Case No: C/2001/1823 & C/2002/0169

Neutral Citation Number: [2002] EWCA Civ 1403
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISON
ADMINISTRATIVE COURT LIST
(MR JUSTICE TURNER)

Royal Courts of Justice
Strand,
London, WC2A 2LL

Monday 14th October 2002

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE CHADWICK
and
LORD JUSTICE KEENE

- -

Between :

Xhevdet Hoxha and "B"
Appellants

- and -

The Secretary of State for the Home Department
Respondent

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Mr Gill QC, Mr C Jacobs & Mr F Omere (instructed by Messrs Berryman Shacklock, Nottingham NG1 6DN & Messrs White Ryland, London W12 8HA) for the Appellants
Miss Carss-Frisk QC & Miss Giovannetti (instructed by Treasury Solicitor, London SW1J 9HS) for the Respondent

- -

Judgment
As Approved by the Court

Lord Justice Keene:
This is the judgment of the court.

1. The principal issues raised in these two appeals concern the proper interpretation of one of the provisions in the 1951 Convention Relating to the Status of Refugees ("the 1951 Convention"), as amended by the 1967 Protocol. The provision in question is Article 1C(5), one of the so-called "cessation clauses" dealing with the circumstances in which refugee status can be lost.

The Facts

2. Both the appellants are ethnic Albanians from Kosovo, and are citizens of the Federal Republic of Yugoslavia. Mr. Hoxha arrived in the United Kingdom in June 2000 and claimed asylum, which was refused by the Secretary of State for the Home Department. His appeal to a special adjudicator was dismissed, but the special adjudicator did accept this appellant's account of what had happened to him in Kosovo. He described how in September 1997 Serb soldiers and paramilitaries had come to his village and had forced their way into the houses. He was shot three times in the leg when he tried to protect his father, and he became unconscious. Other villagers took him to a hospital in Albania. He stayed in that country until October 1998 and then returned to his village in Kosovo. However, he was again attacked by Serb soldiers, who hit his leg with a metal bar, breaking his leg. He stayed with his aunt in the village for about a month, recovering from the fracture.

3. In November 1998 he went again to live in Albania, where he stayed until June 2000, despite the departure of the Serb army from Kosovo in June 1999 and the arrival there of international forces. It was in June 2000 that he decided to leave Albania and travelled in the back of a lorry to the United Kingdom. There was medical evidence before the special adjudicator to support the account of the shooting of Mr Hoxha in the leg. Moreover, the Home Office Presenting Officer accepted at that hearing that this appellant had been a refugee when he left Kosovo in 1998 and went to Albania.

4. However, the special adjudicator, having considered the evidence about the situation in Kosovo at the time of his determination, concluded that Mr. Hoxha did not have a genuine fear of persecution, were he now to be returned to Kosovo, and that it was also objectively safe for him to return there because of the change of circumstances since 1998. The appeal was therefore dismissed, and an application for judicial review of that decision was subsequently rejected by Jackson J. It is from that decision by Jackson J. that the appeal in Mr. Hoxha's case is brought.

5. The appellant B, together with his wife and sons, arrived in the United Kingdom clandestinely by lorry on 26 July 1999, and claimed asylum. That was refused and an appeal to a special adjudicator was dismissed in January 2001. However, the basic account of events given by this appellant was accepted. In particular, the Serb police had ransacked his house in October 1998, beating him and then stabbing him with a knife. One of his sons was slashed with the same knife and B's wife was raped in front of a number of people.

6. The situation in Kosovo got worse and the family fled to Prishtina and from there to Macedonia, where they stayed for between 4 and 6 months. They then travelled to the United Kingdom in July 1999. There was some medical evidence placed before the special adjudicator showing that at least the son who had been slashed with the knife was suffering from post-traumatic stress disorder. The Home Office Presenting Officer accepted that this appellant had left Kosovo as a result of a well-founded fear of persecution, and the special adjudicator likewise accepted that. But he concluded that the situation in Kosovo had changed since the appellant's departure to such an extent that there was no longer a well-founded fear of persecution, were he and his family to be returned there. Leave to appeal was refused by the Immigration Appeal Tribunal on 6 March 2001. That refusal was challenged by way of judicial review, but the challenge was dismissed by Turner J. on 15 January 2002. The matter now comes to this court on appeal from Turner J.

