set out in *Medway*. The essential question is whether the mind of the applicant went with the act of withdrawal.

[12] The question of jurisdiction to reinstate an appeal is one of mixed fact and law. Thus, in most cases, it is necessary first to hear all of the evidence, to enable the facts to be established before a final determination on the application is made. Then, if the application is allowed, and the appeal reinstated, the Authority is seized of the evidence and is able to proceed to an immediate determination of the appeal.

[13] For that reason, we turn now to the evidence of the appellant. Our reasons for allowing the application and our decision on the substantive appeal, will follow.

THE APPELLANT'S CASE

[14] The account which follows is that given by the appellant at the appeal hearing. It is assessed later.

Early years in Mitrovica

[15] The appellant is the only child of a former miner, from the Kosovan city of Mitrovica. Mitrovica is divided by the Ibar River into "north Mitrovica" (substantially Serbian) and "south Mitrovica" (substantially Albanian). Only three bridges link the two halves of the city. In about 1980, his father left the mine and built a two-storeyed building in an Albanian enclave in north Mitrovica. The ground floor became a café/bar, which the family ran, and the upstairs their living accommodation.

[16] The civil war in the Former Republic of Yugoslavia began in 1990. The appellant was still at school at the time. Finishing school in 1991, he applied to enter university but was turned down because he was Albanian. Instead, he began to help his parents in the café. This became more essential after 1993, when his mother passed away from a heart attack.

[17] The early years of the civil war were largely given over to the Serbian/ Croatian and Serbian/Bosnian conflicts. From 1995 to 1997, however, the Kosovo Liberation Army (KLA) became particularly active in Mitrovica, with resulting tensions between the Serbian and Albanian communities.

Beginning of the Kosovo conflict - harassment by the Serb forces

[18] In late 1997, the appellant and three friends were stopped in their car by a Serbian police road-block. Because the appellant and one friend, AB, had forgotten their identity cards, the police searched the vehicle. In the boot, they found an Albanian flag and arrested the appellant and AB.

[19] The two men were taken to a nearby police station, where they were put into cells and interrogated about their occupations, their families and whether they had links to the KLA. The appellant was held by the hair while other police officers beat him with their fists and boots. In all, the appellant was held for two days, before being released. AB was held for several days.

[20] In early 1998, two Albanian men came to the café one evening. They spoke with both the appellant and his father and asked them to support the KLA by providing funds. The appellant's father agreed to do this. Thereafter, he gave 300 - 400 *deutschmarks* whenever the men called at the café.

[21] Some months later, in mid 1998, the appellant and his father travelled south by bus, to visit the appellant's paternal uncle CD in the village of V, near the city of Prezen. Another paternal uncle, EF, was visiting from Albania and it was an opportunity to see both relatives. They stayed in V for a week, before returning to Mitrovica.

[22] The same night that they returned from V, the appellant and his father were detained by Serbian police, who came to the house late at night and arrested them on suspicion of membership of the KLA.

[23] In detention, both the appellant and his father were interrogated as to where they had been during the week they had been away. They denied any involvement with the KLA, but were nevertheless beaten severely before being put in a cell with some 20 Albanian detainees. They were left in the cell without food or water for three days.

[24] On being released, the appellant and his father were each made to sign an acknowledgement that they had been detained on suspicion of membership of the KLA and that they would report on the KLA if they received any information. They were warned not to carry German currency or to use the Albanian language.

[25] There were no hospitals or clinics in north Mitrovica to which Albanians could go and so the appellant and his father attended to their own injuries as best they could.

[26] In February 1999, the café was visited by a group of Serbian paramilitary soldiers, from a group known as "Arkan's Tigers". The soldiers humiliated the

patrons and staff by forcing everyone to stand and raise a toast of “Hail Serbia, hail Milosevic”, while the premises were searched. The atmosphere became tense when one of the soldiers threatened to avenge his brother, who had been killed by the KLA. When the appellant’s father tried to defuse the situation, he was knocked to the ground. The appellant attempted to intervene but was struck with a gun butt and knocked unconscious. The soldiers then left, taking one of the patrons with them. The appellant does not know his fate.

