Appeal No :**HX46891-2001**
MS (Risk-Homosexuality-Military Service) Macedonia CG [2002] UKIAT 03308

IMMIGRATION APPEAL TRIBUNAL

Heard at : Field House
on : 30 May 2002
Dictated : 10 June 2002

Determination Promulgated
.....30.7.2002....................................

Before:-

J A O'Brien Quinn Q C - (Chairman)
Mr M L James

between

MIROSLAV STOJANOVSKI

Appellant

and

Secretary of State for the Home Department

Respondent

DETERMINATION AND REASONS

1. The Appellant, a citizen of Macedonia, appeals against the decision of an Adjudicator (Mrs C M Kennedy) following a hearing on 13 February 2002, when she dismissed his appeal against the decision of the Secretary of State, taken on 18 June 2001, to refuse to vary his leave to remain in the United Kingdom after refusal of his asylum application.

2. The Appellant was represented Mr E Waheed, of Counsel, instructed by Sutovic and Hartigan, Solicitors, while Mr J Morris, Home Office Presenting Officer, represented the Secretary of State.

3. The Grounds of Appeal submitted dealt mainly with the claim that the Adjudicator had failed to take account of the imprisonment which the Appellant would face on account of his draft evasion, that she did not take full account of the situation generally in Macedonia, that on the facts there would be a breach of Article 3 of the ECHR, that, with regard to the Appellant's living with a homosexual partner, the Adjudicator had failed to make suitable factual findings, and failed to take account of

the position of the Appellant's partner under the terms of Article 8 of the ECHR, and that she had erred in the basis of her credibility findings.

4. Leave to appeal to the Tribunal was granted by the Tribunal (Mr J Barnes, Vice President). In granting leave to appeal, the Tribunal stated as follows:-

> "3. I have considered the grounds of appeal in the light of the determination of the evidence before the adjudicator. The grounds of appeal are just arguable and for this reason I grant leave. The Applicant should be aware, however, that the claim that the penalties for draft evasion are excessive and punitive and that prison conditions breach Article 3 of the European Convention were extensively considered by the Tribunal in a recently promulgated determination whose name and citation number is not presently available to me but which is highly germane to the issues on these aspects. My recollection is that the Applicant's representatives were also instructed in that recent appeal before me, and they will no doubt ensure that a copy of that determination is submitted for the consideration of the Tribunal in the present appeal. The translation of the provisions of the criminal code relating to draft evasion in the Applicant's bundle before the adjudicator was not a full translation and I have reason to believe that the full translation will show a far wider discretion in sentencing available to the Macedonian Courts both under the former and the current law than appears from the partial translation. This matter is also touched on in the decision to which I refer above. Leave to appeal is granted."

5. When the appeal opened before the Tribunal, Mr Waheed submitted a skeleton argument on behalf of the Appellant, and a decision of the Canadian Immigration and Refugee Board (Refugee Division) A99-00560, and referred to the bundle which had been put in earlier and which contained recent decisions of the Tribunal and witness statements of both the Appellant and his homosexual partner.

6. He, first of all, addressed us on paragraph 13 of his skeleton argument and submitted that we should look at it in the round in the light of both breaches of Article 3 and Article 8.

7. He drew our attention to the position in which the Appellant would find himself were he to have to undergo military service. He submitted that there were aggravating circumstances where the Appellant was concerned, in view of the fact of his homosexuality, which would make life much more difficult for him if he were to undergo military service. On the question of military service, he drew our attention to the recent determination of the Tribunal in Dimitrijevski [2002] UK IAT 00731, and to Stojkovski [2002] UK IAT 01106, and drew our attention to the Canadian Refugee Board Case A99-00560. He submitted that the Tribunal should take note of what was found in the Canadian Refugee Board case, namely:-

> "If the claimant returns to Macedonia he would face a possibility of being found to have remained outside the country to avoid military service and thus face imprisonment for one - ten years. Documentary

evidence indicates that prison conditions in Macedonia are 'inhuman and degrading'.

8. He submitted that whereas Dimitrijevski had come to a different conclusion, nevertheless the Canadian case should be followed and it should be noted that, in Stojkovski, at paragraph 12, it was held by the Tribunal as follows:-

> "12. I would seem to us that a term of imprisonment of one to five years would be disproportionate to the offence committed but we appreciate the fact that it is probably unlikely that the Appellant would receive the maximum term of imprisonment. Having said that, the recent international Helsinki Report of 2001 gives us some concern as to the likely conditions of prisons."

