Appeal No: HX 65298/2000
HX 16389/2001
CC 12867/2001
HX 43916/2001
HX 49818/2001

[2002]UKIAT 05613
STARRED

IMMIGRATION APPEAL TRIBUNAL

Date of Hearing: 16 & 17 October 2002
Date Determination notified: 3 December 2002

Before:

The President, The Hon. Mr Justice Collins
Mrs. J. Gleeson
Mr. S. Batiste

Secretary of State for the Home Department
Appellant

And

S & K
Respondent

For the Appellant: Mr. Sean Wilken
Mr. Andrew Robb
For the Respondent : Mr. Nicholas Blake Q.C.
Mr. Mark Mullins

DETERMINATION AND REASONS

1. In *S and Others* (01 TH 00632) the Tribunal had, following consideration of 8 appeals which were heard together, produced a determination which was intended to be :-

> "an authoritative decision as to what the current situation is to enable consistent results to be achieved because the tribunal has been able to consider all relevant evidence".

That determination was dated 1 May 2001. The 'current situation' in question was that in Croatia as it affected ethnic Serbs who claimed that to return them to Croatia would be contrary to the United Kingdom's obligations under the Refugee Convention. The tribunal had had before it all relevant material and had in addition had the advantage of listening to oral evidence from two acknowledged experts, Dr. Gow and Judge Karphammer. It concluded that, despite the genuiness of the expressed fears and the fact that there would be considerable hardship on return, the situation did not support the contention that there was a real risk of persecution. Accordingly, the tribunal decided that unless the situation worsened or there were special circumstances affecting an individual claimant, ethnic Serbs would not be able to establish that they were entitled to asylum.

2. Unfortunately, the tribunal had not specifically referred to two reports which had been submitted after the hearing as part of submissions which the tribunal had permitted to be made in writing. This led to leave to appeal being given and to the appeal being allowed. The Court of Appeal's decision was given on 24 April 2002. It discussed what it labelled to be the 'exotic' concept of a factual precedent at some length but concluded that in the context of the I.A.T.'s responsibilities it was in principle benign and practical. In reality, the tribunal did not consider that it was breaking any new ground. In all asylum claims it has to consider the situation in the relevant country of nationality as at the date of the hearing. That involves an assessment of all available evidence about that situation. In an adversarial process, it is inevitable that in some cases the tribunal (or an adjudicator who has to deal with the appeal before him in a similar way) will not have seen all relevant material and so may not be able to form a properly balanced view. This leads to inconsistent decisions in relation to the same country and that is clearly not only undesirable but in some instances positively unfair. Furthermore, it leads to unnecessary appeals and expense.

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3. The Court has in Paragraphs 29 to 32 of its judgment explained what should be the approach of the tribunal in undertaking such an exercise to its determination and in particular to the giving of reasons. It explains how the tribunal erred in that case. We should set out those paragraphs in full.

> "29. But if the conception of a factual precedent has utility in the context of the I.A.T.'s duty, there must be safeguards. A principal safeguard will lie in the application of the duty to give reasons with particular rigour. We do not mean to say that the I.A.T. will have

to deal literally with every point canvassed in evidence or argument; that would be artificial and disproportionate. But when it determines to produce an authoritative ruling upon the state of affairs in any given territory it must in our view take special care to see that its decision is effectively comprehensive. It should address all the issues in the case capable of having a real as opposed to fanciful bearing on the result, and explain what it makes of the substantial evidence going on the result, and explain what it makes of the substantial evidence going to each such issue. In this field opinion evidence will often or usually be very important, since assessment of the risk of persecutory treatment in the milieu of a perhaps unstable political situation may be a complex and difficult task in which the fact-finding tribunal is bound to place heavy reliance on the views of experts and specialists. We recognise of course that the I.A.T. will often be faced with testimony which is trivial or repetitive. Plainly it is not only unnecessary but positively undesirable that it should plough through material of that kind on the face of its determination.

30. It may be thought that this approach is not far distant from the way in which the I.A.T. generally discharges its duty to give reasons, and not only in cases where it resolves to produce an authoritative determination as to the position in a particular country. Indeed we do not mean to suggest that in this latter class of case the I.A.T.'s duty is of an altogether different quality. The experienced members of the I.A.T., not least if we may say so its President and Deputy President, will we are sure have no difficulty in gauging the quality of the reasons given so as to ensure that these authoritative determinations will be, and will be seen to be, effectively comprehensive.

31. In the present case the SR reports constituted substantial recent opinion evidence from an important source. While, as Mr. Blake acknowledged, they may not have uncovered new or otherwise unknown primary facts, they presented a relative gloomy picture on a series of important issues – so-called secret lists, arrests, detentions, prosecutions, the conduct of the police and judiciary, and to some extent discrimination in economic treatment and the distribution of property rights – which is in our judgment significantly at variance with the much more upbeat impression given by the OSCE. Having regard to all the points made by Mr. Wilken the difference is not perhaps as stark as Mr. Blake would have us accept, particularly in relation to such matters as the numbers still facing outstanding

> prosecutions. The SR reports, however, convey the suggestion that whatever the good intentions at the level of the State political leadership, there remain problems, even growing problems, at the local level: see for example paragraphs 41, 46 and 53 of the first report. In the circumstances we entertain no doubt but that, if the I.A.T.'s duty to give reasons in a determination of this kind is of the nature and quality we have sought to describe, its failure to explain what it made of the SR reports means that the duty has not been fulfilled. The position is the more stark given the I.A.T.'s own observations at paragraph 25 of the S determination, "[s]ince the situation is somewhat fluid and improvements are undoubtedly occurring, it is necessary to look particularly at the most recent reports".
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> 32. Accordingly we allow these appeals, and remit all these cases to the I.A.T. to be re-determined. There will be a question what form the re-determination should take. That will be a matter for the I.A.T. It may be that a full re-hearing will not be necessary. We have heard no argument as to the scope of the I.A.T.' s procedural powers, and we make no ruling or finding on the question".

4. We confess to some concern that what is said in Paragraph 29 should be used to justify reasons challenges when every piece of evidence which could bear on the result is not specifically mentioned. Apart from the failure to refer to the two reports, we do not understand the balance of the determination to have been criticised. What we did then and shall do in this case is to summarise the relevant material, to refer to the important reports which give the various different slants and to reach our conclusions. We shall not specify each document which has been put before us. That we do not regard as necessary; the parties know what we have had, have put in detailed written submissions and in oral argument referred to those reports and the passages in them upon which they wish to rely and will be able to decide whether our summary is a proper distillation of the various matters which have been relied on. We are sure that the court did not require us to do more than that. However, we do recognise the need for a comprehensive decision and one which shows we have had regard to all relevant evidence.