The relevant Convention provisions

7. Although the main issues concern Article 1C(5) of the 1951 Convention, it is necessary to see that provision in the context of a number of other parts of the Convention. Article 1A in its original unamended form reads as follows:

> "A For the purpose of the present Convention, the term 'refugee' shall apply to any person who:
>
> (1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;
>
> Decisions of non-eligibility taken by the International Refugee Organization during the period of its activities shall not prevent the status of refugee being accorded to persons who fulfil the conditions of paragraph 2 of this section;
>
> (2) As a result of events occurring before 1 January 1951 and owing to 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.
>
> In the case of a person who has more than one nationality, the term 'the country of his nationality' shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national."

8. Article 1B is not of significance for present purposes. Article 1C itself provides:

> "C This Convention shall cease to apply to any person falling under the terms of section A if:
>
> (1) He has voluntarily re-availed himself of the protection of the country of his nationality; or
>
> (2) Having lost his nationality, he has voluntarily re-acquired it; or
>
> (3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or
>
> (4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or
>
> (5) He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;
>
> Provided that this paragraph shall not apply to a refugee falling under section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;
>
> (6) Being a person who has no nationality he is, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;
>
> Provided that this paragraph shall not apply to a refugee falling under section A(1) of this Article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his formed habitual residence."

9. A number of subsequent Articles in the 1951 Convention deal with the rights of refugees within the territories of the Contracting States, including the right to practise their religion (Article 4), the right to favourable treatment as regards the acquisition of property (Article 13) and as regards employment (Article 12 and 18), and the right to the same treatment as nationals with respect to elementary education (Article 22). Article 45 provides for revision of the Convention, stating:

> "1. Any Contracting State may request revision of this Convention at any time by a notification addressed to the Secretary-General of the United Nations.
>
> 2. The General Assembly of the United Nations shall recommend the steps, if any, to be taken in respect of such request."

10. In January 1967 a Protocol Relating to the Status of Refugees was adopted ("the 1967 Protocol") and came into force on 4 October 1967. The preamble recited that new refugee situations had

arisen since the 1951 Convention had been adopted and that it was desirable that equal status be enjoyed by all refugees covered by the definition in the Convention irrespective of the dateline 1 January 1951. Article 1, insofar as material for present purposes, then provided:

> "1. The States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined.
>
> 2. For the purposes of the present Protocol, the term "refugee" shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article 1 of the Convention as if the words "As a result of events occurring before 1 January 1951 and ..." and the words "...as a result of such events", in article 1A(2) were omitted"

(Paragraph 3 of that Article, referred to in paragraph 2 thereof, is not relevant to the present issues).

11. Over 100 States are parties to the 1951 Convention and/or the 1967 Protocol.

The Issues

12. The appellants seek to rely principally on the proviso to Article 1C(5) of the 1951 Convention, on the basis that there are compelling reasons arising out of previous persecution for refusing to avail themselves of the protection of their country of nationality, in particular in Kosovo. In both cases they contend that the experiences they have been through and the stresses which would be caused by having to live again in the country where these attacks took place amount to compelling reasons within the meaning of that proviso. In the case of B, particular emphasis is placed on the rape of his wife and the ostracism which she would consequently face within her own community on return because she had been raped. Therefore it is said that the appellants are entitled to refuse to avail themselves of the protection which could be obtained in their own country.

13. Two issues of law arise as a result of this contention. The first derives from the fact that the text relied on is a proviso which creates an exception to the main provision, that being Article 1C(5) itself. It is necessary to set out again the crucial words of Article 1C in this respect, namely

> "This Convention shall cease to apply to any person falling under the terms of Section A if:
>
> (5) He can no longer, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality."

