Heard at Field House

MS & others (Risk on Return- Depleted Uranium) Kosovo CG [2003] UKIAT 00031

On 11 October 2002

IMMIGRATION APPEAL TRIBUNAL

Date Determination notified:

21/07/2003

Before:

Mr C M G Ockelton (Deputy President)
Mr J Barnes
Mrs J A J C Gleeson

Between

Appellants

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Appearances:

For the Secretary of State	:	Miss L Giovanetti, Counsel instructed by the Treasury Solicitor.
For the Appellants	:	Mr P Lewis, Counsel, instructed by the appellants' solicitors.

DETERMINATION AND REASONS

1. The appellants appeal with permission against the decisions of Adjudicators who dismissed their appeals against refusal of asylum and the setting of removal directions.

2. In each case, the core issue now relied upon by the appellants is the purported risk on return from depleted uranium munitions used during the Kosovo conflict. These cases have been identified for combined hearing with a view to providing guidance in relation to the depleted uranium risk in Kosovo for asylum claimants who are to be returned now.

3. The Tribunal has the benefit of a detailed combined skeleton argument by Mr Lewis, and a reply prepared by Miss Giovanetti. We have been provided with a map prepared by UNEP (United Nations Environmental Programme) showing the sites identified as being targeted by ordnance containing depleted uranium during the 1999 Kosovo conflict.

4. We also had the benefit of an expert report by Mr Christopher Busby, from whom we heard oral evidence, and another from Professor Hooper, who was not called. Dr Busby and Professor Hooper have worked on the gathering and analysis of samples from the UNEP-identified sites, to establish whether depleted uranium constitutes a risk factor, though their evidence naturally relates to a period closer to its use during the 1999 conflict.

5. In addition, the Tribunal identified and supplied to the parties a copy of an Information Paper on Depleted Uranium Environmental and Medical Surveillance in the Balkans by Dr J Jarrett Clinton, Special Assistant to the Under Secretary of Defense (Personnel and Readiness) for Gulf War Illnesses, Medical Readiness and Military Deployments for the Department of Defense (the Department of Defense report). This document is mentioned both in the Secretary of State's reply to directions, and in Mr Busby's report, but had not been provided to us by the parties.

6. With the exception of a marriage issue, which arises in the appeal of Mr FZ, all of the appeals raise similar issues and they were listed together with the intention of giving guidance on the specific issue of the risk on return from depleted uranium munitions in different areas of Kosovo. Mr MS comes from Mitrovice; Mr FZ from a village in the west of Kosovo; Mr EH and Mr S D from towns near Gjakova, and Mr MM from Prizren.

7. None of these appellants relied upon depleted uranium risk when claiming asylum initially. They do not rely on a threatened breach of Article 3 of the European Convention on Human Rights and Fundamental Freedoms 1950. They do however, claim that return threatens to breach their Article 8 rights (family and private life,

including physical and moral integrity), and they put that claim in three ways –

(i) in the case of FZ, that since his British wife has suffered a miscarriage previously, it would breach her family and private life rights to expect her to return to an area where depleted uranium ordnance raised the risk of spontaneous abortion; and generally

(ii) that the Secretary of State is under a duty of continuing disclosure of all and any evidence available to him to establish where in Kosovo there is a risk from depleted uranium, and that absent such disclosure, the anxiety and fear which the lack of knowledge generates would breach Article 8 if the appellants were to be returned; and

(iii) that the risk in the appellants' home areas from depleted uranium residue is sufficient to engage Article 8.

8. The scientific evidence is in its early stages, as the use of depleted uranium to improve the penetrative capacity of military ordnance is a recent innovation. The following is a summary of matters set out in the Department of Defense report. We all breathe in and consume in food and water small quantities of natural uranium on a daily basis. Natural uranium is more radioactive than depleted uranium. Depleted uranium is 1.7 times denser than lead and is a by-product of the process by which natural uranium is enriched to produce reactor fuel and nuclear weapons components. It is 40% less radioactive than natural uranium, and a depleted uranium round becomes sharper as it penetrates armour.

9. Exposure to depleted uranium, as to natural uranium, occurs primarily through inhalation, ingestion, and to a lesser degree, external irradiation. The depleted uranium rounds leave depleted uranium oxides in the form of a very fine dust, and this mostly settles close to the impact site. The rest is rapidly diluted and dispersed by the effect of wind and weather.

10. In 1999, US A-10 aircraft fired depleted uranium munitions (about 31,000 rounds) containing 10.2 tons of depleted uranium, at 85 locations in Kosovo. Since then, many nations who deployed military personnel to the Balkans have tested the areas their troops occupied for depleted uranium contamination to assess the health risks. In addition, several international organisations have researched depleted uranium and tested the Balkans environment to determine levels of contamination and evaluate all routes of exposure (ways for depleted uranium to get into the body from the environment). Depleted uranium oxide dust is very fine, and can be

inhaled by anyone nearby at the time of impact, or resuspended and inhaled later.

11. While breathing or ingesting very large doses of either natural or depleted uranium could cause kidney problems or damage lung tissue, these problems have not been found in medical follow-up of Gulf War veterans with the highest depleted uranium exposure (those whose armoured vehicles were struck by depleted uranium rounds).