5. We note but respectfully are unable to accept the view of the court of the importance of opinion evidence. The tribunal is accustomed to being served with reports of experts. We have to say that many have their own points of view which their reports seek to justify. The whole point of the country reports is to bring together all relevant material. From them, the tribunal will reach its own conclusions about the situation in the country and then will see whether the facts found in relation to the individual before it

establish to the required standard a real risk of persecution or of treatment which breaches his or her human rights. Further, the tribunal builds up its own expertise in relation to the limited number of countries from which asylum seekers come. Naturally, an expert's report can assist, but we do not accept that heavy reliance is or should be placed upon such reports. All will depend on the nature of the report and the particular expert. Furthermore, it is rare for such experts to be called to give evidence or for their views to be tested. We were fortunate in *S* to have had called before us two experts who were truly knowledgeable and who had no particular axes to grind. We have reports from experts in the present case which we shall of course take into account and we will decide what weight should be accorded to their views.

6. We are not sure how we would have approached our task if we had reconsidered the cases of which *S* was the lead. We had concluded that there was no real risk of persecution, but had not specifically referred to the reports which, it was argued, might have affected our decision. However, in *Lazarevic* a differently constituted tribunal under the chairmanship of the Deputy President did consider our decision and the two reports. It decided and gave valid reasons for its decision that the conclusion reached in *S* was correct. We have no reason to dissent from that decision. Indeed, we approve it. It is difficult to imagine that we would have reached any other conclusion. But *S* and the cases decided with it were all concerned only with asylum since the decisions appealed against were all made before 2 October 2000. Thus human rights would not be considered: see *Pardeepan*. This meant that all the cases would in all probability be the subject of subsequent appeals if (as seemed likely) claims based on Article 3 or any other of the Articles of the European Convention on Human Rights were rejected. Accordingly, it was decided that it would be more sensible to consider the question whether ethnic Serbs could properly be returned on both asylum and human rights grounds and so to choose a number of cases in which the decisions appealed against were made after 2 October 2000. This we have done. We therefore have looked at the evidence to decide whether now there is a real risk of a breach of either Convention if returns are made. Inevitably, we shall rely on our conclusions in *S* insofar as the Court of Appeal has not criticised them. But we must see whether the evidence before us shows that now, some 18 months later, there is an impediment to return.

7. We have heard 5 cases together so that all factual situations which are likely to recur and to be relied on in other appeals can be considered. 3 (including this one) are appeals by the Secretary of State and 2 by the individual. We shall for convenience refer to all individuals as claimants. We shall set out in this determination our general conclusions and our analysis of the material relating to the situation in Croatia and shall incorporate those in the individual determinations which we must make so that appeal rights are properly preserved and proper consideration is given to

any matter affecting an individual claimant which may not have been dealt with in the general conclusions.

8. We should identify those other cases and the representatives in the various appeals. In this appeal as in all the Secretary of State is represented by Mr. Sean Wilken and Mr. Andrew Robb of counsel instructed by the Treasury Solicitor. Mr. Nicholas Blake Q.C. and Mr. Mark Mullins of counsel instructed by Messrs Sutovic and Hartigan have represented the claimant SK. The other appeals are as follows:-

> 1. NT (HX/16389/2001). This is an appeal by the claimant represented by Mr. John Livingston of counsel instructed by J Andrews, solicitor.
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> 2. MM(CC/12867/2001). This is an appeal by the Secretary of State. In it and in all the other appeals the representation is as in SK.
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> 3. NK (HX/43916/2001). This is an appeal by the Secretary of State .
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> 4.ZM (HX/49818/2001). This is an appeal by the claimant.

9. In one case only, that of NT, an issue of credibility might have arisen. He had stated that he had received threatening telephone calls and had identified the caller as the local police commander. He did not mention that until after his asylum interview and the adjudicator rejected his explanation that he had mentioned it but the interpreter had failed to do his job properly. However, the adjudicator accepted that he had received threatening calls and it was acknowledged that this dispute would not affect the overall claim. Mr. Wilken did not seek to rely on the possible credibility issue and he was and we are content to approach all these cases on the basis that no relevant issue of credibility arises.

10. We dealt with the background and the relevant history in *S* and see no reason to add to the length of this determination by repeating what we there said. We also explained how we should approach our task of deciding whether persecution within the meaning of the Refugee Convention had been established with particular reference to *Horvath* [2000] 3 W.L.R. 379. We have also considered whether the more recent decision of the Court of Appeal in *Svazas v SSHD [2002] EWCA Civ 74* makes any difference. While the State does not approve the discrimination and has taken measures to try to prevent it, it is officials at a lower level who are to an extent frustrating the State's intentions. We are not here concerned with active ill-treatment by such as the police: indeed, it is clear that the police do represent the ethnic mix in that there are a number of Serb officers roughly corresponding to the numbers in the population of the relevant area. In the context of a case such as

this where officials are said to be at least in part responsible for producing the persecution or breaches of human rights, a more rigorous approach may be needed. We have concluded that the threshold of persecution or of breaches of human rights is not crossed and that in general there is a sufficiency of protection. The same matters, with one exception, are relied on in these cases as were relied on in *S* to constitute either persecution or contravention of the claimant's human rights. They are, putting them broadly, physical violence, hostility and discrimination based on ethnicity. Their homes in Croatia have either been destroyed or taken over by Croats or any tenancy rights which they may have had have been removed. They have lost and cannot regain employment. There is chronic unemployment and economic hardship but the Serbs are at the bottom of the heap. The present regime has failed to recognise and so to 'convalidate' their pension rights which should have continued to accrue while the Serbs were in control. While it is recognised and to an extent accepted that central government is trying to uphold minority rights and encourage the return of ethnic Serbs who had fled Croatia and who for good reason failed to return while the HDZ under Tudjman was in control, it is contended that the government's instructions are being frustrated at local level by continuing discrimination, by judicial and bureaucratic incompetence and failures and by unwillingness or inability to remedy the situation. In addition, and this is particularly relevant in the case of MM, there is, it is said, a real risk that prosecutions for alleged war crimes will be pursued on the basis of collective responsibility notwithstanding that individuals cannot themselves be proved to have done anything which could properly be regarded as a war crime. The one matter not pursued is the assertion made in *S* that there would be a requirement to do military service and the conditions of such service would result in persecution.