14. The proviso relied on provides an exception to this particular cessation paragraph. What is immediately apparent is that it applies to cases where someone has been recognised as a refugee but where the circumstances in his country of nationality have changed sufficiently for surrogate protection by the international community to be no longer necessary. The legal issue concerns the

significance of the phrase "recognised as a refugee". Both the courts below held that this required some formal recognition of refugee status by the appropriate authorities before Article 1C(5) could apply. That is now challenged by the appellants.

15. The second legal issue arises because the proviso to Article 1C(5) is, according to its terms, applicable only to "a refugee falling under section A(1) of this Article" who is able to invoke compelling reasons as described for refusing to return to his country. Section A(1) has already been set out in full earlier in this judgment, but it only covers persons who have been considered as refugees under a number of international agreements before 1951, so-called "statutory refugees". It was intended to "ensure the continuity of international protection of refugees who became the concern of the international community at various earlier periods": UNHCR Handbook, para. 33. Such persons are to be distinguished from those who fall within the familiar and more general definition of a refugee set out in Article 1A(2) of the 1951 Convention, a definition based upon satisfying certain criteria, including having a well-founded fear of persecution for certain reasons.

16. It is agreed that the appellants are not statutory refugees within the meaning of Article 1A(1). The contention advanced on their behalf is that the restriction of the proviso of Article 1C(5) to statutory refugees no longer has force, because state practice and the humanitarian purposes lying behind much of the 1951 Convention should lead to an interpretation sufficiently wide as to include all refugees. This argument was also rejected by Jackson J. and Turner J. in the courts below.

17. It is to be observed that the appellants have to succeed on both the issues identified above. Failure on either would be fatal to their case under Article 1C(5). It is convenient to take the two issues separately, before turning to a subsidiary argument advanced on the appellants' behalf.

The Recognition Issue

18. On behalf of the appellants, Mr Gill, Q.C., submits that recognition as a refugee does not require any formal determination of status to have taken place by any country. A person is a refugee because he meets the criteria set out in Article 1A, and therefore the appellants were refugees as soon as they fled from Kosovo. In support of this submission, reference is made to paragraph 28 of the UNHCR Handbook, a publication which has been produced for the guidance of governments concerned with the determination of refugee status and which has been referred to in a number of decided cases. Paragraph 28 reads as follows:

> "28. A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognised because he is a refugee."

19. This demonstrates, it is said, that refugee status exists prior to any recognition of it by a State. That is confirmed by the decision in *Khaboka –v- Secretary of State for the Home Department*

[1993] Imm A.R. 484, where the Court of Appeal referred to para. 28 of the UNHCR Handbook and accepted the propositions set out in that paragraph.

20. Furthermore, contends Mr Gill, the 1951 Convention must be interpreted liberally and purposively in the light of its humanitarian aims as described in its Preamble. One finds in the Preamble reference to profound concern for refugees and to seeking to ensure them "the widest possible exercise of these fundamental rights and freedoms". Those humanitarian aims would be restricted if the obligations owed to a refugee only arose after a formal recognition of his status had taken place.

21. Finally, as an alternative argument on this issue, the appellants rely on the acknowledgement by the Secretary of State's representative before the special adjudicator in both cases that each appellant had been a refugee at the time when he left Kosovo – in 1998 in Mr Hoxha's case, when he went to Albania, and in early 1999 in B's case, when he and his family went to Macedonia. It is argued that this acknowledgement amounted to formal recognition of them as refugees, thus bringing Article 1C(5) and its proviso into play.

22. We find these submissions on the first issue unpersuasive. It is of course right that one is here dealing with an international convention, in the interpretation of which the principles found in the Vienna Convention on the Law of Treaties, 1969, Articles 31 to 33, are applicable, because they reflect customary international law: *Golder –v- United Kingdom* [1979-1980] 1 EHRR 524 at para. 29. Article 31(1) requires an international treaty to be interpreted:

> "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

23. It follows that the "object and purpose" of the 1951 Convention is relevant on this issue, and the recitals in the Preamble assist in identifying that object. Undoubtedly humanitarian aims are reflected in those recitals. But there is a limit as to how far a consideration of those aims can lead one to depart from the ordinary meaning of the terms used in the Convention. That point was forcibly made by Lord Hope of Craighead in *Horvath –v- Home Secretary* [2001] 1 A.C. 489 at 498a-d and 499h-500a

24. It is of some considerable importance that Article 1C(5) does not refer to "circumstances in connection with which he has become a refugee". It specifically uses the expression "circumstances in connection with which he has been *recognised* as a refugee" (our emphasis). It is quite clear that the UNHCR Handbook in the passage relied on by the appellants, para. 28, distinguishes between being a refugee and being recognised as such. It also equates recognition with the formal determination of refugee status by a State. The decision in *Khaboka* relied upon by the appellants does not assist them, because it simply recognises the same distinction between being a refugee and being recognised as such. It is the latter concept which one finds in Article 1C(5) and indeed Article 1C(6).

25. Article 1C(5) is expressly concerned with those who have been recognised as such, an event of some importance since various rights and benefits then have to be accorded to them under the

Convention. As the Executive Committee of the UNHCR's Programme resolved in October 1977,

> "if the applicant is recognised as a refugee, he should be informed accordingly and issued with documentation certifying his refugee status."

26. The 1951 Convention does not provide any mechanism itself for establishing that a person is a refugee. The UNHCR Handbook itself points out in its Foreword that the assessment as to who is a refugee is a matter for the State "in whose territory the refugee applies for *recognition* of refugee status" (our emphasis). Such recognition will normally, as in the United Kingdom, involve formal procedures, initiated by the making of an application for asylum. But whether procedures are formal or informal, there has to be some process of recognition and some State or body which does the recognising of a person as a refugee. Recognition requires therefore a decision as to the status of a person as a refugee.

27. The cessation clauses contained in Article 1C(5) and (6) make good sense if the reference to a "recognised" refugee is given its full force but much less sense if applied to the situation before there has been a determination that a person is entitled to refugee status. It is established that a person seeking asylum has to show that the criteria set out in Article 1A are met at the time when his application is being considered. A well-founded fear of persecution for a Convention reason which existed in the past but which no longer exists subsequently or is no longer objectively well-founded will not suffice. That was confirmed by the House of Lords' decision in *Adan –v- Secretary of State for the Home Department* [1999] 1 A.C. 293., where it was held that it is necessary to show that a well-founded fear *currently* exists. Indeed, such a current fear is not only a necessary consideration for refugee status, it will also be a sufficient condition: *Gardi –v- Secretary of State for the Home Department* [2002] EWCA Civ 750, with the result that the claimant need not show that he fled his country because of such a well-founded fear. As was emphasised in *Adan*, Article 1A(2) is expressed in the current tense – "*is* outside the country of his nationality and *is* unable ... to avail himself of the protection of that country."

28. But if a person cannot satisfy the criteria in Article 1A(2) without a currently well-founded fear of persecution, there is no need for Article 1C(5) to come into play at the stage of determining whether or not he is entitled to refugee status. If that is its purpose, it is otiose. Its role must be to deal with the situation where someone has already been held to have refugee status but conditions in his country of nationality have changed since then.

29. This interpretation is the one which has been adopted by the UNHCR Handbook, which when dealing with Article 1C states at para. 112:

> "Once a person's status as a refugee has been determined, it is maintained unless he comes within the terms of one of the cessation clauses."

30. In the same vein the UNHCR Executive Committee in its "Note on the Cessation Clauses" of 30 May 1997, relied on by the appellants, said at para.7:

> "A declaration of cessation under the 'ceased circumstances' clause involves an assessment of the specific conditions during a certain time period which led to *the granting of refugee status*..." (our emphasis)

31. Since the Office of the UNHCR is expressly charged by the 1951 Convention with the duty of supervising the application of the provisions of the Convention (Article 35(1)), statements such as these may be seen as support for the proposition advanced by Miss Carss-Frisk, Q.C., on behalf of the Secretary of State that Article 1C(5) comes into play after a determination of refugee status has earlier been made. In our view, she is right, as were the judges in the court below.