9. With regard to the question of whether or not homosexuality had been legalised in Macedonia, it was accepted that homosexuality was no longer a criminal offence, but that in south eastern Europe the general population was much less tolerant of homosexuality than in the United Kingdom.

10. He submitted that, homosexuality, of itself, is not imprisonable, but it is an aggravating feature, particularly where military service is concerned.

11. He then drew attention to paragraph 5 of the determination, and the letter of refusal by the Secretary of State which stated that homosexuality was no longer a criminal offence in Macedonia.

12. He submitted that what the Adjudicator had found at paragraph 12 of the determination, namely that the shortest period which the Appellant would serve for failure to undergo military service, would be a period of one month, which she did not consider to be punitive, and that there was no reason to suppose that the Appellant would be incarcerated in the prison previously described. He submitted that that ran contrary to the evidence, generally, which was to the effect that the sentence for draft evaders or absconders in Macedonia was imprisonment of between one and ten years and that, while that term would, in itself, be considered to be harsh, it would be more so in view of the sexual orientation of the Appellant, and the general prison conditions in Macedonia; and for the Appellant to have to undergo such imprisonment, in such bad conditions, would amount to a breach of Article 3 irrespective of the length of imprisonment which would be imposed on him.

13. With regard to the state of the prisons in Macedonia, which the Appellant would face, if returned, it would amount to inhuman and degrading treatment. He submitted that having to serve in the army, which was a male dominated institution, just as the police, it would be doubly more difficult for the Appellant due to his homosexual orientation.

14. He submitted that the finding of the Adjudicator, at paragraph 12, that the shortest period which the Appellant would have to undergo was a period of "one month", was not in accordance with the evidence. He submitted that he was unable to trace where the Adjudicator had found the figure of one month, as that would not appear to be the general evidence, which was that the sanction was imprisonment of from

one to ten years which would indicate that the lowest term the Appellant would have to serve would be one of one year and not one month.

15. With regard to the prison conditions in Macedonia, he drew our attention to the annual report on Human Rights Practices in Macedonia for 2001, at page 26F of his bundle, where it was stated that the Helsinki Committee had assessed the conditions in the prisons as bad, and that, when visiting the penitentiary at Idrizovo, the worst impression one could get, is in the solitary cells. It also stated that prisoners who had been given disciplinary sanctions stay in those solitary cells and that those cells are about ten to twelve metres in area, without heating, while the only window open is permanently open. He submitted that it is also stated that food is prepared in extremely unhygienic conditions, that the dispensary is located immediately next to the closed section of the penitentiary, that conditions where also humiliating and that the conduct of the newly engaged physician was especially disrespectful and arrogant. He drew our attention to the report that requests of prisoners for medical examination were simply ignored and where contacts between the prisoners and the structures almost did not exist.

16. He drew attention to the Helsinki Report at page 22 of his bundle, again dealing with prison conditions in Macedonia, which confirmed what he had already submitted.

17. He drew our attention to what was stated, at paragraph 21 of Dimitrijevski, where the question of the prison conditions in Macedonia were considered and where it was held that the question of whether or not imprisonment in Macedonia would lead to treatment contrary to Article 3 of the ECHR, would depend on its own circumstances, and that claims, at large, as to whether prison conditions in a specific country are likely to lead generally to a breach of Article 3 rights, for any one imprisoned, required clear and cogent evidence of general international acceptance that the prison conditions are so regarded.

18. He submitted that on the objective evidence to which he had referred, and in view of the findings by the Canadian Refugee Board, it would appear that there is clear and cogent evidence of general international acceptance that the prison conditions in Macedonia are regarded as being inhumane and degrading.

19. He submitted, relying on paragraph 11 of his skeleton argument, that Dimitrijevski, was wrong in suggesting that there must be Article 3 suffering to demonstrate a real risk or a reasonable likelihood of Article 3 being breached.

20. He submitted that it was not necessary for the Appellant to have undergone imprisonment in the past to support his claim that it would be inhumane and degrading for him to be imprisoned if he were returned, and that, to that extent, what had been held in Dimitrijevski, did not properly represent the legal position.

21. He submitted that what the Adjudicator found at paragraph 10 of her determination, namely that the overwhelming inference which she drew was that the Appellant's fear of ill-treatment by fellow soldiers due to his homosexuality was the real reason for his aversion to military service and that, having regard to what was stated in paragraphs 168 and 169 of the UNHCR Handbook, the fact of his homosexuality would not bring him within these terms and that in order to show that he would

suffer disproportionately severe punishment on account of his sexuality, he would have to produce a stronger case.