11. Mr. Blake's submissions which were adopted by Mr. Livingston can be summarised as follows. The claimant fled ethnic cleansing, some discrimination, harassment and lack of protection. At the time Tudjman was in power ethnic cleansing was government policy and the steps taken to achieve it by forcing Serbs to leave and not to return amounted to persecution or at the least a breach of human rights. Thus they would have succeeded had their claims been considered then. They have lost all that they had in Croatia – homes, jobs, economic security, social position – and there is, because of discrimination and a failure to implement the expressed intentions of the government, no real prospect of improvement. This constitutes degrading treatment. Further, a sustained breach of core human rights can and does in the circumstances of these claims amount to persecution. While it is accepted that generally speaking if persecution is not established Article 3 would be unlikely to be breached, it is said that where degrading treatment is relied on it is possible that Article 3 could be contravened even if the treatment could not be said to amount to persecution. Nonetheless, it is clear that persecution and breach of Article 3 do usually stand or fall together. So much was accepted by Mr. Blake

and is supported by the tribunal decision in *Kacaj* [2002] Imm. A. R. 213.

12. Since we have to decide whether there is now a real risk of persecution, it is obvious that the more recent reports and forecasts are most relevant. But we cannot ignore the historical background and evidence as to how the situation has developed over the months since Tudjman's death and the election of the new regime in early 2000 is clearly relevant. We sought in *S* to draw a line at the date of that determination in the spring of 2001. We decided that those claimants had not established a real risk of persecution. We relied particularly on the latest full report from the Organisation for Security and Co-operation in Europe (OSCE) of March 2001. It was said that this painted too optimistic a picture and that was the burden of the expert evidence from Dr. Gow and Judge Karphammer. We have been criticised for that. Thus we find Mr. Misha Glenny in the course of an interview carried out in October 2001, which was put before us as an expert's report, expressing his 'astonishment' that we should have failed to follow the views of Judge Karphammer and Dr. Gow. We do not doubt Mr. Glenny's expertise or his right to criticise us, but we are satisfied that our reasons for concluding as we did stand up and have not been shown to be wrong by anything put before us in these cases.

13. It is said that we were wrong to express doubts about the existence of 'hidden and secret lists of alleged war criminals'. A bulky list has been produced before us downloaded from the internet. But, as Dr. Gow recognises, its provenance is unproven and there is indeed no evidence that it is approved by the government or by anyone who might be able to institute proceedings. Dr. Gow's assertion that 'it seems reasonable to assume it may be authoritative' we cannot accept: he gives no satisfactory reason for that assertion. We shall have to return to the war crimes question in more detail later in our general considerations and more particularly in MMs case.

14. Mr. Blake persuaded the Court of Appeal in *S* that specific reference to and consideration of two reports from the Special Rapporteur of the UN Commission on Human Rights (the SR Reports) was needed because they might have affected our considerations. These did on their face paint a somewhat more gloomy picture than that disclosed in the OSCE report. We had (and have in these cases) to form a judgment based on all the material, both historical and recent. We now recognise that we should have referred specifically to those reports. But the tribunal did just that in *Lazarevic*. Since we did have those reports before us and our error lay in not referring specifically to them and since another division of the tribunal had regard to them and explained why they made no difference to the result, we see no reason to modify our conclusions. But that does not mean we automatically decide that the claims are not established unless there has been a worsening of the situation since the spring of 2001. We have to consider all

the material before us and put it into the historical context. Nonetheless, we are inevitably and in our view properly influenced by the conclusions reached in *S*. We have too to bear in mind that the argument deployed by Mr. Blake may go beyond those put before us in *S.*

15 Not surprisingly, greater emphasis has been placed on the human rights claims. While it is recognised that Article 14 is not free standing, it is submitted that discrimination may amount to conduct which is intended to and does arouse in the victim a feeling of fear, anguish or inferiority and so humiliates and degrades him. Thus the circumstances of the individual have to be considered and there is no universal standard applicable. Support for this approach is said to be found in the decision of the European Commission on Human Rights in the *East African Asians case*(1973) 3 E.H.R.R. 76. At Paragraphs 207 and 208 this was said:-

> "207. The Commission has stated … that the legislation applied in the present cases discriminated against the applicants on the grounds of their colour or race. It has also confirmed the view, which it expressed at the admissibility stage, that discrimination based on race could, in certain circumstances, of itself amount to degrading treatment …
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> The Commission recalls in this connection that, as generally recognised, a special importance should be attached to discrimination based on race; that publicity to single out a group of persons for different treatment on the basis of race might, in certain circumstances, constitute a special form of affront to human dignity; and that differential treatment of a group of persons on the basis of race might therefore be capable of constituting degrading treatment when differential treatment on some other ground would raise no such question.
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> 208. The Commission considers that the racial discrimination, to which the applicants have been publicly subjected by the application of the … immigration legislation, constitutes an interference with their human dignity which, in the special circumstances described above [viz: that the provisions deliberately treated Asians because of their race less favourably than whites who might have been forced to leave Uganda following Idi Amin's actions] amounted to 'degrading treatment' in the sense of Article 3 …"

16. Mr. Wilken suggests that it is an old case which has not been and should not be followed. Not so, submits Mr. Blake, relying on *Cyprus v Turkey* (ECtHR: 10 May 2001). He relies particularly on

Paragraphs 304 to 306 of the judgment. We do not need to set them out here; suffice it to record that the Court referred to without criticising the Commission's observations in the *East African Asians* case and noted:-

> "Regardless of recent improvements in this situation, the hardships to which the enclaved Greek Cypriots were subjected during the period under consideration still affected their daily lives and attained a level of severity which constituted an affront to their human dignity".

In Paragraph 307, the Court notes a UN report that the Greek Cypriots in question "were the object of very severe restrictions which curtailed the exercise of basic freedoms and had the effect of ensuring that, inexorably, with the passage of time, the community would cease to exist".

It concluded (Paragraph 309):-

> "The conditions under which that population is condemned to live are debasing and violate the very notion of respect for the human dignity of its members".

17. We do not doubt that discrimination on the ground of race is a factor that should be taken into account in deciding whether a breach of Article 3 has been established. It may in some circumstances tip the balance. In *Cyprus v Turkey* the conditions of the enclaved Greek Cypriots was such as to breach Article 3 and the discrimination on racial grounds was the motive. The Court did not suggest that merely to discriminate on racial grounds would have sufficed to breach Article 3: the effect of the discrimination and its purpose are important. In both *East African Asians* and *Cyprus v Turkey*, the racial discrimination was government policy intended to achieve a result which was degrading to the victims. While we accept that an intention to degrade is not necessary and treatment which in fact degrades will constitute a breach (see *Pretty v United Kingdom* at Paragraphs 52 and 53), its absence will be relevant in forming an overall view. Thus here the treatment in issue is the removal by the United Kingdom to Croatia in circumstances where it is said there is a real risk of degrading treatment. The knowledge that the government opposes such discrimination and is taking measures to try to prevent it is clearly a most relevant factor. It would be very different if return were in issue when the Tudjman regime was in power and ethnic cleansing was the policy. We have to consider whether notwithstanding the government's measures the treatment which the claimants will receive does mean there is a real risk that there will be a breach of Article 3. That some will discriminate despite government policy to the contrary is not sufficient: it must be shown that that there will be a real risk that whatever is done amounts to degrading treatment. Hence there are the references in *East African Asians* to the particular circumstances and in *Cyprus v*

Turkey to the actual conditions faced by the enclaved Greek Cypriots.