32. Mr Gill's alternative submission under this heading was that there had already been a determination of refugee status because of the concessions made by the Secretary of State's representative before the special adjudicator in each case. The terms of these concessions have already been set our earlier and need not be repeated. In neither case did the concession go beyond an acceptance that the appellant had been a refugee at a date in the past when he had left Kosovo, either for Albania or for Macedonia. At those dates no application for asylum had been made by either appellant and the statements by the Secretary of State's representatives cannot be seen as a recognition at the time of those statements that the appellants enjoyed refugee status. They were merely a description of historic facts and do not add to the significance, such as it is, of those facts. The issue to be determined by the special adjudicator was, in each case, whether the appellant met the criteria in Article 1A(2) at the time of the determination in late 2000. All that the Secretary of State's representatives were doing was acknowledging that the appellants had left Kosovo owing to a well-founded fear of persecution for a Convention reason in 1998 and early 1999 respectively. That does not amount to a determination of refugee status.

33. We conclude, therefore, that the appellants cannot bring themselves within Article 1C(5) and that the decisions on this issue in the courts below were soundly based.

<u>The Scope of the Proviso to Article 1C(5)</u>

34. The principal argument advanced on behalf of the appellants on this issue is that on a proper interpretation of Article 1C(5) today, the proviso should no longer be seen as restricted to statutory refugees. The principle underlying the proviso itself recognises that the need for protection may continue to exist in the case of certain persons who can invoke compelling reasons arising out of previous persecution for refusing to avail themselves of the protection of their country, notwithstanding that the circumstances in connection with which they were recognised as refugees have ceased to exist. It is said that this principle is simply part of a wider principle which recognises that a refugee should not be required to re-avail himself of the protection of his country unless his return can be guaranteed in conditions in which he can live reasonably with dignity and with respect for his core human rights, even though he no longer has a well-founded fear of persecution for a Convention reason. That same principle, it is submitted, underlies the requirement of reasonableness which is a central part of the internal relocation principle familiar in respect of all refugees.

35. Mr Gill relies in this connection on part of paragraph 136 of the UNHCR Handbook, which states:

> "The reference to Article 1A(1) indicates that the exception applies to 'statutory refugees'. At the time when the 1951 Convention was elaborated, these formed the majority of refugees. The exception, however, reflects a more general humanitarian principle, which could also be applied to refugees other than statutory refugees. It is frequently recognised that a person who – or whose family- has suffered under atrocious forms of persecution should not be expected to repatriate. Even though there may have been a change of regime in his country, this may not always produce a complete change in the attitude of the population, nor, in view of his past experiences, in the mind of the refugee."

36. In referring to the Handbook, Mr Gill reminds us that this court in *R –v- Secretary of State for the Home Department, ex parte Adan and Aitsegeur* [1999] 3 WLR 1275 at 1296F regarded it as providing good evidence of what has come to be international practice within the meaning of Article 31(3)(b) of the Vienna Convention. Reference is also made to one of the recommendations contained in the Final Act of the Conference of Plenipotentiaries which adopted the 1951 Convention, which reads as follows:

> "The Conference expresses the hope that the Convention relating to the Status of Refugees will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who would not be covered by the terms of the Convention, the treatment for which it provides."

37. The appellants recognise that the 1951 Convention was in practice amended for most states by the 1967 Protocol but that no change was made to the wording of the proviso to Article 1C(5). However, it is contended that the words of limitation in that proviso should be seen as otiose since the 1967 Protocol, because the recitals in the Preamble to that Protocol make it clear that it was desired that equal status should be enjoyed by all refugees irrespective of the dateline of 1 January 1951. The distinction between statutory refugees and other refugees should therefore be regarded as defunct.

38. A report by Professor Goodwin-Gill, Professor of International Refugee Law at the University of Oxford, supports the appellants on this issue. In that report he states:

> "In my opinion, for the reasons set out below and subject to meeting the 'compelling reasons' requirement, the benefit of this provision extends to <u>all</u> Convention refugees, notwithstanding that, as originally drafted, it appeared to be limited to so called 'statutory refugees', that is, to those refugees falling within the terms of Article 1A(1) of the 1951 Convention. My opinion is based, in particular, on the drafting history of the exception and on the practice of States since the adoption of the Convention."