22. He submitted that the position would be, for the Appellant, that if he were to have to undergo military service, in a male oriented institution, which would be traditionally hostile to homosexuals, it was certain that his fate would be a lot worse than others of his fellow countrymen. He submitted that it was not being unrealistic to take note that the Appellant would suffer disproportionately severe punishment on account of his homosexuality if he were forced to do military service.

23. He also submitted that, having regard to the fact that the Appellant and his partner had been living together in a family type relationship, would be sufficient to establish that he had a family life which would be breached if he were returned to Macedonia taking account of Article 8(1) of the ECHR.

24. He submitted that the appeal should be allowed.

25. We then heard Mr Morris, in reply, and he drew our attention to what had been held in paragraph 20 of Dimitrijevski, which stated as follows:-

> "To summarise what we have said above, bearing mind what is said in the US State Department Report and the fact that no other penal institution is specifically criticised in the Macedonian Committee Report to the Helsinki Foundation application, we are not satisfied that the evidence shows that it is reasonably likely that prison conditions generally in Macedonia are such as would lead to treatment contrary to Article 3. In effect Mr Nathan is claiming that anybody in prison in Macedonia is at a real risk of inhuman or degrading treatment. That is not a proposition supported by the evidence either generally or in respect of this specific Appellant."

26. He submitted that all the reports on the prison situation in Macedonia have not yet been compiled and that we may have to wait until October 2002 to get a fuller report on them. Nevertheless, he submitted that the objective evidence which was before the Tribunal in Dimitrijevski, was pretty clear and that, to a large extent, the situation in the prisons in Macedonia was serious. However, he considered that he would have to disagree with the Adjudicator's findings with regard to the minimum term which the Appellant would have to serve being one month, as there was nothing to indicate that that was so. He submitted that the least the Appellant would have to serve would be one year to five years, as was held in Stojkovski. He submitted that the human rights aspect of the appeal were dealt with at paragraph 13, where the only Articles dealt with were Articles 3 and 8.

27. He submitted that the Adjudicator had carefully considered the situation in respect of both of these Articles, had dealt with the question of disproportionality and had come to the conclusion that Article 8 should not be used to circumvent the Immigration Rules, and that in her opinion the same applied to the concessionary arrangements, under which the relationship between the Appellant and his homosexual friend, must have subsisted for four or more years, which was not the case in this appeal.

28. Mr Morris submitted, that if the Appellant were returned, he would have to serve at least one year's imprisonment for draft evasion, and the question to be considered is whether or not the situation in the Macedonian prisons was such that his having to go to prison would amount to inhumane or degrading treatment, in the light of the objective evidence which had been cited by Mr Waheed to the Tribunal.

29. We then heard Mr Waheed, in reply, and he again drew our attention to the prison situation in Macedonia set out in page 26D of his bundle, and drew our attention to what was held in Stojkovski, at paragraph 13, where it was stated as follows:-

> "We have no evidence to give us any indication as to where this Appellant is likely to be imprisoned in Macedonia but we do not consider it would be appropriate to assume, without any evidence at all, that any other prison would be less inhuman and degrading, when referring to Idrizovo prison."

30. He submitted that there was a real risk of likelihood of the Appellant's receiving degrading treatment, not alone due to the physical conditions in the prisons, but in the light of his homosexuality, and that, taking account of these matters which the Adjudicator had not, they would clearly be a breach of Article 3 as well as of Article 8 of the ECHR.

31. We then reserved our determination, carefully considered all the evidence and the submissions made to us, as well as the judicial authorities cited, and directed ourselves that the burden of proof lay upon the Appellant but that the standard of proof is the lower one laid down by the House of Lords in Sivakumaran as explained and expanded by the Tribunal and the Courts in more recent decisions.

32. In this appeal, the Appellant, a citizen of Macedonia, born on 19 December 1978, arrived in the United Kingdom on 8 November 2000, using his own passport endorsed with a UK "au pair" visa, was granted six months leave to enter on the usual conditions, but did not seek asylum until 22 March 2001. The basis of his claim for asylum was that he was a homosexual and had been called up for military service, that he was a pacifist and that as Macedonia was becoming unstable he feared that he would be forced into service in the army, and that, in addition, as a pacifist and a homosexual he would be persecuted, particularly as homosexuality was unlawful in Macedonia.

33. His application for asylum was refused by the Secretary of State, in his letter of refusal, dated 18 June 2001, as follows:-

> "5. The UNHCR Handbook on Procedures and Criterion for Determining Refugee Status states that fear of prosecution or punishment for desertion of draft evasion does not in itself constitute a well-founded fear of persecution. The Handbook also states that a person is clearly not a refugee if his only reason for desertion or draft evasion is his dislike of military service or fear of combat.