12. At least 13 countries have monitored soil, air water, vegetation and food samples in the Balkans, including Belgium, Bulgaria, France, Germany, Greece, Hungary, Italy, Poland, Portugal, Sweden, Switzerland, the United Kingdom, and the United States. All the programmes were to monitor combatants or military personnel involved in peacekeeping. The researchers found small amounts of depleted uranium within one metre of the impact sites, and mostly only in the impact hole. UNEP found no contamination of the water, milk, or buildings in Kosovo in autumn 2000.

13. WHO in their March 12 2001 report concluded that there was no convincing evidence of depleted uranium affecting the health of the Kosovo population, who had been in Kosovo throughout the war. They concluded that 'for the general population, neither civilian or military use of depleted uranium is likely to produce exposures to depleted uranium much above normal background levels' for natural uranium. A report issued by the European Commission found that radiological exposure to depleted uranium did not result in a detectable effect on human health, and that a cumulative dose from contaminated drinking water, soil, or the food chain, would still produce very low resulting doses, which would be observed first in renal toxicity before any other damage, including cancer.

14. The overall conclusion is that only under the most extreme circumstances, such as presence in a vehicle struck by a depleted uranium penetrator, could adverse medical consequences be possible. There was no widespread depleted uranium contamination and no detectable impact on the health of the general population or deployed military personnel. None of this evidence assists with the risk to those who were absent from Kosovo during the conflict and would be returning four years after the event, but we considered that it was likely that risk would be even lower.

15. The appellants rely on evidence prepared in respect of Italian peacekeeping forces who went to the areas where the ordnance had been used, about ten months after the end of the war, and on research by Dr Christopher Busby (working with Professor Hooper)

which seeks to establish a continuing risk. Professor Hooper was not called. We have heard oral evidence from Dr Busby.

Preliminary issue

16. Mr Lewis raised a preliminary issue as to whether the Secretary of State had complied with a direction by Mr O'Brien Quinn that he should produce for the Tribunal and the appellants all documents in his possession relating to the risks to the civilian population of Kosovo arising from the use of depleted uranium.

17. In January 2002, in response to that direction, the Secretary of State served a paper by a Mr Nick Swift, country officer for Kosovo, dated 19 November 2001. That document relies upon and summarises an information paper by the U S Department of Defense published on 25 October 2001, containing 'a summary of reports from countries and international organisations performing environmental assessments in the Balkans and medical surveillance on Balkan veterans'. It quotes from the UN Secretary-General's report on UNMIK, presented to the Security Council on 13 March 2001, and indicates that the Secretary of State is seeking to obtain further details of the measures taken by UNMIK in relation to depleted uranium since March 2001.

18. Between January 2002 and just before the hearing on 11 October 2002, none of the appellants' representatives suggested that the Secretary of State's discovery was inadequate or non-compliant. Mr Lewis' application was that these appeals should be allowed because of breach of direction.

19. The Tribunal considered that the Secretary of State had complied with Mr O'Brien Quinn's direction, to the extent already set out, as long ago as January 2002. It would not permit Mr Lewis now, as late as October 2002, to embark upon a fishing expedition, which was not supported by relevant authority, nor to allege that the disclosure given was non-compliant when there had been no earlier suggestion that there was any defect in the Secretary of State's discovery in response to Mr O'Brien Quinn's direction. There was no general duty on the Secretary of State to assist the appellant to prove his case; to the lower standard applicable for this Convention, the burden of proof remained with the appellants.

Proposed duty on Secretary of State to investigate and disclose material not in the public domain and not relied upon by him

20. Mr Lewis confirmed that in none of the present appeals had depleted uranium been a basis of claim for any individual appellant before removal directions were set. There was no material regarding depleted uranium before the Secretary of State when he made the decisions to remove these appellants. The appellants

relied upon the very short time limits on the accelerated procedure at the material time on manifestly unfounded cases (two days for notice of application, hearing within three days, appeal hearing within seven days) as reasons for not arguing depleted uranium at that stage.

21. The Tribunal pointed out that in the case of Mr MS, due to Home Office delays, the appellant had actually had years, not days, to prepare his arguments. Further, in a House of Lords decision based specifically on the accelerated procedure Abdi and Gawe v Secretary of State for the Home Department and Special Adjudicators (1996) Imm A R 288 at p305, Lord Justice Mustill in the lead decision said this -

> "So I am not persuaded that justice requires that the Secretary of State should give discovery in asylum appeals, even if it were possible (which it is not) to reconcile such an obligation with the express provisions of the 1993 rules. Indeed I find much force in Mr Pannick's argument that if the Courts were to supplement the rules by imposing some such obligation on the Secretary of State, there would be a risk of frustrating the evident legislative purpose that 'without foundation' appeals should be considered with all due speed. This was the view expressed by Neill LJ and Peter Gibson LJ in their carefully reasoned judgments in the Court of Appeal. It is sufficient to say that I agree with their reasoning."

22. That decision binds this Tribunal. Accordingly, there was no duty on the Secretary of State to embark upon an investigation to identify evidence not in his hands for the preparation of his country reports, in order to assist these appellants in making their cases.