18. Reliance is also placed on Article 8. The concept of 'private life' covers both physical and psychological integrity of a person. In *Pretty* the Court states that the 'notion of personal autonomy is, an important principle underlying the interpretation of [the Convention] guarantees'. Restrictions which adversely affect the quality of a person's life can produce a breach of Article 8.

19. Before going further, we should deal with a problem which arises because of the provisions of s.77 (3) and (4) of the Immigration and Asylum Act 1999. These read:-

> "(3) In considering –
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> (a) any ground mentioned in s.69, or
>
> (b) any question relating to the appellants' rights under Article 3 of the Human Rights Convention
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> the appellate authority may take into account any evidence which it considers to be relevant to the appeal (including evidence about matters arising after the date on which the decision appealed against was taken).
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> (4) In considering any other ground, the appellate authority may take into account only evidence –
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> (a) which was available to the Secretary of State at the time when the decision appealed against was taken; or
>
> (b) which relates to relevant facts at that date".

Those provisions may seem to require that a different approach is taken to Article 3 from the other Articles. This could lead to absurd results. It may be, to give perhaps a somewhat extreme example, that the appellate authority is persuaded that at the time of the Secretary of State's decision there would have been a breach of Article 3. This would mean almost inevitably that there was then a breach of Article 8. At the date of the hearing there had been a fundamental change of circumstances in the country of nationality and so there was no breach of Article 3 or of Article 8. Would the appellate authority be excluded from considering the change of circumstances and thus have to find a breach of Article 8? The absurdity is obvious, and it can work in the opposite direction. We have had put before us a decision of Ouseley J *R(Nyakonya) v I.A.T.* [2002]EWHC 1437 (QB) in which he gave a very wide interpretation of 'evidence' within s.77(4)(b). This is helpful, but still may necessitate in an individual case an examination which may be difficult and involve an element of logic

chopping. It also does not easily deal with cases where it is said that family life has been established in the United Kingdom (perhaps because of delays following the decision under appeal) and so Article 8 would be breached by a return.

20. We do not think such refinements are needed. It is the intention of the 1999 Act reflected in ss. 74 to 77 under the heading "'One-stop' procedure" that all issues relevant to return ought to be dealt with at one hearing. It is accepted that the safety of return must be judged at the time of the hearing. That is obviously sensible because otherwise there would be likely to be a flood of fresh claims based on alleged changes of circumstances since the original decision. It reflects, in the asylum context, the decision of the Court of Appeal in *Ravichandran* [1996] Imm A.R. 97 and gives it statutory approval. It was said in *Ravichandran* that the appellate authority was an extension of the decision-making process. With that observation we must quarrel since it may seem to suggest that the appellate authority is somehow to be regarded as being part of the administrative process. It is not. It is an independent body hearing an appeal against a decision but bound to test that decision against facts found by it at the date of the hearing. Unless withdrawn, the decision under appeal is to be regarded as being maintained at the date of the hearing.

21. Section 6 of the Human Rights Act 1998 requires the appellate authority as a public authority (see s.6(3)(a)) to act in a way which is compatible with a convention right. This obligation does not apply if "as the result of one or more provisions of primary legislation, the authority could not have acted differently" (s.6(2)(a)). Section 3 of the 1998 Act requires us to read and give effect to legislation so far as possible in a way which is compatible with the Convention rights. To make a determination which upholds a decision to return in breach of human rights could, subject to the impact of primary legislation, breach section 6. It is important to note the language of and relationship between s.77(3) and (4). In s.77(3) a distinction is drawn between a 'ground mentioned in s.69' and a question relating to rights under Article 3. S.77(4) refers to consideration of 'any other ground' not to consideration of other questions arising. The differences in wording must be taken to have been deliberate. We are well aware that the Home Office view was (and the argument has been raised by Mr. Wilken in his skeleton but not developed because of our decision in *Kacaj*) that only Article 3 could be relied on in removal cases. It is therefore not surprising that Parliament should have wanted to leave the matter open, particularly in the light of indications in *Soering v United Kingdom* (1989) 11 E.H.R.R. 439 that Article 6 certainly might be relied on in such cases. Parliament no doubt recognised the absurdities and contradictions of its 'one-stop' policy which would arise otherwise and it is incidentally to be noted that the matter is put beyond doubt in the 2002 Act which has just been passed.

22. In our judgment s.77(4) does not in appeals concerned with potential removals from the United Kingdom prevent consideration of any question relating to an appellant's rights under any Article of the Human Rights Convention as at the date of hearing. Such a question is not a ground within the meaning of s.77(4). The explicit reference to Article 3 in s.77(3)(b) is explained by the concern to put beyond doubt the need to consider Article 3 breaches as at the date of hearing. Since *Chahal v United Kingdom* (1996) 23 E.H.R.R. 415 had made it clear that the United Kingdom was bound to do just that it is not surprising that Parliament should have decided to legislate in such a way as meant no argument could be raised about it. This means that when human rights issues are raised no distinction is drawn between Article 3 and any other Article and so the appellate authority can comply with s.6 of the 1998 Act and effect is given to the 'one-stop' principle.

23. Mr. Blake has argued that both in relation to Article 3 and Article 8 the individual's circumstances must be considered. Thus, it is submitted, those who had houses and jobs and will be returned to neither will suffer more severely and so their quality of life will be affected to a greater degree. We accept that an individual's circumstances can be relevant. Thus, for example, a person who has learning difficulties or some physical disability may suffer disproportionately because of his or her condition. Nonetheless, there must be a threshold which is of general application. Croatia has suffered the ravages of a fierce and bitter civil war. Thus the mere fact that there will be return to hardship resulting from that cannot produce a breach of human rights. The general situation must be taken into account, as must what is generally accepted in the society in question. Otherwise, the wealthy could claim merely because they had lost more. But obviously if on return particular people are far worse off and so are disproportionately affected by the general difficulties because of discrimination, they may be able to establish a breach. But this will not be because they had a reasonable standard and return to poverty and hardship. It will be because they are unable to escape from such poverty and alleviate such hardship because of the way in which they are treated.

