Appeal No: CC19224-2000

BN (War Crimes – Ethnic Serb – Fair Trial) Croatia CG [2002] UKIAT 05750

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 5th December 2002
Date Determination notified:
....11 December 2002.....

Before:

Mr C M G Ockelton (Deputy President)
Mrs A J F Cross de Chavannes
Mrs M Padfield JP

Between:

BN

APPELLANT

and

Secretary of State for the Home Department

RESPONDENT

DETERMINATION AND REASONS

1. The Appellant is a citizen of Croatia and is of Serbian ethnicity. He appeals following the quashing of an earlier determination of the Tribunal against the determination of an Adjudicator, Mr T J Cary, dismissing his appeal against the decision of the Respondent on 20th August 2000 refusing him leave to enter and refusing asylum. His case was one of those originally considered by the Tribunal with S & others (01/TH/00632) and it is for that reason that the Court of Appeal [2002] EWCA Civ 539; [2002] INLR 416, in line with its decision in S, ordered that his appeal be reconsidered by the Tribunal. Before us today he has been represented by Mr Mullins, instructed by Sutovic & Hartigan, and the Respondent is represented by Mr Saunders.

2. The Tribunal has recently considered a number of matters relating to the return of ethnic Serbs to Croatia in its determination in SK & others sub nom S & K [2002] UKIAT 05613, issued on Tuesday of this week. At the beginning of the proceedings before us today, Mr Mullins told us that he was instructed to seek an adjournment of these proceedings on the basis that

there might be evidence arising subsequent to the hearing in SK & others which might be relevant to these proceedings. No such evidence was specifically identified other than that which has been put in the bundles for the hearing today. It was for that reason that Mr Saunders objected to the matter being adjourned. Indeed, as it appears to us, no proper reason has been given making it just for there to be an adjournment in this case. We therefore refused the adjournment, but have heard submissions based not only on the Tribunal's determination in SK & others, but also on the evidence which is in the bundles prepared for this hearing and which Mr Mullins tells us is new.

3. We do not need to consider the facts of the Appellant's case in any great detail because Mr Mullins, with his customary conciseness, has invited us to direct our attention to three issues only and, in respect of one of those issues, merely in order to make no finding on it. The issue on which we are asked to make no finding relates to the Appellant's son's state of health. In view of the date of the decision in this case, only matters relating to asylum fall to be considered today. For that reason, it is appropriate that we take no account of issues relating only to human rights and we readily accede to Mr Mullins' suggestion that we should ignore matters arising out of the Appellant's son's state of health.

4. The second issue raised by Mr Mullins is that of the possibility that the Appellant would be prosecuted for, and perhaps convicted of, a war crime if he were to be returned. The determination of the Tribunal in SK & others has set out in paragraph 38 principles which we shall endeavour to follow. Unless there is any particular reason to suppose that an individual would be at risk of prosecution for war crimes, the mere suggestion that others may be so prosecuted would not be enough to make a person a refugee.

5. Mr Mullins' primary response to that is that is that there is evidence not available to the Tribunal in SK & others demonstrating that there has been a recent increase of prosecutions of individuals, particularly of Serbian ethnicity, for alleged crimes which took place in the war that has now been over for some seven years. The evidence to which he points derives from two sources. The first is a non-governmental organisation called Veritas. We have been shown material derived from Veritas' website and from Mr Mullins' instructing solicitors' correspondent at Veritas. Although Veritas was established in late 1993, and although Mr Mullins' solicitors' correspondent addresses the solicitor in relatively familiar terms, we are assured by Mr Mullins that the material now before us simply could not be obtained in time for the hearing of SK & others before the Tribunal, less than two months ago.

6. The aims and objectives of Veritas are set out in its website and we will record them in full. They are as follows:

> "Collecting documents pertinent to the pre-war, war and post-war property and sufferings of Serbs on the territory of the then Republic of Serbian Krajina and of all citizens of the then Republic of Croatia;
>
> To exhibit, publish and publicise findings of these document searches to the public;
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> To prepare and disseminate evidence to national and international institutions that portrays a different 'truth' regarding events to the territory of the former Socialist Republic of Croatia, and to initiate court proceedings against perpetrators of crimes committed against humanity and the international law;
>
> To unearth information pertinent to destinies of all Krajina residents who failed to flee Krajina in May and August 1995 and who are either dead or alive;
>
> To co-operate with the Commissions for the exchange of prisoners of war and the hand-over of bodies of those killed on either side of the conflict, and to work with international humanitarian organisations in order to release all prisoners of war and hand over the bodies of those killed to their families as soon as possible;
>
> To provide legal aid to former Krajina residents, including compensation for physical and emotional suffering and the damaged and destroyed property."