23. The present application goes further and posits a duty to search for additional information not in the public domain but available to Governments and which had not formed part of the Secretary of State's decision to refuse leave to remain. Mr Lewis could not identify any particular documents which should have been disclosed, or references in the disclosed material to documents which should have been disclosed. The duty imposed on the Secretary of State would be unacceptably wide and extremely onerous.

24. Mr Lewis' final argument on the investigation point was that the Tribunal should have regard to paragraph 196 of the UNHCR Handbook on the Determination of Refugee Status, which sets out the shared duty in asylum appeals between the examiner and the appellant to try to establish the facts. That argument also cannot succeed, for two reasons. First, as already explained, since these appellants did not put the depleted uranium argument at first instance, the Secretary of State had no opportunity to examine the depleted uranium question before reaching his decision on the appellants' appeals. The appellants, in seeking to rely on the

paragraph 196 shared duty, have not discharged their part of the duty.

25. Second, the Handbook constitutes guidance for the determination of refugee status, and is not strictly relevant to questions of human rights arising under the European Convention on Human Rights and Fundamental Freedoms 1950. That convention predates the Geneva Convention relating to the Status of Refugees 1951 and its protocols by one year. The Tribunal is satisfied that had the Handbook intended to deal with both Conventions, it would have said so.

26. We are not prepared to find that the Secretary of State is obliged to seek out and disclose material upon which he has not relied, and which is not in his knowledge.

Proposed duty of disclosure of physical risks within the knowledge of Secretary of State and Article 8

27. We then turned to the argument that return to Kosovo without full disclosure of physical risks known to the Secretary of State would breach the European Convention on Human Rights and Fundamental Freedoms 1950. Mr Lewis accepted that he would be in difficulty if he had to rely on Article 3 of the European Convention on Human Rights and Fundamental Freedoms 1950; this argument turned on Article 8 in the sense of physical and moral integrity.

28. Mr Lewis argued that there was an overriding requirement of fairness. The report of the Secretary of State was biased and incomplete. He took the Tribunal to the decision of the Court of Appeal on appeal from the Divisional Court, in Thirukumar (1989) Imm A R 402, at 414.

29. Thirukumar deals with the general requirement for fairness in asylum cases as between the Secretary of State and the appellant, in that the mind of the appellant must be directed to any consideration which would, as matters stood, defeat his application. He must be reminded of, or preferably shown, his answers in earlier interviews if the Court or Counsel will rely on them. Lord Donaldson, MR specifically indicated that –

> "I am not intending to make any general statement about natural justice or procedural propriety but simply to indicate what, in the peculiar circumstances of cases such as these, fairness seems to me to require.'

30. The Thirukumar decision is specific to its own particular circumstances and will not bear the interpretation which Mr Lewis sought to put upon it. It is authority only for appellants being reminded of their answers at earlier interviews. Mr Lewis further argued that the Secretary of State for the Home Department was in

an unique position as he had access to sources not available to appellants such as other Government Departments, diplomatic sources, and other Governments.

31. Mr Lewis also relied on the minority judgment of Steyn LJ in Secretary of State for the Home Department v Abdi and Gawe (1994) Imm A R 402. Dealing with a duty of disclosure posited by Sedley J in the decision under appeal, Steyn LJ held that the proposed duty did not frustrate the aim of the legislation or impose an impossible burden on the Secretary of State. Although the argument in this respect is potentially relevant to the argument now put forward, we bear in mind that the observations of Steyn LJ are not the view of the majority of the Court. The majority view was that there was no obligation on the Secretary of State to provide to the parties and the Adjudicator all the information on which he had relied. Accordingly, this element of the appellants' claim also fails.

The risk from depleted uranium in Kosovo today

32. We then turn to the actual risk to these appellants from depleted uranium on return to Kosovo today. It is to this part of the claims that Professor Hooper's and Dr Busby's evidence was relevant. In all cases in this combined appeal, the return would be to Pristina, not elsewhere in Kosovo. The question then is whether in Pristina, or perhaps in the appellants' home areas (this is a matter to which we will return later) there is any present risk from spent depleted uranium munitions at a level which would engage Article 8 of the European Convention on Human Rights and Fundamental Freedoms 1950.

33. Mr Lewis argued, following Lopez Ostra v Spain (1994) 20 EHRR 277, that significant environmental damage can engage Article 8. In that case, Spain, which was a party to the Convention, exposed the individual to severe environmental pollution. The decision turns on the fear induced in individuals by not knowing the extent of the risk; the potential damage to young children; and the absence of information for individuals regarding the risks which they were to undertake.

34. The town of Lorca in Spain has a heavy concentration of leather industries and several tanneries there, owned by the same company, which built a plant for the treatment of liquid and solid waste. The plant operated without a licence for noxious, dangerous, or nuisance activities, despite having been built with a State subsidy on municipal land. It was just 12 metres away from the Applicant's home. Owing to a malfunction, the plant's start up in 1988 released gas fumes, pestilential smells and contamination, which immediately caused health problems and nuisance to many residents of Lorca. The Town Council evacuated local residents for several months, and then the Applicant returned and lived in Lorca

until 1992. The plant continued to emit noxious fumes and cause health problems for the Applicant and her daughter.