Eviction from north Mitrovica

[27] Following this incident, the appellant’s father decided that it had become so dangerous that they could not keep the café open. Within a few weeks, in March 1999, the Serbian authorities ordered all Albanians to leave Mitrovica. Officials in civilian clothes came to the café and told the appellant’s father that he had one hour in which to leave. They confiscated their important papers and told them to leave all possessions behind. They were ordered not to return.

[28] The appellant and his father travelled to the south of Mitrovica, where the appellant left his father with Albanian friends. The appellant himself then walked with three other young Albanian men to the nearby village of X, in an area which was under KLA control. There, they found shelter with other friends who were associated with the KLA. While staying there, the appellant was taken to a KLA meeting in the forest and he resolved to join the group. By this point, the military conflict in Kosovo had escalated to become a fully-fledged war.

[29] The appellant had no prior military experience and was assigned by the KLA to one of their field hospitals nearby, where he served for three months, treating the wounded as a medical orderly. The conflict between the KLA and the Serbian forces was such that there were many casualties.

[30] The appellant was not an active combatant for the KLA, serving only in the capacity of a medical orderly, holding basic military rank.

[31] In June 1999, a cease-fire was announced and the appellant was demobilised from the KLA. He joined his father in X village but, before they returned to Mitrovica, the appellant’s father asked him to travel south to the village of V to ascertain whether their relatives were safe and, if so, to remain with them

until a durable peace was established. The appellant's father told him that he intended to return to Mitrovica.

Travel to southern Kosovo

[32] The appellant duly went south but found in V that his uncle's family had gone and the house had been burned down. Much of V was abandoned and derelict, with the populace having crossed into Albania.

[33] The appellant crossed into Albania on foot and went to the town of K, where he had heard his uncle had gone. Unable to find him, the appellant went on to Tirana, where he found his uncle and his uncle's family in a United Nations refugee camp. The appellant was recognised by the United Nations as a refugee and remained there with his uncle's family for three months.

[34] In the refugee camp, the appellant met a family recently arrived from Mitrovica. They told him that the situation in Mitrovica had deteriorated, with former members of the KLA being hunted by Serbian paramilitary forces. The appellant became anxious for his father's safety and determined to return to Mitrovica to find him. Accordingly, he crossed back into Kosovo on foot and travelled by bus to Mitrovica.

Return to Mitrovica

[35] The appellant stayed in southern Mitrovica until nightfall. Serbian snipers targeted the three bridges and it was impossible to cross safely in daylight. In the dark, however, he crossed into north Mitrovica and made his way to the Albanian enclave where his home was. There, he found that the café building had been destroyed. There was no sign of the appellant's father.

[36] Having nowhere else to go, the appellant returned to south Mitrovica, where he stayed with former KLA members. There, he learned that they had integrated into the Defence Force of Kosovo (DMK), under the auspices of the United Nations and the NATO troops working thereunder. The DMK comprised approximately 75% Albanians and 25% Serbians.

[37] Believing his father to have been killed and with no other immediate plans,

the appellant joined the group and became a DMK official, keeping a rough law and order in south Mitrovica. Because he had been a member of the KLA, the appellant was trusted by the other former KLA members and had no difficulty joining.

[38] The appellant was provided with a uniform and was paid 250 deutschmarks a month. He was based at a converted government building with 40 other DMK members. His duties included patrolling in high risk areas, where he was frequently exposed to Serbian snipers.

[39] Eventually, the appellant became worn down by the risks. Further, the feelings of anger and revenge at the presumed death of his father had abated. He stayed with the DMK for some five months, leaving it in March 2000. He remained in south Mitrovica until October 2000, however, staying with the family friend with whom his father had stayed a year earlier.

Second trip to southern Kosovo

[40] In October 2000, the appellant left again for V village, hoping to find his uncle. There was no one there, however, and he travelled on to Albania. In Tirana, he returned to the refugee camp but learned that his uncle's family had been sent to New Zealand as refugees. The appellant found a family living nearby who gave him board and assisted him to contact his uncle in New Zealand.