6. However, the Secretary of State is aware that in accordance with the terms of Article 120 section 2 of the Macedonian Constitution, the Macedonian Assembly on May 30, 2001 passed a law which granted the right for all citizens who were eligible for military service to opt to serve in non military agencies. The law stated that every person, who due to religious or moral beliefs does not want to use weapons during military service in the Macedonian Army, can serve without using weapons or can serve in the health, social, and humanitarian organisations or in the fire brigades. In these circumstances, therefore, military service will last 14 months instead of 9 months. Accordingly, the Secretary of State does not accept that you have a well-founded fear of persecution because of your objections to military service.

7. With regards your homosexuality, and contrary to the contents of your Statement of Evidence Form, the Secretary of State is aware that homosexuality is no longer a criminal offence listed in the Macedonian penal code. He does not accept, therefore, that your declaration to being homosexual is evidence that you have a well-founded fear of persecution. Furthermore, your claim that your homosexuality would have an adverse effect if you were forced to serve in the military is, in the opinion of the Secretary of State, negated for the reasons outlined in paragraph 6 above."

34. On appeal against that decision, the Appellant gave evidence before and Adjudicator and was cross-examined. The Adjudicator, having considered the whole situation, found as follows:-

"10. The Appellant also claims to be a conscientious objector. The only reason given is that he is a pacifist and if there were a war given the history of the Balkans 'it is almost certain that such a conflict would be internationally condemned. I accept that the Appellant became eligible for 'call up' when he was 18. However he has successfully evaded military service allegedly through the intervention of his cousin for three years during which time he has twice left Macedonia without any problems. The overwhelming inference that I draw is that his fears of ill-treatment by fellow soldiers due to his homosexuality that is the real reason for his aversion to military service. The question then arises whether that fear brings the Appellant within paragraphs 168 & 169 of the UN Handbook. To do so he must show that he would suffer disproportionately severe punishment on account of his homosexuality.

11. Mr Nathan referred me to two serious sections in the International Helsinki Federation (IHF) Report on Macedonia in his Bundle on the sanctions for draft evasion and the conditions in prison. A new draft defence law was debated in Parliament at the end of 2000 providing for an alternative civilian service for conscientious objectors but the draft did not entirely satisfy the IHF because amongst other criticisms it prescribed 'a punitive lenth of 14 months civil service against the normal military service of nine months." Otherwise the penalty for draft evasion is 'a fine and/or imprisonment for up to a year or from one to five years for anyone found to

have left the country and remained abroad in order to avoid military service'. Conditions in the largest/oldest prison in the country are said to be 'extremely poor amounting to inhuman or degrading treatment or punishment.

12. I have given much anxious thought to all aspects of this appeal. On the evidence before me I accept that life may well be difficult for the Appellant because he is a homosexual but that attitudes are changing. I do not accept on the basis of Sepet and Bulbul and that he has shown he is a genuine conscientious objector.
He has successfully evaded military service in the past and I find his explanation that his cousin managed to cancel his 'call up' papers for over three years implausible especially as the Appellant although not a student twice managed to leave Macedonia during that period. I consider he has been less than truthful about his ability to avoid military service. I do not therefore accept that he would be liable for the longest periods of imprisonment meted out to draft evaders. The shortest period is one month which I do not consider punitive and there is no reason to suppose that he would be incarcerated in the prison previously described.
I consider the delay in claiming asylum after he had become aware that he could do so is adverse.
In my opinion he had not been persecuted when he left Macedonia I do not consider that the difficulties he may face on return amount to persecution.
He has failed to discharge the onus and the appeal is dismissed."

35. On appeal against that decision, it was argued on the Appellant's behalf that the Adjudicator had misconstrued the terms of imprisonment which the Appellant would have to undergo for evasion of military service if returned to Macedonia, that the Appellant, if he had to undergo military service would, as a homosexual, find it considerably worse than any ordinary heterosexual person and that it would amount to inhumane and degrading treatment. Further, it was argued that the Appellant, being a military service evader, would have to undergo imprisonment from one to ten years, which, in view of the deplorable conditions of the prisons in Macedonia coupled with the Appellant's homosexual orientation would amount to inhuman and degrading treatment under the terms of Article 3 of the ECHR, which would make it a breach of the United Kingdom's obligations under Article 3 of the ECHR.