The website also contains a list of publications of Veritas up to February 2002 and a note of projected publications. Amongst the projected publications are what is described as "*A book of Croat crimes against the Serbs in 1990 to 1995 war*" in five volumes. There is also to be a video cassette on the same topic. The website notes that "*So far, Veritas has prepared some twenty files regarding crimes against the Serbs*". They are then specified. And the note continues, "*Most of these files have been forwarded to the Hague Tribunal*".

7. We do not wish to mis-state the aims of Veritas, but the extracts that we have given from the website appear to us to give a fair impression of them. It is evidently a Serbian organisation, whose primary aim is to make the point that the story told by the Croats is not the only "truth". It is in that context that we evaluate the material derived from Veritas.

8. It is said in a recent exchange of correspondence between the President of Veritas and Mr Mullins' instructing solicitor that there are proceedings issued through Interpol against 4,530 people whom Veritas regards as mainly ethnic Serbs. Those proceedings are for alleged war crimes. Mr Mullins has told us that these proceedings only came to notice of the solicitors when a person in the United Kingdom was the subject of an international arrest warrant served through Interpol. We have been provided with a list of some of those against whom Interpol has been asked to assist proceedings. It is said that the recent history of Croatia indicates that there is an increase in newly commenced proceedings against alleged war criminals and, in particular, against Serbs. We have to say that so far as the evidence before us is concerned, we are not easily able to see that the new material supports a suggestion that there has been a change since the hearing of SK & others.

9. Mr Mullins also referred to the OSCE Mission, which reported again at the end of October (the report itself is dated 18th November 2002, that is to say after the hearing in SK & others). The OSCE notes as follows:

> "From May until the end of October 2002, there were 18 new arrests for war crimes (15 Serbs, 3 Croats), involving 10 Serb returnees and 8 long-term residents (5 Serbs and 3 Croats). [Of 18 persons arrested since May, 7 have subsequently been released as a result of charges being dropped or courts allowed persons to defend themselves from freedom.] Twenty Serbs and one Bosniak have been convicted since early May, while 5 Croats were acquitted. While statistics about the outcome of prosecutions are not necessarily probative, disparities can indicate a different weighing of the evidence and guilt of defendants, or may simply result from the higher number of proceedings initiated against Serbs. [The Mission is currently monitoring 59 cases involving Serb defendants, 11 cases involving Croat defendants and 1 case involving a Bosniak defendant. Of the 59 cases (including *in absentia* cases) against Serbs (involving 330 persons), 67 percent involve one defendant whereas 33 percent involve groups of defendants. Half of the cases against Serbs are in the Danube Region. Of the 11 cases (4 individual and 7 group cases) against Croats (involving 34 persons), the majority (6 of 11) are in the Knin area in Southern Croatia.]"

In that quotation, the parts which we have inserted in square brackets derive from the footnotes to the report.

10. Veritas alleges that at least eight Serbs have been arrested since August of this year. That is in an e-mail of 8th November. It does not appear to us that either the figures in the OSCE Report, or those in Veritas' material, indicate a major increase, since the hearing of SK & others or at all, in arrests of Serbs, or indeed of anybody, for war crimes. Veritas also suggest that the process is different for Serbian defendants and for Croatian defendants. So far as Serbian defendants are concerned, it is said that they are liable to be dealt with by means of a joint indictment and that they may be prosecuted and tried, even if they were only in the area where a crime was committed. On the other hand, where Croatians are tried, it is on the basis strictly of individual responsibility. Although we do not doubt the sincerity of Veritas in giving that opinion, it is not supported by the individual statistics mentioned by the OSCE. Insofar, therefore, as Mr Mullins' submissions rely on new evidence relating to a tendency to prosecute for war crimes not apparent at the time when the Tribunal heard SK & others, we reject them.

11. In any event, the issue is not general risk to others, but the risk to the Appellant. So far as that is concerned, we accept Mr Saunders' submission that there is no material at all to suggest that this Appellant is at risk of prosecution for war crimes. If he were to be prosecuted, he would be able to deal with it in the way we are informed happened in one case which is given as a vignette in Veritas' material. Here, we are told about the arrest of a group of villagers, five or six of them, and proceedings in Krajina. Veritas' President records as follows:

> "However, I do know that all of the arrested were subsequently released and that the proceedings were never completed ie no person was ever convicted of committing that crime. Following his repatriation, M was kept in a Croatian prison and after fresh proceedings were organised, he was released from prison. I assume that he must have provided evidence to the court that he was nowhere in the vicinity of the crime scene at the time it took place, and that was the reason he was released from detention."