24. We must now turn to the factual situation and consider whether, in the light of the approach we have set out, there is in general a real risk that ethnic Serbs such as these claimants will suffer persecution or breaches of their human rights. Before doing so, we should identify the material before us. The parties were aware that these cases were intended by the tribunal to establish the general position as at the date of hearing and so to enable (subject to any special factors in individual cases or to a deterioration or improvement of the situation in Croatia depending on the tribunal's conclusion) adjudicators and subsequent tribunals

to reach consistent decisions. Thus they have between them endeavoured to and, so far as we are aware, succeeded in putting before us all relevant material. In addition to the various reports from the Home Office, UNHCR, OSCE, Human Rights Watch, Amnesty, the U.S. State Department, the European Commission against Racism and Intolerance (ECRI), various reports from NGOs both international and local and from the Commission of the European Communities, a report from Donald Anderson MP to Alice Mahon MP and a report from the department for International Development (DFID), we have statements (or in the case of Mr. Glenny, the record of an interview and a further statement) of three experts, that is to say Dr. Milivojevic, Dr. Gow and Mr. Glenny. The DFID report is expressly stated to reflect the views of the consultant, not DFID. These are largely those of Professor Pajic. We have also seen a number of press and television news reports and interviews and correspondence with and from various individuals, such as the outgoing leader of the OSCE (Ambassador Poncet) and his successor (Ambassador Semneby). We did not hear any evidence from the experts and so their reports were not tested. We did not consider that that exercise was necessary since the material before us enabled us to form a judgment and to reach our conclusions without extending the process. The views of the experts were of course taken into account and we have weighed them in the context of all the evidence. We note the concerns of the Secretary of State that they are appearing to some extent to enter the arena by criticising our previous conclusions in *S* and so acting more as advocates than experts. As we have already said, we accept that they are entitled to criticise if their views remain that we were wrong and we do not reject their opinions on that account. But theirs is but part of the large volume of evidence before us and, although helpful and to be accorded due respect, it cannot be determinative.

25. Mr. Blake was constrained to leave the hearing during the afternoon of the second day. We agreed that he should be entitled to submit a written reply since it was agreed between the parties that the claimants should open the appeals rather than the Secretary of State . But we bear in mind that three of the appeals were by the Secretary of State and that we had to be flexible in dealing with rights of reply and to try to ensure that neither side was disadvantaged. So it was envisaged that the Secretary of State might reply to Mr. Blake's written submissions to deal in particular with any new matters raised. Messrs Sutovic and Hartigan have complained at what was in fact put in by Mr. Wilken and submitted that it goes beyond a legitimate response to the claimants' 'reply' and so should be ignored. This is disputed by the Secretary of State. We of course accept that there must be finality and we note that the Secretary of State through the Treasury Solicitor has asked us to ignore the submissions rather than enter into disputes about finality. We have read them. We are bound to say that we do not think they add anything of significance to the submissions made by Mr. Wilken orally and in

writing before us. Certainly they raise nothing which has not been dealt with by Mr. Blake or any other counsel. We are content in the circumstances to act on the arguments made before us at the hearing and Mr. Blake's reply. There was some additional material, namely a translation of the application of Mirko Gravec to the ECtHR (the referral was in the papers before us), production of proper copies of photographs of the state of the houses of some of SK's family in the village in which he used to have a home and a transcript of Scott Baker, J's judgment in *R(Ahmadi) v Secretary of State for the Home Department* CO/3894/2002 of 11 September 2002. In that case, at Paragraph 38 Scott Baker, J said:-

> "What the case [*Bensaid*] does establish … is that Article 8 includes protection of the right to identity and personal development, which includes the development of relationships with other human beings and the outside world".

Ahmadi concerned the return to Germany of an Afghan family and in particular the lawfulness of the certification by the Secretary of State that their claim under the Human Rights Act was manifestly unfounded. Scott Baker, J quashed the decision partly because of the evidence of the wife's mental condition and the anticipated effect on it of removal to Germany for their asylum and human rights claims to be considered here. It does not add anything to the authorities to which we have already referred. We entirely accept that the conditions to be faced on return can engage Article 8. The point in *Ahmadi* was that the situation was not as the Secretary of State had asserted it to be, but was far less satisfactory and so could impact adversely on the family's and in particular the wife's mental health and well being.

26. Following those digressions, we turn to our assessment of the situation. The claimants recognise that unfair war crimes trials are of less significance in these cases (with the exception of MM) and that there is no sufficient evidence to suggest that in general there is a real risk that returning Serbs will face unfair war crimes trials. There must be some special factor to bring that concern into play. Similarly, as we have already noted, military service and any problems said to stem from it are not live issues. Those concessions mean that we need not go into those issues in depth, although we shall have to deal with war crime trials in the context of MM's case. The essential complaints common to all are :-

> 1. Discriminatory loss of homes and livelihood.
>
> 2. Discriminatory denial of social and economic rights in the areas to which return is envisaged. No special efforts are being made to redress the wrongs suffered and the help return to society.

3. Discriminatory denial of judicial assistance in reclaiming homes occupied by Croats.

4. Loss of stability and security because of the prospect of a marginalised and ostracise existence in largely ethnically cleansed country. Only a small fraction of Serbs who used to live in Croatia now remain and the majority are the elderly who have returned to die in their homeland.

27. There is a history of ethnic tensions in what is now Croatia. Following the first multi-party elections in Croatia, the HDZ under the leadership of Tudjman came to power in 1990. This was followed in 1991 by a declaration of independence which triggered war. Tudjman was fiercely nationalistic, but initially his attempt to establish an independent Croatia was unsuccessful and, following fighting, the part of Croatia in which Serbs were in the majority was declared to be the Republic of Serbian Krajina (RSK). In 1995, the Croatian forces captured what were then UN protected areas (i.e. the bulk of the RSK) and expelled in all some 212,000 Serbs. In 1998, some 50,000 more Serbs fled when eastern Slavonia (the only part of the RSK left under UN control) was to be handed over to Croatia. The Tudjman regime was maintaining a policy of ethnic cleansing and removal of Serbs. There was great bitterness because of atrocities which had been committed by both sides, but it was only the Serbs who were to be targeted and punished on the basis of collective responsibility. Positive barriers were erected to prevent Serbs from returning to their homes, from obtaining employment and from being able to reintegrate into society. Furthermore, acts and threats of violence to Serbs were commonplace and were not dealt with by the authorities, particularly when they emanated from war veterans who were known as 'homeland defenders' who were regarded as 'untouchable'.