[41] The appellant remained living with the family, raising the money necessary to travel to New Zealand. He found part-time work and, in April 2002, was able to arrange for an agent to supply him with a false Greek passport and other travel documents. He then travelled by speedboat to Italy, which he entered on the false passport. From there, he flew to New Zealand.

[42] The details of the appellant's refugee claim and notice of appeal have already been given (see [4]-[5] above). It suffices to record that, after the appeal hearing, the appellant learned from the Red Cross that its long-standing search for his father had been successful. The Red Cross informed the appellant in early 2004 that it had located his father living in a refugee camp in Turkey.

[43] In speaking to him by telephone, the appellant has learned that his father

did not in fact return to the family home in north Mitrovica. Considering it too dangerous, he remained with the family friend in south Mitrovica until a month before the appellant returned from Albania in October 1999. By then, the appellant's father had left instead for Macedonia, where he stayed at a refugee camp until he was able to be transferred to a camp in Turkey.

[44] As a result of this information, the appellant contacted his father and, in the euphoria of the moment, wrote to the Authority on 17 February, withdrawing his refugee claim with the intention of flying to Turkey to join his father. So emotional was he that he did not seek any legal advice before withdrawing the appeal.

[45] Since then, however, the appellant has learned that he has no ability to join his father in Turkey. His father does not have residence in Turkey and has informed the appellant that, as a refugee there, he is not eligible for it for five years. Even then, however, his father does not want to remain in Turkey permanently and would prefer to return to Kosovo once it becomes safe.

[46] Without his father having residence in Turkey, and with the appellant not having any travel documents, he has been advised by both the New Zealand Immigration Service and by the Canberra office of the United Nations High Commissioner for Refugees that there is little prospect of him being permitted to enter Turkey. He does not have a Turkish entry visa of any sort. The United Nations is unable to issue the appellant with any form of travel document and the New Zealand authorities are unable to do so because he is neither a citizen nor a holder of refugee status. It is highly unlikely that he could obtain a passport from the Serbian authorities because he has no identity documents or proof of place of birth. In short, the appellant came to realise that he would not, in fact, be able to join his father in Turkey.

[47] Realising that he had withdrawn his appeal under the misapprehension that there was another available solution to his need for state protection, the appellant sought legal advice and filed an application for reinstatement of his refugee appeal.

DECISION ON APPLICATION FOR REINSTATEMENT

[48] We remind ourselves that the *Medway* principle is whether the mind of the applicant went with the act of withdrawal. See [9]-[11] above.

[49] The English Court of Appeal in *Medway* was unwilling to limit the range of circumstances in which such a finding might be made. It did, however, suggest that both mistake and misapprehension might be encompassed. In our view, both are applicable to the circumstances in the present case.

[50] We are satisfied that the appellant withdrew his appeal in the belief or misapprehension that he was able to quickly and easily join his father in Turkey and reside there permanently and that he would not have done so had he been aware that, in fact, he has no right to travel to and reside in Turkey and is not lawfully able to do so.

[51] Imprudent, ill-considered action will not always be excusable. The integrity of the refugee determination process requires protection from abuse. Relief should not be presumed. Here, however, the appellant's belief or misapprehension was clearly the result of clouded judgement on his part, fuelled by the elation of finding his father to be alive. We accept that the circumstances are explicable and that it is appropriate to allow the application. The appeal is reinstated.

[52] We turn now to the substantive issues on appeal.

THE ISSUES

[53] The Inclusion Clause in Article 1A(2) of the Refugee Convention relevantly provides that a refugee is a person who:

> "... owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

[54] In terms of *Refugee Appeal No. 70074/96* (17 September 1996), the principal issues are:

(a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?

(b) If the answer is yes, is there a Convention reason for that persecution?

ASSESSMENT OF THE APPELLANT'S CASE

[55] Before considering the issues raised by the Convention, it is necessary to record that the appellant's credibility is accepted.

Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to Serbia?

[56] "Being persecuted" is defined in New Zealand (and the United Kingdom) as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection. See for example *Refugee Appeal No 71427* [2000] NZAR 545 at [47]-[51]. Central to the definition of the term 'refugee' is the concept of state protection with the result that the phrase 'being persecuted' must be interpreted within the wider framework of the failure of state protection. The phrase 'being persecuted' is the construct of two separate but essential elements, namely risk of serious harm and a failure of state protection. As to the serious harm element, refugee law is concerned with actions which deny human dignity in any key way and the sustained or systemic denial of core human rights is the appropriate standard. Core norms of international human rights law are to be relied upon to define forms of serious harm within the scope of 'being persecuted'. The human rights to which reference is to be made are those listed in *Refugee Appeal No 74665/03* (7 July 2004) at [64] to [79]. The relevant case law is collected in that decision at [51]-[53].

[57] The appellant fears being seriously harmed by Serbian paramilitary and military forces if he returns to Serbia. In particular, he anticipates that he is at risk of being detained and seriously harmed or killed because of his past membership of the KLA.

[58] We are satisfied that such mistreatment would, if suffered, constitute "being persecuted" within the meaning of the Refugee Convention. It would comprise numerous breaches of basic or core human rights. See in this regard *Refugee Appeal No 2039/93* (12 February 1996). The relevant rights are Article 3 (non discrimination), Article 6 (the right to life), Article 7 (the prohibition on torture or cruel, inhuman or degrading treatment), Article 9 (the right to liberty and security of the person) and Article 14 (the right to a fair judicial process) of the 1966 International Covenant on Civil and Political Rights (ICCPR). Further, such mistreatment would comprise both serious harm and a failure of state protection. See in this regard *Refugee Appeal No 71427* (16 August 2000) at [43]-[67].

Well-foundedness

[59] It is necessary also to consider whether such fear is well-founded. In other words, is there a real chance of it happening if the appellant returns? Such an assessment first requires consideration of the relevant country information.

[60] The general background to the Serbian/Kosovan conflict of 1997-1997 hardly need be given. It is sufficient to record that, following the Dayton Peace Accord and the cessation of hostilities in Bosnia in 1995, Slobodan Milosevic turned to the long-standing Serbian repression of Albanians in Kosovo. With the rise of the KLA in 1995-1996, Serbian aggression in Kosovo increased, with the result that, by 1997, ethnic-cleansing by the Serb military had forced some 800,000 to 900,000 Kosovan Albanians to flee the country to neighbouring states. Albanian villages and towns in Kosovo were destroyed and the region's infrastructure paralysed. The intervention of the United Nations and NATO forces (KFOR, later joined by UNMIK) brought about an October 1998 cease-fire and, effectively, the Serbian surrender. Since 1999, Kosovo has been governed as a quasi-autonomous district within Serbia, though without full sovereignty. For general background, see for example Human Rights Watch's *World Report 2000: Federal Republic of Yugoslavia* (December 1999).

[61] The picture drawn by commentators, including the United Kingdom Home Office, in its *Country Report: Serbia and Montenegro* (April 2004) and the United States Department of State *Country Reports on Human Rights Practices: Serbia and Montenegro* (February 2004), is that KFOR and UNMIK are maintaining a

fragile peace throughout most of the Albanian-dominated south of Kosovo, but that the north, including Mitrovica, is volatile and often beyond their control.

[62] The appellant's account of events in Mitrovica is consistent with the country information we have seen. Ethnic tensions in Mitrovica remain extremely high. It is described by the United Kingdom Home Office, in its *Country Report: Serbia and Montenegro* (April 2004), in the following terms:

> **"K.5.43.** The US State Department report for 2002 notes Mitrovica as the area of greatest ethnic tension and hostility in Kosovo is the city of Mitrovica (sic). Divided by the river Ibar, the city had, until March 2004, about 9,000 Serbs controlling the north bank and more than 90,000 ethnic Albanians living on the south side. The presence of 2,000 Albanians in the north, up and until March 2004, living under great pressure to leave from extremist Serbs, added to the tension. The US State Department report for 2003 records on-going property disputes in 2003:
>
> > 'In Mitrovica, Kosovo Serbs in the northern part of the city continued to illegally occupy Kosovo Albanian properties, while Kosovo Albanians in the southern part of Mitrovica also denied Kosovo Serbs access to their property.'"