39. In dealing with the drafting history, Professor Goodwin-Gill indicates that the restriction of the proviso to statutory refugees was introduced so that the number of those who might be covered by the proviso would be known, thus avoiding an obligation of unknown scale being imposed on the Contracting Parties. It is noted that the United Kingdom delegate regretted the limitation. So far as state practice is concerned, reference is made to conclusion number 69 of the UNHCR Executive Committee in 1992, which recommended:

> "So as to avoid hardship cases, that States seriously consider an appropriate status, preserving previously acquired rights, for persons who have compelling reasons arising out of previous persecution for refusing to re-avail themselves of the protection of their country. "

40. Legislation in Canada and the United States of America has provided for all Convention refugees to remain as such, despite a change of circumstances in their country of nationality, if there are compelling reasons arising from past persecution for refusing to return to that country. Moreover, the French Commission des recours des réfugiés takes the view that Article 1C(5)'s proviso is now applicable to all Convention refugees, and so does the equivalent body in Belgium. In 2001 a meeting of experts on asylum law at the Lisbon Round Table concluded that the proviso in both Article 1C(5) and 1C(6) is recognised to apply to Article 1A(2) refugees. They added "this reflects a general humanitarian principle that is now well grounded in State practice." In the same year the European Commission proposed that there should be a Council Directive on minimum standards for qualification as Convention refugees and noted in relation to cessation of status on the basis of changed circumstances that "the member state invoking this cessation clause should ensure that an appropriate status, preserving previously acquired rights, is granted to persons who are unwilling to leave the country for compelling reasons arising out of previous persecution or experiences of serious and unjustified harm". In so saying the Commission drew no distinction between statutory refugees and other refugees.

41. Finally the appellants on this issue rely upon submissions made by the UNHCR to this court in the case of B, in which representations it is said at paragraph 15:

> "Although initially drafted with statutory refugees as defined under Article 1A(1) in mind, it is now generally recognised that the proviso to Article 1C(5) should also apply to all Convention and Mandate refugees who are able to show 'compelling reasons arising out of previous persecution'. The essentially humanitarian and necessary nature of the proviso to Article 1C(5) has been endorsed by UNHCR's Executive Committee in its Conclusion number 69 (1992, Cessation of Refugee Status, paragraph (e)). The Committee recommended that States seriously consider an appropriate status, preserving previously acquired rights for persons who have compelling reasons arising out of previous persecution for refusing to re-avail themselves of the protection of their country."

42. Putting all this together, Mr Gill submits that there is sufficient evidence of a general practice on the part of the international community to establish an interpretation of the proviso which renders it applicable to all refugees and not simply to statutory ones. The number of those who fall within

Article 1A(1) has by now diminished substantially and the rationale for restricting the proviso to such refugees has disappeared.

43. We readily accept that subsequent international practice in applying a treaty may indicate an agreement as to how the terms of that treaty should be interpreted. This proposition from customary international law was recognised in the Vienna Convention, 1969 at Article 31. Paragraph 1 of that Article has already been set out earlier in this judgment, but paragraph 3 of the same Article provides:

> "There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."

44. It is to be observed that Article 31.3(b) requires the subsequent practice to establish the agreement of the parties regarding the interpretation. That reflects again the approach adopted in customary international law as was established in the case of *The Temple of Preah Vihear* [1962] ICJ Reports page 33. It is, moreover, easier to establish an interpretation by subsequent state practice where the treaty in question is a bilateral one rather than one which has been agreed by a large number of countries. As was said by Sir Percy Spender in *Certain Expenses of the United Nations* case [1962] ICJ Reports 150 at 191:

> "In the case of multi-lateral treaties the admissibility and value as evidence of subsequent conduct of one or more parties thereto encounter particular difficulties. If all the parties to a multi-lateral treaty where the parties are fixed and constant, pursue a course of subsequent conduct in their attitude to the text of the treaty, and that course of conduct leads to an inference, and one inference only, as to their common intention and understanding at the time they entered into the treaty as to the meaning of its text, the probative value of their conduct again is manifest. If however only one or some but not all of them by subsequent conduct interpret the text in a certain manner, that conduct stands upon the same footing as the unilateral conduct of one party to a bi-lateral treaty. The conduct of such one or more could not of itself have any probative value or provide a criterion for judicial interpretation."