28. The Tudjman policies had led to a regime of political and more significantly financial ostracism. Croatia needed support to rebuild its economy and this was not forthcoming so long as its discriminatory policies remained in being. It wished to join the EU. In December 1999 Tudjman died. In February 2000 Mesic was elected President for 3 years and in Parliamentary elections the HDZ was soundly defeated. It is accepted that the new government has made real efforts to overcome the legacy of hatred and that positive steps have been taken in the form of legislation and other actions to try to remove the obstacles to return and the discrimination against ethnic minorities such as Serbs. However, there are concerns that too little is being done and that the good intentions of central government are being frustrated by the local officials who are supposed to implement the policies and by delays in the political process coupled with incompetence of or unwillingness to apply the laws in favour of

Serbs by the judiciary. Thus we find the January Human Rights Watch report stating:-

> "President Stipe Mesic's government often failed to confront entrenched ethnic Croat nationalists obstructing reform, particularly on issues of impunity for war-time abuses and the return of Serb refugees".

And later in the same report, it is said:-

> "Obstacles to the return of Croatian Serb refugees remained a significant human rights concern. Although by August 2001 over 100,000 Croatian Serbs had returned according to the UN High Commission for Refugees, most were elderly. According to international organisations, significant numbers of these refugees may have again departed for FRY or Bosnia-Herzegovina after only a short stay in Croatia.
>
> Human rights violations contributed to the reluctance of refugees to return and to their renewed flight. While violent attacks on Croatian Serbs continued to decrease in frequency, isolated serious incidents contributed to apprehension about return. Croatian authorities frequently condemned ethnically motivated attacks and opened investigations, but arrests or judicial proceedings did not always follow".

So far as the last sentence is concerned, it is always dangerous to read too much into particular incidents since arrests and judicial proceedings require evidence and the absence of arrests may not mean that the investigations were not carried out properly. Amnesty International in its report of September 2002 noted:-

> "Croatia continued to suffer the legacy of the 1991-1995 armed conflict, particularly impunity for war crimes and other violations of human rights. Significant progress was made in co-operation with ICTFY. The domestic criminal system improved its record in investigating and prosecuting war crimes committed by both Croats and Croatian Serbs, although not all proceedings were conducted thoroughly and impartially. Return of the country's pre-war Serb population continued to be marred by discriminatory laws and political obstruction. Allegations that law enforcement officials ill-treated detainees were not investigated promptly and thoroughly".

29. In September 2002, Ambassador Semneby made a presentation on behalf of OSCE. In it, he noted the deficiencies that existed in the protection available for returning Serbs. He said:-

> "It appears that the majority of the Croatian Serb refugees in FRY wish to remain there for various reasons including difficulties to repossess private property, to receive adequate remedy for terminated occupancy rights and to validate documents regarding pension rights. Still, most surveys indicate that about 30% of Croatian Serb refugees in FRY wish to return or would consider returning if conditions for their return were more favourable".

After setting out the need to ensure that the necessary action was taken to improve the situation, he noted:-

> "Croatia's ambitious objective to become part of the Euro-Atlantic community, which has been acknowledged through the signing of an EU Stabilisation and Association Agreement (SAA) in October 2001 and the announcement of a Membership Action Plan (MAP) with NATO in May 2002 has underlined the necessity to urgently address several problems within the Missions mandate.
>
> As a consequence, the quality of the Government's dialogue with the Mission and its international partners has improved in recent months, but there is still a need to involve the international community earlier in the decision-making process in order to ensure the quality of legislation and other decisions. The Mission is an important instrument to help Croatia in dealing with the many challenges it faces".

30. In September 2002 Donald Anderson MP, visiting as a NATO delegate, noted that doubts still remained about the sustainability of returns because in many war affected areas hard line nationalists continued to run local government and would frustrate any return policy. Even where local government was favourable, the necessary infra-structure was lacking and particular difficulties were created by the failure to enable Serbs to repossess their properties. In November 2001 the UNHCR was concerned at the lack of homes, the absence of proper repossession, the deprivation of tenancy rights and economic restraints on returns. Nevertheless, returns are being encouraged by UNHCR and a letter of 17 May 2002, while recognising the existing difficulties, notes the Government's action in taking positive steps to assist in reconstruction of damaged homes and its plans to render assistance to those whose tenancy rights have been determined. This is criticised as jam tomorrow, but does show that genuine efforts are being made, albeit they may not yet have borne much fruit.

31. In May 2002 OSCE issued its status report. It noted that property repossession remained at the core of the return process. In December 2001 the government had presented an Action Plan to

return 19,000 properties by the end of 2002: some 10,557 had by May been returned. But the Plan does not cover all properties affected and there is opposition preventing further extensions of the Plan. Loss of tenancy rights is not covered, but there are some encouraging signs. Thus it is noted (p.16 of the Report):-

> "In December 2001, after consultations with representatives of the international community, the Government stated that a proposal for a comprehensive solution to this issue would be prepared, but such a proposal has not yet materialised. …. Public comments by President Mesic in February 2002, acknowledging that circumstances during the conflict provided reasonable grounds for Serbs to depart in fear for their physical safety, suggest that the climate for addressing this issue is improving".

And in relation to reconstruction, it noted that in late 2001 the Government, supported by UNHCR, 'for the first time encouraged and promoted the conditions for filing reconstruction applications to Serb refugees in the place of asylum".

32. Reliance has been placed on interviews with Ambassador Poncet in July and December 2001 which are said to confirm that the OSCE report of March 2001 was too optimistic. He was asked:-

> "Although no particular progress has been achieved in the … of repossession of property, it seems that … has to admit that the political climate has significantly changed, after all. Do you agree?
>
> He replied:-
>
> "Yes, I agree, the tension has considerably decreased, and it is easier to establish dialogue, even with the people from HDZ. There is less nationalism and more realism. Politically, the situation is gradually changing and people are more focussed on the future, than on the past".

In December, he said 'truly commendable progress has been made in the last year and a half' in relation to co-oporation with OSCE. But he was saddened by the failure to pass a new law on the Rights and protection of Minorities and to enforce judgments properly. But he was encouraged by public discussions on occupancy rights.