35. The European Court of Human Rights found that Article 3 was not engaged, but that in the particular circumstances of the case, the respondent State had not struck a fair balance between the competing interests of the economic wellbeing of the town and the Applicant's effective enjoyment of her right to respect for her home and her private and family life. The factual matrix in Lopez Ostra is dissimilar to that in the present appeals, since the Applicant was not returned by a third state to live in an at risk area, but was directly put at risk by the negligence of a contracting State in its control of emissions in her home town. Even then, the Court considered that its decision was finely balanced as between Article 8(1) and 8(2), having regard to the margin of appreciation and the economic interests of Spain as a national authority.

36. Mr Lewis also relied upon the decision of the European Court of Human Rights in Guerra and others v Italy (1998) 26 EHRR 357 in which the Court found that there could be a positive obligation in environmental cases to respect the family and private life of an individual as guaranteed by Article 8. Again, that obligation is on the State where the pollution is occurring, and again there was neglect by the State in question to inform individuals of a risk of toxicity, of which they were aware for a period of at least six years.

37. Mr Lewis sought to draw an analogy from these two cases and to extend it to an obligation on the United Kingdom not to return persons to a country of origin where it was aware of a possible depleted uranium risk. The United Kingdom, he argued, was aware of the location of areas of depleted uranium pollution in Kosovo and the appellants were entitled to information from the United Kingdom as to areas in Kosovo where there might be a risk to physical integrity sufficient to breach Article 8 of the Convention.

38. The Tribunal asked Mr Lewis why that entitled the appellants to claim that they should not be returned to *any* part of Kosovo; Mr Lewis argued that despite the map which had been filed, it was not possible to be certain of every site where depleted uranium ordnance had been used and as radiation was windborne, one would also need to know the prevailing winds. It was therefore difficult to make an assessment as to whether the appellants' home areas should be regarded as safe, or not.

39. He contended that if the Secretary of State happened to be aware of information regarding a person's home area, he was under a duty to provide it to that individual. He asked that the Secretary of State undertake to give that information before removal. He accepted that there must be an element of trust that the Secretary of State would not deceive the appellants.

40. Mr Lewis argued that if the documents existed, the Secretary of State was under a duty to disclose them, and that was a continuing duty. He relied on a decision of the European Court of Human Rights in McGinley and Egan v United Kingdom (10/1997/794/995-996) and sought to revisit the argument that some unspecified documents existed which the Secretary of State ought to have disclosed.

41. At page 29 of that decision, in paragraphs 96-99, the Court reminded itself that the Applicant was serving as a plant operator on Christmas Island when the United Kingdom's nuclear test programme took place. He was 25 miles from one of the detonations on the day on which it occurred. He was ordered to line up in the open, but no individual monitoring took place to establish whether or not he had been exposed to radiation at a dangerous level. The Court accepted on those facts that Article 8 was engaged, and that the radiation levels records for the areas in which they were stationed should have been made available. It accepted that the applicants had an interest under Article 8 in obtaining those records.

42. However, the Court distinguished Guerra and others v Italy (1998) 26 EHRR 357 in relation to any other relevant documents as their "existence…has not been substantiated and is thus no more than a matter of speculation." At paragraph 101, the Court said this –

> "100. The Court recalls that the Government have asserted that there was no pressing national security reason for retaining information relating to radiation levels on Christmas Island following the tests (see paragraph 81 above).
> 101. In these circumstances, given the Applicants' interest in obtaining access to the material in question and the apparent absence of any countervailing public interest in retaining it, the Court considers that a positive obligation under Article 8 arose. Where a Government engages in hazardous activities, such as those in issue in the present case, which might have hidden adverse consequences on the health of those involved in such activities, respect for private and family life under Article 8 requires that an effective and accessible procedure be established which enables such persons to seek all relevant and proper information."

43. It is clear from the McGinley decision that the obligation is on the national Government which has engaged in a potentially hazardous activity to disclose the information it has, not to go on a fishing expedition for information which the applicants cannot specify and which may not exist. The Secretary of State has disclosed a map of areas where depleted uranium ordnance was used in Kosovo in 1999. He says that there is no other evidence or material, and there must be an element of trust in this respect. Mr Lewis did not seek to argue, when it was put to him, that a continuing duty extended after the appellants' return to Kosovo to notify them of further scientific information which might come into the hands of the Secretary of State. Once returned to Kosovo, their

Article 8 rights were the responsibility of the national authorities (or international surrogates) in Kosovo.

44. Mr Lewis contended that a scientific debate existed, as to the risk from depleted uranium, which could not be ignored. The United Kingdom had set up a panel to investigate it. Mr Lewis renewed his application for an undertaking or at least a 'declared attitude of good faith' that the appellants would be told of any actual or seriously debatable risk, in relation to information which was not otherwise in the public domain and could be made easily accessible to the individuals. He was prepared to assume that the Secretary of State would not knowingly or willingly breach the appellants' human rights.