45. Moreover, some care needs to be taken before it is assumed that the practice of a particular state has been adopted as a matter of interpretation of the international treaty in question. It would be understandable if some states had decided to apply the principle embodied in the proviso to Article 1C(5) to all Conventional refugees for admirable humanitarian reasons. That does not necessarily amount to a recognition of a legal obligation to do so nor to the adoption of a particular interpretation of the 1951 Convention. Paragraph 26 of the UNHCR Handbook, relied upon by the appellants, has to be seen in this light, expressing as it does merely a hope that states would in

practice go beyond their contractual obligations. That indeed is borne out by the comment contained in the very next paragraph, paragraph 27 which reads:

> "This recommendation enables States to solve such problems as may arise with regard to persons who are not regarded as fully satisfying the criteria of the definition of the term 'refugee'."

46. Aspirations are to be distinguished from legal obligations. It is significant that a number of the passages relied on by the appellants are expressed in terms of what 'could' or 'should' be done. Thus paragraph 136 of the UNHCR Handbook, cited to us, simply indicates that the general humanitarian principle reflected in the proviso '*could* also be applied to refugees other than statutory refugees' (our emphasis). In the same way, conclusion number 69 of the UNHCR Executive Committee merely recommends that states 'seriously consider an appropriate status' for persons with compelling reasons arising out of previous persecution for refusing to re-avail themselves of the protection of their country. This is not the language which one would expect if there was a widespread and general practice establishing a legal obligation to that effect. The European Commission's proposal for a Council Directive remains only a proposal. The UNHCR submission to this court in the case of B states that the proviso 'should also apply' to all refugees and its support for that proposition, apart from the general humanitarian principle, is said to be conclusion 69 of its Executive Committee in 1992, upon which I have already commented.

47. Where one has clear and express language imposing a restriction upon the scope of a particular provision, as is the case with the proviso to Article 1C(5), it must require very convincing evidence of a widespread and general practice of the international community to establish that that restriction is no longer to be applied as a matter of international law. However purposive an approach one adopts towards an international treaty, the starting point, as Lord Lloyd of Berwick stated in *Adan* (ante) at page 305, must be the language itself. We cannot see that the evidence put before us establishes such a widespread and general practice as must be necessary for a finding in the appellants' favour on this issue. A number of states do adopt a more generous approach towards Article 1C(5) than is required by the terms of the Convention itself, but they represent on the evidence before us a minority of the signatories to the Convention, who number over 100.

48. Moreover, it must be seen as significant that the international community did not take the opportunity at the time of the 1967 Protocol to amend the proviso to Article 1C(5) when it was considering the temporal scope of the 1951 Convention. The changes made by that Protocol reflected the changes in the international situation since the 1951 Convention had been agreed, as is made clear by paragraph 8 of the UNHCR Handbook. Yet no change was made to the proviso to Article 1C(5). Of course, it is right that the purpose of the 1951 Convention is a broadly humanitarian one, but that does not justify a disregard of the agreed limitations which are contained within the terms of the Convention itself, any more than such humanitarian purposes could lead one to disregard the particular causes of persecution which have to be shown under Article 1A(2). As was emphasised in *Horvath*, the Convention does not provide protection in all cases when it would be humane to do so, such as when a person is a refugee from civil war or natural disaster. One might think it desirable that states should provide asylum to those fleeing from such events and in the same way one can recognise the humanitarian purpose which would be served by ignoring the restriction on the proviso to Article 1C(5). But that is not enough to establish a legal obligation

binding upon all parties to the Convention. As was said by Lord Phillips of Worth Matravers, MR, in *El Ali and Daraz –v- Secretary of State for the Home Department* [2002] EWCA C 1103 at para. 66,

> "What matters is what the Member States in fact agreed in 1951, not what they might have agreed had they envisaged a state of affairs which they did not foresee at the time."