We see no basis at all in the evidence before us to suggest that if the Appellant were to be accused of a war crime, he could not properly defend himself on precisely the same basis. Mr Mullins acknowledged to us that there is nothing to suggest that the Appellant was in the vicinity of the commission of a war crime at any time. For those reasons, we reject the submissions based on the possibility of prosecution for war crimes.

12. We turn then to Mr Mullins' other primary submission, which was related to the Appellant's access to housing if he were to be returned to his country. Mr Mullins relied on a new supplementary witness statement by the Appellant, which contains the following passage:

> "9. I visited my family home for the second time in January 1999 to see if there was any possibility of being able to return there. The situation was much the same, save that three elderly women were now living in the village, in the ruins of their former homes.
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> 10. My mother has since returned to the village, she went there in May 1999 and she is living in the kitchen part of our former home, which has been made habitable. My mother could not bear to live as a refugee any longer and wanted to die in her own home and on her land.
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> 11. There are no young people returning to Croatia. To this day, there are only a few elderly women living in my home village. My mother informs me that they do have electricity for the past year. There is still no school, doctor or bus service. It would be physically impossible for my family and I to live there."

13. Mr Mullins submits that those facts suggest that the Appellant, if returned, would have no access to living accommodation. We have to say that, on the facts, we regard that submission as not entirely well supported. This is not a case where it is alleged that the Appellant and his family have lost their living accommodation through confiscation or occupation. It is clear that the Appellant's family, represented by his mother, is still in occupation of their house, albeit ruined.

14. Mr Mullins refers in particular to the OSCE Report, to which we have already made reference. On page 12 of the Report, under the heading "*Return, Reintegration and Restitution of Property: The Return Process from, to and within Croatia*", we find the following passage:

> "According to the most recent official data, 96,534 *minority* returns have been registered to Croatia since the end of the armed conflict [that is to say, 1995]; 68,154 returned from the Federal Republic of Yugoslavia, 5,716 from Bosnia and

> Herzegovina, while 22,668 were regarded as internally displaced persons from the Danube Region. However, for personal and objective reasons, many individuals return only to settle their affairs and sell their properties prior to returning to their countries of asylum. Others wish to remain, but cannot because their properties remain damaged, destroyed or occupied, or they do not receive redress for terminated occupancy/tenancy rights."

15. Mr Mullins argues that a person who wishes to remain but cannot is a person who may be a refugee. He derives that conclusion as follows. Lack of access to accommodation is an infringement upon an individual's rights. If the lack of access to accommodation derives from discrimination, it might be persecutory. A person who is returned to his own country but cannot remain there is a person therefore who may be fleeing persecution if the reason that he cannot remain is because of discriminatory lack of access to accommodation.

16. Whilst not wishing to comment in full on those submissions which clearly raise general issues which do not arise in this appeal, it appears to us that they do not have any substance in the context of the present appeal. It is quite clear firstly, that despite the difficulties to which reference is made in the paragraph of the OSCE Report which we have cited, OSCE nevertheless continues to support returns to Croatia. The conclusions, at pages 21 and 22 of the report, refer to the difficulties of obtaining accommodation, but do not suggest that returns are unlawful where accommodation is not available. We accept that there are those who have been returned to their own country, but seek to leave because of lack of access to accommodation. If it be right to say that the lack of accommodation was predictably persecutory, then the return must have been unlawful, which OSCE does not suggest that it was. Mr Mullins seeks to translate an unwillingness to remain following a lawful removal, into unlawful removal. That, in our view, cannot be done. Removal to Croatia of a person who has no access to accommodation is not prohibited by the Refugee Convention. That is the result of applying SK & others. It is also the result which we would have reached without applying SK & others. Nothing in the material which Mr Mullins has put before us relating to those who wish to remain but it is said "*cannot do so*" causes us to change our view.

17. For the foregoing reasons, we reject Mr Mullins' submissions as they stand, and we reject also his submission that matters have materially changed since the Tribunal heard SK & others on 16th and 17th October of this year. The Appellant's appeal is dismissed.

C M G OCKELTON
DEPUTY PRESIDENT