45. For the Secretary of State, Miss Giovanetti said that she was astonished that the appellants would now be content to return merely on the basis that they would be given information as to where the military strikes took place. All previous requests for disclosure had related to the level of risk to the general population and there had been no request to disclose the sites where depleted uranium had been used. The national authorities in Kosovo, as the Secretary of State's report indicated, were addressing the matter.

46. In relation to the posited general obligation of disclosure reviewed by the House of Lords in Abdi and Gawe, Miss Giovanetti said that the Tribunal had no jurisdiction to impose a duty of freestanding disclosure by the United Kingdom Government. The appellants' claim must succeed as a breach of the European Convention on Human Rights and Fundamental Freedoms 1950, or fail.

47. Miss Giovanetti was not aware of any authority requiring Convention States to notify individuals of hazards outside their own territory, and the proposed overarching duty of general disclosure set too high a standard. If any duty existed, the short report already provided was more than ample to meet it. The European Court of Human Rights decision in McGinley and Egan v United Kingdom (10/1997/794/995-996) turned on its own particular facts, involving deliberate exposure by the national authority to high levels of radiation. There was no indication in this or any of the other decisions on which the appellants relied that the European Court would approach an expulsion case in the same way. Further, there had been a total lack of any request to the Secretary of State for specific information and the Secretary of State had never been given the opportunity to make a decision based on the depleted uranium risk.

48. At best, the duty amounted to a positive duty to take reasonable and appropriate measures to safeguard physical integrity. The Secretary of State did not accept that there was any real substantial risk or hazard, and it had always been open to the appellants to conduct their own research. There was no material on

the appellants' side to support the claimed risk, and absent such a risk, this was a bad faith argument. If there were a real risk, the Kosovan population would know of it by now and evidence would exist. It would be very surprising if there were a real radiation risk without the local population being aware of it, three years after the war.

49. In reply, Mr Lewis insisted that the duty was not so onerous as to frustrate the procedure. The CIPU Country Report for Kosovo should be reviewed and updated to include information which might suggest the areas of risk. The Court of Appeal in Abdi and Gawe indicated that the information which should be disclosed was that relevant to a decision maker. The Secretary of State was not claiming privilege here (Thorpe LJ in R v Secretary of State for the Home Department ex p Besnik Gashi (1999) EWCA Civ 1099).

50. The Tribunal observed that before the question of privilege arose, it would be necessary to establish a general rule. Mr Lewis accepted that the Secretary of State's letter of 20 July 2001 gave an extensive review, but argued that it failed to provide all the relevant information for the appellants to assess the risk to them. He argued again that the Secretary of State was under a duty to disclose relevant information, which the individual could not obtain for himself, such as inter-Governmental correspondence and advice, received from diplomatic posts. He accepted that some discretion must be afforded to the Secretary of State.

51. When the Tribunal asked what the specific breach was on which he relied, Mr Lewis indicated that his claim was based on the Secretary of State's failure to provide a map or locations with all the information which he had of areas where depleted uranium ordnance was used, or in the alternative, a certificate that he did not have any such information. The documents opposed to those summarised in the Secretary of State's letter were a tiny minority, but should be summarised as though of equal weight.

52. The Tribunal ruled that, as the appellants had already had two years to research their case, and the Article 8 duty if any on the Secretary of State was clearly very light, the disclosure point was bad and could not found a successful appeal before the Immigration Appeal Tribunal. We invited Mr Lewis to proceed with the substantive issues.

53. There were two remaining live issues, first, whether there was in fact any risk from depleted uranium in Kosovo, and second, whether even if such a risk existed, removal of these appellants would breach Article 8 of the European Convention on Human Rights and Fundamental Freedoms 1950.

54. Mr Lewis conceded that Professor Hooper's evidence showed that there were areas of Kosovo where there was no or very little

likelihood of a breach of Article 3 or 8 if the appellants were returned there. He would not be calling Professor Hooper, as the argument had concentrated on disclosure. Mr Lewis accepted that any danger was likely to be localised.

55. The Tribunal then heard the oral evidence of Dr Christopher Busby, based upon his expert report. That report, and that of Professor Hooper, represents a different scientific conclusion to that of the thirteen or more national investigations and three international investigations summarised earlier in this determination, a point which Dr Busby very fairly makes himself at page 4 of his report. Dr Busby criticises the Department of Defense report at some length and details conversations which he had with its author. He describes himself as an epidemiologist, but is somewhat vague about the tests he actually performed and their scientific results. He relies upon anecdotal evidence of ill health in the Italian and Portuguese veterans exposed to depleted uranium. Indeed, Dr Busby's investigations (accompanied by a television cameraman) collected samples which were not always analysed.

56. More significantly, nothing in this report deals with the risk to those who were not present during the conflict at all and only return after four years. That was an important gap in the evidence before us, which would need to be dealt with in oral evidence. Dr Busby adopted his expert report. He explained that he had collected and tested samples from areas on the NATO map of depleted uranium use, following a list of coordinates, which were supplied with that map. The expedition had also made opportunistic surveys of areas where they simply happened to be, and where the signals were strong, they brought back samples.