36. In arguing the appeal, Mr Waheed placed reliance on the decision of the Immigration and Refugee Board of Canada, in A99-00560, on the point that, contrary to the findings of the Adjudicator, the Appellant would face imprisonment for from one to ten years for his having remained outside Macedonia to avoid military service, and for the point that the documentary evidence indicated that prison conditions in Macedonia are "inhuman and degrading" and would amount to a breach of the Appellant's Article 3 rights.

37. However, the Tribunal, in two appeals recently dealt with, came to opposing views of the question of imprisonment in Macedonia being inhuman and degrading; it having been held in Dimitrijevski, that claims at large as to whether or not prison conditions in a particular country are likely to lead generally to a breach of Article 3 rights for anyone imprisoned, would require clear and cogent evidence of general

international acceptance that the prison conditions are so regarded; and it being held in Stojkovski that, while the Appellant in that appeal had not established his case for Refugee Status under the Refugee Convention, it took the view that there was a substantial risk that the Appellant's human rights would be infringed if he were returned to Macedonia, as, having regard to the circumstances of that particular case, in its judgment, having taken the view that the Appellant required protection because if he were to be removed, his rights under Article 3 would be very likely to be infringed.

38. The Tribunal, in Stojkovski in coming to that conclusion, had considered Soering v UK, and the latest International Helsinki 2001 Report, on Macedonia, in concluding that, while it could not be said that every Macedonian suffered the sort of treatment reported, the report indicated that it is likely that any Macedonian could be so treated.

39. We have taken full consideration of the reports on the state of the prisons in Macedonia, as accepted by the Home Office representative, and that the Appellant would not serve a minimum term of one month, but would, in all probability, serve, at least, one year, and we are of the opinion that the proviso in paragraph 21 of Dimitrijevski where it states that,`` if there were clear and cogent evidence of general international acceptance that the prison conditions in any specific country, were likely to lead generally to a breach of Article 3, such a breach could be established, would be met, in the case of the prisons in Macedonia, to where the Appellant would be sent on return.

40. We so find, as, having considered the International Helsinki Report on Human Rights in Macedonia for 2001, were it assessed the prison conditions as being bad, where prisoners who have been exceptionally sanctioned stay in solitary cells of about ten to twelve square meters in area, without heating, with the only window openings kept permanently open, with just one bucket for toilet needs, with food prepared in extremely unhygienic conditions, where requirements of prisoners for medical examination are simply ignored, where the penitentiary premises are dirty, full of bad smells, with the walls ruined and the floor seeming never to have existed, we are satisfied that, to put prisoners into such conditions, would clearly amount to inhuman or degrading treatment.

41. In our considered opinion, the Appellant has not established that he is a genuine conscientious objector to military service, as found by the Adjudicator, nor has he established that the fact of his being a practising homosexual is in breach of the law in Macedonia, nor, again, has he established that his being a homosexual, by itself, would lead to his being treated in such a way if he were to do his military service, as to amount to a breach of Article 3. However, we accept that the Adjudicator was not correct in finding that the Appellant would have to serve only one month's imprisonment for failure to perform his military service, and find, on the objective evidence, that the imprisonment which the Appellant would face would be of at least one year's duration or probably more, and that, for him to have to serve that term, however long or short, in the internationally accepted bad conditions in the Macedonian prisons, would amount to a breach of his rights under Article 3 of the ECHR.

42. We have considered the Appellant's claim that the United Kingdom would be in breach of his rights under Article 8 of the ECHR, by requiring him to return to Macedonia and leave his homosexual partner behind, and the question of his homosexual relationships generally, and we find that the concession of the Secretary of State that a homosexual relationship such as that between the Appellant and his partner should have subsisted for four or more years, before being considered, is a highly reasonable approach, in all the circumstances, and would not, in our view be in breach of the Appellant's rights, particularly in view of the fact that the present relationship has lasted for, at most, just over one year, in addition to which, weighing up the state of the relationship, we do not consider it to be disproportionate, in all the circumstances of the case, even taking into account that the relationship has been "registered" since 21 November 2001.

43. Accordingly, while we dismiss the Appellant's appeal on Refugee Convention grounds, as we are not satisfied that he is a genuine conscientious objector, we are satisfied that, for him to be returned to serve a prison sentence, for failure to report for his military service, in the atrocious prison conditions in Macedonia, would amount to a breach of his Article 3 rights, but we are not satisfied that his being returned to Macedonia, without his partner, would be in breach of his rights under Article 8.

44. To that extent, therefore, this appeal is allowed.

J A O'BRIEN QUINN Q C
CHAIRMAN