[63] The 3 June 2002 "Balkans Report No 131" by International Crisis Group, entitled *UNMIK's Kosovo Albatross : Tackling Division in Mitrovica* states:

> "Three years after its establishment, the United Nations Mission in Kosovo (UNMIK) has not established a safe and secure environment, the rule of law or a meaningful civil administration in north Mitrovica. The city's continuing de facto partition, with parallel structures run by Belgrade operating north of the river Ibar, is a black mark on the international community's record in Kosovo. It calls into question Serbia and the FRY's commitment to regional stability and undermines UNMIK's credibility with ethnic Albanians in Kosovo."

[64] As to the appellant's account of Serbian snipers targeting the three bridges which link the city, the Department of State notes:

> "Early in the year, UNMIK disbanded the Kosovo Serb paramilitary group known as the "Bridgewatchers"; however, Albanians in Mitrovica claimed its members continued to operate on and around the boundary between north and south Mitrovica as part of other organizations. Former members of the Bridgewatchers were allegedly involved in inter-ethnic violence in Mitrovica. There were reports that a group of Serb extremists in north Mitrovica called "Pit Bulls" were linked with the former Bridgewatchers, and may have coordinated the December attack on Prime Minister Rexhepi and the World Bank delegation. Other reports alleged that the group was led by Marjan Ilincic, a former leader of the Bridgewatchers, who was wanted by police for an attack against Polish police and other persons."

[65] In March 2004, serious violence broke out in Kosovo, particularly in Mitrovica, when an Albanian schoolchildren's protest at the drowning of three children the previous day resulted in Albanian mobs attacking UNMIK and Serbian property. Serb crowds reacted by attacking Albanian shops and businesses and razing a mosque. 50,000 rioters took part. There were numerous deaths and

injuries. See Human Rights Watch *Failure to Protect: Anti-Minority Violence in Kosovo, March 2004* (July 2004) at pp28-30. See also the UNHCR report *Update on the Kosovo Roma, Ashkaelia, Egyptian, Serb, Bosniak, Gorani and Albanian Communities in a Minority Situation* (June 2004), at pp29-30, which documents numerous attacks by Serbs against Albanian Kosovars in and around Mitrovica and which strongly urges the non-return of ethnic Albanians from areas where they are in the minority. Albanians from northern Mitrovica are expressly mentioned as a group for whom such concern is warranted.

[66] We are satisfied that it remains unsafe for the appellant to return to the Mitrovica region. In reaching that conclusion, we pay particular regard not only to the extreme instability in the region, evident in the country information above, but also to the fact that the appellant is a former member of the KLA, which is recorded in his employment records at the DMK - an organisation which includes both Albanian and Serbian personnel. We are satisfied that if he returns to northern Kosovo there is a real chance of him being harmed by Serb extremists for his prior involvement in the KLA.

[67] We have turned our minds to the question whether the appellant might be able to live safely in another part of Kosovo. After careful reflection, we reach the view that he could not. Kosovo is extremely small - barely 100 kilometres by 80 kilometres. To assume that the real chance of serious harm, which we acknowledge exists in Mitrovica, would not extend such a modest distance would be unrealistic. While the Serb and Albanian populations tend to live in enclaves, even in the south they are not mutually exclusive zones of habitation and we cannot say that the appellant would be immune from being recognised or discovered. Some 80,000 Serbs continue to live in Kosovo (see *Agence France-Presse* of 20 April 2003, “Inter-Ethnic Hostility Remains in Kosovo Almost Four Years After the War”) and it would be simplistic to see the province as simply divided into a majority-Serbian north and a majority-Albanian south. In fact, there are Serb-dominated provinces in the south as well as the north, including Strpce and Novo Brdo, where the authorities are also predominantly Serbian (see the *Organisation for Security and Co-operation in Europe*: *Mission in Kosovo* October 2003 report “Municipal Profile: Strpce/Shterpce”). Bearing in mind the probability that the appellant’s former membership of the KLA will be known to Serbians through his records with the DMK, we are satisfied that there is not an internal flight alternative available for the appellant within Kosovo.