57. They discovered some areas of increased radioactivity, which were probably caused by depleted uranium, although not all of his samples had actually been analysed. Dust in the streets where children were playing was radioactive in 46% of sites, at levels which could cause harm. He considered that there might be a risk near Pristina, where there had been heavy cruise missile damage, possibly from depleted uranium warheads. Significant levels of depleted uranium could cause genetic mutation, an increased risk of cancer and general malformation.

58. Mr Lewis asked whether in his expert knowledge, Dr Busby was aware of any relevant unpublished reports, Dr Busby said that he was aware of a couple of pieces of work on Gulf Veterans with chromosomal damage at the same level as for victims of the Chernobyl nuclear accident. Four years earlier, he and Professor Hooper had been the dissenters, but that was changing. He had recently lectured to an international conference on low dose radiation effects, to the European Committee on Radiation Waste, which would be published in the next month, dealing with the

difference between internal and external radiation. Dr Busby was the Secretary of that organisation.

59. Mr Lewis asked Dr Busby what would be the radius of contamination. That was very difficult, the witness said, as it was not a radial problem and would depend on the topology. If depleted uranium ordnance was used in a valley it could potentially contaminate the entire valley, but one might be safer on the mountain. If returned, he personally would make the decision to live on high land upwind of where depleted uranium ordnance had been used.

60. In cross-examination, Dr Busby confirmed that the only in-depth health study was an Italian study of peacekeepers who had been in the depleted uranium areas ten months after the war. There was no more recent epidemiology, nor, as far as Dr Busby was aware, was there any in-depth study of people returning today or very recently. The Italian Peacekeepers study showed 17 cancers, 2 lymphomas and 2 leukaemias in 40,000 peacekeepers.

61. Dr Busby accepted that this was a low rate of cancer, but said that it would be lower as soldiers were healthier, and people who were going to get cancer did not join the army. It was a tiny proportion, but the rate of cancer was normally even smaller. Over 20 years, in 40,000 people, an additional 20 people would get cancer, and the Tribunal should understand that real people would actually die. There would be increases in infant mortality and congenital malformation, but it was impossible to generalise.

62. In response to questions from the Tribunal, Dr Busby said that he had a number of different areas of interest in this matter. He had trained as a chemical physicist and physical chemist and had fourteen years' experience of radiation and health matters. Dr Busby told the Tribunal that depleted uranium had a half-life of 4.7 billion years.

63. However, in the area for which his expert report had been commissioned, Dr Busby described himself as an amateur. He was director of an independent research organisation called Green Audit, which published its own material so that the papers would exist. There was no peer review. Dr Busby was also a member of the International Society for Environmental Review, with five years' experience of epidemiology calculation.

64. His evidence was that even where there was a significant increase in lymphomas, such an increase would not necessarily be caused by depleted uranium. Dr Busby was concerned about the concentration of radiation in the air. Sunlight and rainfall pumped the uranium around, and it would be re-suspended in the air in sunny weather without rain. As time went on, it might work its way below the surface soil and not become re-suspended. A significant

level of uranium had been found over ten months after its use in 1999. It was untrue to say that depleted uranium could not be found in water. The problem was that water always contained ordinary uranium, and it was difficult to measure levels of *depleted* uranium.

65. The UNEP report did not distinguish between particles and solids. Samples had been split and sent to two different laboratories for analysis and showed that the 0.2-micron filter was removing particles. This, Dr Busby said, suggested that the uranium was in rainwater at the rate of 30,000 particles per litre. The ten tons of depleted uranium munitions known to have been used amounted to 300 million particles for every person in the European Union. An ordinary sample of rainwater would contain particles, but spring water would not.

66. Epidemiology would not answer the question, as it was not possible to know if the rate of cancers was higher than before, because Kosovo did not keep information as to the incidence of any specific cancer. There was some anecdotal evidence of an increase in Sarajevo where depleted uranium had been used.

67. Dr Busby was then asked about exposure to radiation at the levels in Kosovo today, as opposed to that experienced by soldiers on the battlefield. He confirmed that there was already a significant decrease between the levels for combatants and the levels found in Italian peacekeepers, who came to the region after the fighting. Dr Busby accepted that levels would have continued to fall; exposure to the quantities of radiation in Kosovo today would not be as dangerous as that to soldiers on the battlefield.

68. Ms Giovanetti did not wish to cross-examine further at the end of the Tribunal's questions. Mr Lewis re-examined. He established that Dr Busby was also a member of the Green Group of the European Union Parliament, that he was on the Ministry of Defence Oversight Board and had advised the Irish State. He was a member of the European Committee on Radiation Risk and the National Speaker on radiation for the Green Party.

69. Dr Busby said that during the collection of soil samples in Gjakova, he and all his staff wore nuclear and biological protection suits. The radiation would not pass through snow. Their opportunistic sampling in Pristina had not been under the same level of precautions, because he had then believed that there was no problem in Pristina, but had afterwards felt that there was an element of risk. In each case, he and his team took an informed decision on whether to wear bio protection suits, based on the available evidence, but it was difficult to draw a line around 'safe' areas.

70. In his final submission, Mr Lewis argued that the evidence before the Tribunal amounted to evidence of severe environmental damage. On the evidence before us, which it was our duty to hear and weigh, there was a significant risk. Even if the Tribunal were to find that the risk was not significant, the very real concern and doubts expressed by Dr Busby went to the reasonableness of return to the depleted uranium areas.