33. We have, we hope, cited enough to identify the real difficulties and discrimination that undoubtedly face Serbs if returned. The government has the right intentions but is still being frustrated at lower levels. However, the government is undoubtedly taking steps to improve the situation and in June 2002 the

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

> "UNHCR continues to support directly the return Programme of the Government of Croatia, accepting and assisting with the processing of return applications. The total number of applications to the Office for Displaced Persons and Refugees (ODPR) procedure from the start of the Return Programme in June 1998 until mid-May 2002 stands at 6,908 while 3,921 persons have returned thus far. Those numbers do not include returns occurring spontaneously outside of the Return Procedures. Currently, there are 1,173 cases where the procedure has not been completed or is pending clearance, and of these 451 cases have been deferred for lack of records …"

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

34. We are well aware that there are concerns that the numbers of returnees have been exaggerated and that many who returned have left again. Equally, those who have remained are said in the main to be the elderly. We note, too, that the percentage of ethnic Serbs in the population has reduced from about 12% to nearer 4%. This means that they now represent no threat to the majority but an increase in numbers may be regarded differently. We note that the figures show that the majority apparently are unwilling to return, preferring to remain in FRY or elsewhere and

seeing their future there. The numbers in the United Kingdom likely to be affected by our decision are relatively small. We recognise that those who are prejudiced against fellow human beings on grounds of race or ethnicity may be stirred to react if they fear that an increase in the numbers will threaten them. We have to an extent seen this phenomenon in the United Kingdom where an increase in immigrants can lead to support for nationalist policies and even to violence. Even where the government pursues vigorous anti-discrimination policies and the forces of law and order are prepared to provide protection, it is not possible to guarantee that there will be no discriminatory acts or even violence. But that does not mean that there is a real risk of a breach of Convention obligations. It is a question of judgment and we have regard to the high threshold which must be applied as the ECtHR has recognised in *Bensaid v United Kingdom* (2001) 33 E.H.R.R. 208 and to the 'rigorous scrutiny' needed where the ill-treatment will be contrary to government policy and from non-state actors. It is we think worth citing Paragraph 40 where the court said:-

> "The Court accepts the seriousness of the applicant's medical condition. Having regard however to the high threshold set by Article 3, particularly where the case does not concern the direct responsibility of the Contracting State for the infliction of harm, the Court does not find that there is a sufficiently real risk that the applicant's removal in these circumstances would be contrary to the standards of Article 3. It does not disclose the exceptional circumstances of the D case [*D v United Kingdom* (1997) 24 E.H.R.R. 423] where the applicant was in the final stages of a terminal illness, AIDS, and had no prospect of medical care or family support on expulsion to St. Kitts".

35. Considerable reliance has been placed on the DFID draft report based on visits to Croatia in the summer of 2001. It notes that the police are being reformed and the penal system appears satisfactory but that:-

> "there are considerable problems on the provision of and access to justice especially for the minorities … and in relation to the return of refugees".

Discriminatory practices in relation to housing and war crimes are said to have put returning Serbs at risk and to raise the possibility of future inter-ethnic conflict 'and to create the most significant major barrier to regional stability and the successful integration of Croatia into Western structures'. It is said that Croatia has 'the worst record on integration of refugees and displaced persons. There is a clear ethnic bias against non-Croats'. There follows reference to the problems faced by Serbs to which we have already referred and to the failure by the Office of Displaced Persons

(ODPR) set up by the Government of Croatia to act in an even-handed manner and its persistence in discriminating against non-Croats. All this we recognise, but it is now somewhat out of date. The government has clearly recognised the importance for Croatia of economic ties with the EU. There has been greater co-operation with ICTY and the concern about that which was expected by some to result in the fall of the present government in July 2002 have not provoked that result. We find in the OSCE fortnightly report of 25 September to 8 October 2002 reference to President Mesic's testimony at the Milosevic trial. Croats have been handed over to face trial on charges of crimes against Serbs and the weekly report, having noted the considerable public interests in the President's testimony which was carried live and watched by as much as 40% of the population according to one opinion poll, concluded:-

> "More than half of the viewers believe the President's appearance before the ICTY would improve the international standing of Croatia, arguing that it showed that Croatia believes in the rule of law and takes its international commitments seriously".

The OSCE background report of 10 October 2002, while recording the support for the decision to challenge the indictment against General Bobetko, notes that the most recent polls indicate a shift of public opinion back to a support for co-operation and compliance with Croatia's international commitments. The opposition to General Bobetko's surrender to ICTY is based to a greater extent on his age (he is now 83) and cannot in our view be regarded as an indication of failure to co-operate generally with ICTY. It further notes that public acknowledgements in the media by Croatian officials that both sides committed war crimes have notably become more common. All this gives some encouragement since it shows that there is recognition of the importance to Croatia of integration into Western Europe and this is more likely to result in greater acceptance of the need to show that discrimination is being tackled.

36. Local elections were held in May 2001. The HDZ gained one third of the local regional assembly and council seats contested nationally. This is said to show a resurgence of support for ultra-nationalist policies including discrimination against Serbs. Thus we find Dr. Milivojevic saying:-

> "As things stand now … the high hopes of radical political change and a possible rejection of the HDZ years engendered by the election of a new government at the beginning of 2000 may prove to have been little more than illusions about the supposed seizure of the HDZ and all that it represents".

In his report of August 2002, he says that the 'powerful and quasi-criminal wing' of the HDZ led by Ivic Pesalic has not been fully curbed by the new leader. But there has been a significant change and there are signs that the HDZ, although no doubt still nationalist and right wing, is not run by those espousing the extremist policies of the Tudjman era. The majority of Croatians will not want to return to the isolation and economic damage resulting from it which the Tudjman policies produced and which similar policies would be likely to produce. In addition, in some areas the HDZ has entered into arrangements with other parties, including the SDS (the government party), to share power. While the dangers of a resurgence of nationalism are apparent – the history of this part of Europe cannot instil confidence that in the future there will be no regression – we do not regard the increased support for the HDZ as it now is with the same pessimism as is displayed by Dr. Milivojevic.

37. The government of prime minister Racan has survived despite the expectations that it would not. Dr. Gow refers to major anti-government demonstrations in 2001. He concludes thus:-

> "Regarding the status and conditions of ethnic Serbs in Croatia, generally since the election in February 2000 of a new President with a new approach, Mr. Stipe Mesic, there has been a marked change of emphasis in Croatia at the government level in Zagreb. However, it clearly remains the case that despite the top level change, the position for ethnic Serbs in certain regions especially individuals who have served in the OS RSK, or similar, cannot be guaranteed to be beneficial and free from acts that could be deemed persecution. It is equally apparent that despite the best intentions of President Mesic and of the government of Prime Minister Ivica Racan, at the national level, the power of the nationalist HDZ remains entrenched in many areas and, indeed, was reinforced and enhanced by results in the May 2001 local elections, where the HDZ made gains. This may confirm the impression that in relevant areas, the situation has deteriorated at a time when generally there has been improvement in Croatia".