[68] We also accept that, as an Albanian, he could not live safely in any part of Serbia outside Kosovo itself. We have particular regard to the UNHCR report *The Possibility of Applying the Internal Flight or Relocation Alternative Within Serbia and Montenegro to Certain Persons Originating From Kosovo and Belonging to Ethnic Minorities There* (August 2004), which records that Kosovar forced-returnees from other countries are not entitled to register as IDPs with the Serbian authorities in Serbia (outside Kosovo) and are thus denied access to basic rights normally available, including medical care, employment benefits, pensions and education:

> "In the absence of permanent residency, IDP registration with the Serbian Commissioner for Refugees is a pre-requisite to access all socio-economic rights. **It is important to note that, persons originating from Kosovo who are forcibly returned from third countries to Serbia and Montenegro are not permitted to be registered as IDPs either in Serbia or in Montenegro**. IDPs who do not hold an IDP identification card are consequently deprived of access to basic rights including but not limited to health, employment benefits, pensions, social insurance, and accommodation. This triggers a subsequent process of legal and socio-economic marginalization."

[69] The UNHCR report strongly urges foreign states not to return Albanian Kosovars to those parts of Serbia outside Kosovo at all. While its report must be read in the context that UNHCR has differing obligations to those which fall for consideration in this jurisdiction (for example, UNHCR recognises "reasonableness" as a consideration in the context of whether there is an internal protection alternative), nevertheless, the first-hand experience of the United Nations in Kosovo and the surrounding regions is extensive. Where it expresses concern even about the viability of survival, let alone the quality of life, it is right to accord considerable weight to its injunction.

[70] The point is relevant to the second and third limbs of the test which is applied in this jurisdiction. In *Refugee Appeal No 71684* (29 October 1999), citing with approval the 1999 *Michigan Guidelines on the Internal Protection Alternative*, the Authority held that the enquiry into whether an internal protection alternative exists, calls for a three-part analysis:

> "(a) Does the proposed site of internal protection afford the asylum-seeker a meaningful 'antidote' to the identified risk of persecution?
>
> (b) Is the proposed site of internal protection free from other risks which either amount to, or are tantamount to, a risk of persecution?
>
> (c) Do local conditions in the proposed site of internal protection at least meet the Refugee Convention's minimalist conceptualization of 'protection'?"

[71] As to the second limb, we are satisfied that the risk of harm to the appellant in Serbia (outside Kosovo) as an IDP, without the ability to register as such, would rise to such a high level that he would feel compelled to abandon the region, even if the only other location for him to live would be to return to Kosovo. The appearance of protection would ultimately be illusory.

[72] As to the third limb (for the sake of completeness), it is clear that the appellant would not have the benefit of access to the same basic norms of civil, political and socio-economic rights which are given to the general populace (including other IDPs). He would not be accorded even the minimal standard of effective protection set by the Refugee Convention itself. We are satisfied that this limb of the test is not met either.

[73] In summary, we conclude:

(a) There is a real chance of the appellant being persecuted if he returns to Kosovo; and

(b) There is no internal protection alternative available to him.

Is there a Convention reason?

[74] We are satisfied that the risk of harm to the appellant is for reason of his race, namely Albanian Kosovar. There may well be other relevant Convention reasons, such as political opinion, but the presence of any one Convention reason suffices and it is not necessary to consider this issue further.

CONCLUSION

[75] For the foregoing reasons, the appellant is a refugee within the meaning of Article 1A(2) of the Convention. Refugee status is granted. The appeal is allowed.

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C M Treadwell
Member