71. The Tribunal pointed out that on the Secretary of State's evidence, the levels of depleted uranium in Pristina were not high. If an individual chose to go from there to an area where they were higher, that surely was not a breach by the Secretary of State engaging the human rights Convention? Mr Lewis accepted that the evidence which the Tribunal had seen and heard did not necessarily rule out the whole of Kosovo. If the Secretary of State provided such information as he had, on an ongoing basis, there would be no breach. However, if he failed to do so, Mr Lewis continued to argue that would constitute a potential breach of the Convention.

72. Busby and Hooper had criticised the Secretary of State's report and that of the United States Department of Defense. The UNEP report came out in April or May 2002, but had not been provided. The Secretary of State's summary of the World Health Organisation report was selective and had been justifiably criticised. He contended that the appellants had demonstrated a risk on return to Kosovo.

73. In relation to the marriage element of Mr EH's claim, the evidence was that his British wife had previously lost a child. Mr Lewis contended that the evidence of potential spontaneous abortions in depleted uranium contaminated areas was relevant to the proportionality of requiring Mr FZ to return to Kosovo to make his application for entry as a spouse. The decision was in February 2001 and the parties had married in March 2002. Mr Lewis asked the Tribunal to allow all of the appellants' appeals.

74. For the respondent, Miss Giovanetti reminded the Tribunal that the appellants had accepted that the circumstances in Kosovo did not engage Article 3 of the European Convention on Human Rights and Fundamental Freedoms 1950. Full disclosure had been made, including the UNEP map of areas where depleted uranium ordnance had been used. The Secretary of State's short report of 19 November 2001 indicated that K-FOR had briefed UNMIK on the depleted uranium strike areas which were being marked.

75. It was not appropriate to expect the Tribunal to resolve the scientific debate, though it was relevant to note the views of such bodies as WHO, UNEP, and others. As regards Dr Busby's evidence, and the

Italian report, the troops whose health had been analysed had been at the sites either when the depleted uranium was used, or not long after. There was no authoritative evidence whatsoever on recent returns, and the evidence before the Tribunal showed an admittedly tiny increase in quite rare conditions. The risk was confined to specific, marked areas and was not over the entire area of Kosovo.

76. Further, Miss Giovanetti contended that such interference with the appellants' Article 8 rights as was proposed was limited to return to Pristina. Where the appellants went after that was a matter for them, and if they chose to return to home areas, where there might be increased risks from depleted uranium ordnance, that would not be because of any lack of respect for their family and private life by the United Kingdom Government. Further, the European Court of Human Rights was quite clear that Article 8(2) was applicable and the level of risk in the evidence before the Tribunal was plainly outweighed by the United Kingdom's legitimate interest in controlling immigration.

77. Miss Giovanetti argued that even if the scientific evidence were accepted in full, it would be an extraordinary suggestion to say that asylum claimants could not be returned to Kosovo as a whole because of a slightly increased risk of a very rare disease in their home areas. She asked the Tribunal to dismiss the appellants' appeals. Mr Lewis did not exercise his right of reply.

Conclusions and findings

78. We reserved our decision for postal delivery, which we now give. For the reasons already set out, we were not prepared to allow these appeals based upon alleged breaches of directions. There was no breach of directions.

79. Nor are we satisfied that we should impose on the Secretary of State a duty of investigation of materials available to Government Departments which is not in the public domain. The present jurisprudence simply does not support such a duty, the burden on the Secretary of State would be unacceptably onerous, and the authorities set out above bind the Tribunal.

80. As regards the postulated duty of disclosure of the materials upon which the Secretary of State bases his CIPU Country Report or other background reports, we are satisfied that the sourcing of the Country Report discharges any duty which exists, and we do not find that the Secretary of State is obliged to provide full copies of all the materials which support his conclusions. The suggestion that there is a continuing duty after the individuals have returned to Kosovo, to the extent to which Mr Lewis still relied upon it, is

unsustainable. If the United Kingdom were at risk of breaching Article 8, that breach would occur at the latest when the individuals were returned to Pristina.

81. We now turn to the scientific and other evidence in relation to the actual risk on return. The Secretary of State's paper in response to discovery adopts in its entirety the US Department of Defense paper, *Depleted Uranium Environmental and Medical Surveillance in the Balkans,* published on 25 October 2001 which –

> "...provides "a summary of reports from countries and international organisations performing environmental assessments in the Balkans and medical surveillance on Balkan veterans". Although the Department of Defense naturally has a military perspective, the reports considered by the Paper specifically address the effect of depleted uranium upon the civilian population as well as military personnel."

82. The Information Paper annexes summaries of the main conclusions and recommendations from several research projects specifically addressing the risk to the civilian population in Kosovo. We note that the appellants did not rely upon, nor include as part of their documentation, full copies of any of these materials, but we have made available and summarised the Department of Defense paper, which is itself a summary of a broad international consensus as to the risk to military personnel exposed to depleted uranium during or shortly after the war, and to the civilian population present during the delivery of depleted uranium ordnance in the 1999 conflict. None of the international monitors detected any significant levels of depleted uranium contamination, nor any significant risk to the health of the population from the presence of depleted uranium.