49. In summary, therefore, the evidence before this court does not establish a clear and widespread state practice sufficient to override the express words of limitation contained in the proviso to Article 1C(5).

The Subsidiary Issue

50. This concerns the meaning of 'persecution' for the purposes of Article 1A(2). Mr Gill on behalf of the appellants accepts that a current well-founded fear of persecution has to be established if a person is to bring himself within the scope of that particular provision. However, he argues that persecution can include not only the initial act or acts of persecution but the consequences which flow from it or them. As he puts it, persecution includes the continuing effects of past acts of persecution. If there is a current fear of such consequences in the country of nationality, then so long as that is well-founded that fear will suffice. Thus in the case of B, there is likely to be ostracism of the family because of the earlier acts of persecution by Serb police, even though there is no longer a well-founded fear of any further acts in Kosovo by Serb police.

51. This submission is based upon the underlying humanitarian purpose of the Convention. Reliance is also placed on the decision of this court in the case of *Svazas –v- Secretary of State for the Home Department* [2002] EWCA Civ 74, where Sedley L.J. said:

> "In other words, even though the home state may be able to provide protection, the fear now justifiably felt by the individual may be such that he is unable to rely on the State to protect him." (para.22)

52. The appellants contend that they are unwilling to return to Kosovo by reason of the fears caused by past persecution and the continuing effects of that persecution, which is sufficient to satisfy the requirement of a current persecution.

53. What is implicit in this argument on behalf of the appellants is that what will or may happen to them on their return to Kosovo will not itself amount to acts of 'persecution' within the meaning of Article 1A(2). For example, it is not suggested that the ostracism of the family of B which it is feared may happen would itself amount to persecution within the normal meaning of that word. The acts of persecution which are referred to are in both appeals ones which took place in the past. It seems to us that the appellants are right not to seek to allege that what would happen to the appellants on their return would itself amount to persecution, since that entails 'acts of violence or ill-treatment' of a sufficiently grave nature: see *Horvath*, per Lord Hope of Craighead page 499 H and per Lord Lloyd of Berwick page 504 C to D. The appellant's contention is that the ill-

treatment to which they were subjected in the past has left them less able to cope with the difficulties of daily life in Kosovo, and that in effect this should be seen as a continuation of persecution for the purpose of Article 1A(2).

54. But the 1951 Convention is quite specific as to the situations in which surrogate protection by the international community is required. Under Article 1A(2) there has to be a well-founded fear of being persecuted for one of the specified reasons and it is well established that such a fear and its well-founded nature have to be current. Had the wider interpretation now being contended for by the appellants been appropriate as part of the definition of 'refugee' under Article 1A(2), there would have been no need for the proviso to Article 1C(5), because in all cases of this kind the applicant would be able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of his country of nationality. The very existence of Article 1C(5) indicates that this submission on behalf of the appellants about the scope of Article 1A(2) is ill-founded.

55. The decision in the case of *Svazas* does not in fact assist the appellants' arguments. That case, as the quotation from the judgment of Sedley L.J. indicates, was dealing with a quite different matter, namely the situation where there is a subjective fear of persecution happening in the future which renders the individual unable or unwilling to avail himself of the protection of his country of nationality, even though that protection may be available. That has nothing to do with the case of someone who does not have a fear of acts of persecution if returned to his or her country of nationality. That is the situation with which these appeals are concerned. There is no sound basis for this subsidiary argument.

Conclusion

56. It follows that none of the grounds of appeal advanced on behalf of the appellants is soundly based. Both appeals are therefore dismissed.

Order: Appeal dismissed.
Respondents to have their costs, such costs to be assessed by a costs judge pursuant to Community Legal Services Order 2000
Detailed Community Legal Services Assessment Order of Appellants' costs.