These views are entitled to be accorded considerable respect, but they seem to us to be over pessimistic and to ignore the signs to which we have referred which point in a more optimistic direction. Contrary to the views of at least one tribunal, we do not regard the increased support for the HDZ in May 2001 (which incidentally, still represented a fall in support as against the Tudjman years) as showing a worsening of the situation since *S* was decided.

38. War crimes prosecutions we can deal with relatively briefly having regard to the concession that unless there is a particular reason to believe an individual will be prosecuted or (as in the case of MM)

has been prosecuted, they cannot be relied on as a barrier to return. We should say that we are satisfied that the concession was rightly made. It is, of course, proper that war criminals should be punished for having committed crimes and there can be no doubt that both Serbs and Croats have been guilty of such crimes. But such prosecutions must be based on proper evidence and proof of individual responsibility. The OSCE and the UNHCR closely monitor prosecutions and, in particular, if a returnee is arrested, the UNHCR will 'very closely and thoroughly monitor the situation'. It notes that' we found the trials have been very fair and correct in their procedure'. The numbers do not suggest there are widespread prosecutions let alone an implementation of the lists to which we have been referred. There has been an amnesty, but that amnesty has not wiped out the conviction and so there remain barriers to individual's employment prospects unless the conviction is expunged. In November 2001, we find OSCE noting:-

> "a positive trend in … decisions by County Prosecutors and judges to reject war crimes and genocide charges against groups of Serbs due to the lack of any evidence of individual crimes".

39. Despite this, there remain some problems where trials in absentia have been held. MM is an example, he having been sentenced to 4 years imprisonment on the basis of charges which on their face cannot properly be said to amount to conduct which can reasonably be regarded as constituting a war crime. He manned a barricade and was, it was said, offensive and threatening in a racist manner to Croats. An accelerated procedure has been put into effect to ensure a reconsideration and if necessary a re-trial of anyone convicted in absentia. But there may be a remand in custody of usually no more than one or two months while the matter is reconsidered. If it is clear that the case is too weak to be able to succeed, release may be effected after a couple of days. Whatever may seem to be the strength of the case from the information produced to us, we find it impossible to say that there would be persecution or a breach of human rights if the question whether there should be a re-trial is investigated properly even if there may be a relatively short remand in custody while that is being done.

40. As will no doubt be apparent, we are satisfied that there has been no worsening of the situation since we decided *S* and in any event the material before us does not persuade us on the low standard required that there is a real risk that in general Serbs if returned to Croatia will suffer persecution or a breach of any Article of the European Convention on Human Rights. We recognise that the situation is far from pleasant and the deprivation and misery that will be faced. That stems from the war and the destruction caused by it. But that by itself cannot mean that surrogate protection is needed or that there will be a breach of human rights. We regard the steps taken by the Croatian government, despite the

difficulties at local level and the obstacles that still undoubtedly exist, as sufficient to provide the necessary protection. It follows that we accept the submissions made by Mr. Wilken, set out in detail in his skeleton argument and more particularly in Annex 2 to it. Even though there is discrimination coupled with the difficulties particularly of housing, employment and convalidation to which we have referred, we are satisfied that the threshold of Article 3, in particular of degrading treatment, has not been crossed. Equally, although we recognise that the Article 8 threshold is lower, we are not persuaded that it has been crossed. But even if it has, we are satisfied that removal is justified by a proper control of immigration.

41. We must finally consider the circumstances of the claim by SK. He arrived in the United Kingdom on a flight from Hungary with a valid Croatian passport on 27 November 1997 and was given leave to enter as a visitor for 6 months. On 22 January 1998 he claimed asylum, but was not interviewed until 16 October 2000. On 24 November, his claim was rejected and removal directions were made. His appeal was heard by an adjudicator on 1 May 2001. The adjudicator allowed his appeal on the basis that he had a well-founded fear of persecution and faced a real risk of treatment contrary to Article 3 of the European Convention on Human Rights. The Secretary of State was given leave to appeal on the ground that the adjudicator had not been able to consider *S* and, if he had, should have reached a different conclusion.

42. The claimant was born in Knin and lived there until August 1995. Kuin was in the RSK. He was doing his military service in the OS RSK when Operation Storm occurred and he then fled to Bosnia. He then went to Serbia and came from there to the United Kingdom because, he said, he feared that the Serb authorities would try to mobilise him for the impending war in Kosovo. He had obtained Croatian documentation when the region of Eastern Slovenia was Serb controlled under UN protection. The Secretary of State in refusing his claim did not consider whether he could have remained in safety in Serbia but rejected it on the basis that he would not by then suffer persecution or a breach of his human rights if he returned to Croatia.

43. SK's family had a house near Vrtika, a small town near Knin, and a flat in Knin. The house in Vrtika was burnt down and the flat in Knin was taken over by Croats. The family owned arable land at Podosje, which is near Vrtika. All houses have, as the photographs show, been destroyed and the village "turned into a rubbish dump". Although some family are now living there, he would have nowhere to live and any scheme for living with sympathetic families would founder for such lack of resources. His father has applied for repossession of the Knin flat but so far no steps have been taken by the Croat authorities in that direction.

44. SK is now in full-time employment as a security officer. He is living with a British citizen and she is expecting their baby in February 2003. He has thus established a family life in this country and return to Croatia would, unless his partner went with him, interfere with that family life. So far as we are aware, that aspect has not yet been considered by the Secretary of State. He could if returned seek an entry clearance on the basis of that relationship. There is no doubt that he would if returned suffer hardship and the situation for the partner, who would be uprooted from a reasonable standard of living in the United Kingdom to what can only be described as a miserable existence, would be harsh in the extreme. If satisfied that the relationship is genuine and subsisting, the Secretary of State will no doubt bear all this in mind in deciding whether to return the claimant. We have to apply the approach of the Court of Appeal in *Mahmoud* in deciding whether return would breach Article 8. The establishment of a family life when a person's immigration position is precarious will not usually justify a finding that Article 8 is breached since application can be made from abroad and it is wrong to jump the queue. Thus we are not prepared to make the primary decision; that must be done by the Secretary of State . Nor do we think that it is appropriate for us to make a specific recommendation in the absence of any consideration of the full circumstances, which we cannot do since we only have his word at the moment and the Secretary of State has not had an opportunity of investigating the position.

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

46. This case has been starred but the starring only relates to the consideration of s.77(4). Although it is intended to provide the answer to claims by ethnic Serbs who seek to prevent their return to Croatia, it is a decision based on fact and so cannot be starred. However, unless the situation deteriorates to a significant extent or special circumstances can be shown in an individual case, no ethnic Serb should be able to establish a claim under either Convention.

Sir Andrew Collins
President