83. Precautionary measures suggested, mainly for UNMIK to carry out, included: cleaning of contamination points; depleted uranium sites to be marked as appropriate until cleared; children to be prevented from playing in the immediate area of contamination; information to be given to the local population on precautions to be taken on finding depleted uranium material; groundwater used for drinking to be monitored for contamination (none had been found to be contaminated thus far) and improved recording of medical data.

84. UNMIK took the matter very seriously. On 13 March 2001, the Secretary-General reported to the Security Council that a review of hospital records had found no increase at all in the past four years in the incidence of adult leukaemia in Kosovo. UNMIK cooperated closely with UNEP, K-FOR, and WHO, as well as national public health and environmental institutions.

85. Significantly, the WHO assessment team found a minimal risk to public health from depleted uranium, and recommended an information campaign, which was in place at 13 March 2001, to encourage the public to report depleted uranium findings. It also recommended improved medical health data and a comprehensive health information system.

86. K-FOR had briefed UNMIK on depleted uranium strike areas and they were being marked. That is over two years ago now. There is no suggestion that they are not now properly marked and fenced off so that children cannot play on the depleted uranium sites.

87. In effect, the Tribunal is asked to prefer Dr Busby's rather unsatisfactory and admittedly amateur report to the expertise of the World Health Organisation and the United Nations Environment Programme, all of which is more detailed and probably more current. There are flaws in his research, which is vague and lacking in objectivity; it does not appear to have been particularly methodical, some samples have not been analysed and his explanation of the supporting statistical evidence was unclear and at times contradictory. The research has not been subjected to peer review.

88. On careful consideration of this research, this Tribunal is not satisfied to any standard that Dr Busby's evidence is so persuasive that it ousts the more rigorous work of the international organisations summarised in the Department of Defense report. Therefore, the Tribunal prefers the evidence of the WHO, UNMIK, K-FOR and UNEP that even as early as 2000/1 there was no significant depleted uranium contamination or risk to the general population of Kosovo.

89. We also have regard to the lack of any evidence from Kosovo itself that there has been any adverse health effect. In the three years between the hearing of this appeal and the Kosovo conflict, there has been ample time for a pattern of significant or severe environmental pollution to be identified, and it has not been found. Further, the evidence which is before us does not relate to people who may return after the depleted uranium has dispersed, but to those who were in Kosovo when it was used, or shortly after. In effect, the scientific evidence on which the appellants rely is not evidence as to the risk on return at all, and thus cannot possibly oust the more recent and comprehensive international materials.

90. Further, Dr Busby's research plainly predates the UNMIK marking of sites and prevention of children playing in depleted uranium contaminated areas. Dr Busby and Professor Hooper both accept that some areas of Kosovo are safe, as is evidenced in particular by the approach of Dr Busby and his team to the donning of bio protection suits in some areas but not others. The scientific

evidence put forward by Dr Busby establishes, at best, a slightly increased risk of a very rare disorder in some areas.

91. Accordingly, we find that even in areas where depleted uranium was used, the risk to these appellants if they were to be returned now is minimal or non-existent. In the present appeals, the risk is simply not proven. Even taking the appellants' case at its highest, on Dr Busby's evidence, the risk is not at a level which would engage Article 8.

92. The present appeals also seek to impose on the United Kingdom as a third party State a duty to give these appellants a right of residence in the United Kingdom based not just upon environmental pollution risks in Kosovo, but upon a fear of risk of alleged pollution, in this case on return to an area of former conflict where this new weapon was used. Mr Lewis did not suggest that the fact that the weapon was used by the United Kingdom during that conflict made any difference to the argument, and he was right not to do so: the Article 8 test is an objective one.

93. The Tribunal considers that a high and demanding threshold should be set before imposing such a novel duty on a sovereign State in relation to an area outside its national boundaries, and that at the very least, such a duty would require a severe and proven environmental risk. There is no such risk here.

94. If we are wrong, and Article 8(1) is engaged, the risk is so low that the United Kingdom's right to regulate immigration in the national interest under Article 8(2) easily outweighs it. We have considered Miss Giovanetti's argument that return would be to Pristina, and any onward travel to the home area would be the appellants' choice. That is in effect an internal flight argument, but given the lack of evidence of any significant or substantial risk even in the home area, it is not an argument on which it is necessary to rule.

95. Finally, in relation to the circumstances of Mr FZ and his wife, we find that there is no evidence before us which meets the appropriate lower standard that Mrs Z would be at increased risk of spontaneous abortion in Mr FZ's home area were the couple to return together. It was not alleged that she was pregnant at the date of hearing. Nor is there any obligation on the couple to return together; it remains open to Mr FZ to return alone and apply for readmission as a spouse. Following the Mahmood principle, and in view of the brevity of the marriage at the date of hearing, it is not disproportionate to expect the appellant to do that. The marriage issue, despite Mrs Z's gynaecological history, therefore does not alter the Tribunal's determination in Mr FZ's appeal.

96. For all of the above reasons, the appellants' appeals are dismissed.

Mrs J A J C Gleeson
Vice-President
26 June 2003