Case Nos: C/2000/3468 and C/2001/0109

Neutral Citation Number: [2001] EWCA Civ 782
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM IMMIGRATION APPEAL TRIBUNAL
ON APPEAL FROM CROWN OFFICE LIST
(MR JUSTICE DYSON)

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday 24th May 2001

B e f o r e :

LORD JUSTICE SIMON BROWN
LORD JUSTICE CHADWICK
and
LORD JUSTICE LONGMORE

- -

CANAJ	Applicant
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	Respondent
and	
VALLAJ	Applicant
- and -	
A SPECIAL ADJUDICATOR	Respondent

- -

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

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Mr A. Nicol QC & Mr M. Henderson (instructed by Ms G. Hughes of Avon and Bristol Law Centre) for the Applicant Mr Canaj
Mr I. Macdonald QC & Ms S. Harrison (instructed by Messrs A.S. Law of Liverpool L7 7EL) for the Applicant Mr Vallaj
Mr S. Catchpole (instructed by the Treasury Solicitor) for the Respondents

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Judgment

LORD JUSTICE SIMON BROWN:

1. The applicants in these two linked cases are Kosovar Albanians who resist repatriation to Kosovo and claim asylum here. The essential background to the cases is United Nations Security Council Resolution 1244 by which the powers of government over Kosovo on 10 June 1999 became lawfully vested in UNMIK (United Nations Interim Administration Mission in Kosovo), supported by KFOR (the internal security force for Kosovo). One of UNMIK's main responsibilities was "assuring the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo" under the supervision of UNHCR.

2. In March 2000 UNHCR published a report stating that the vast majority of Kosovar Albanians who had fled the conflict in Kosovo during 1998-9 had since returned (over 800,000 of them), that whilst there were certain individuals who could face danger on return (for example, those of mixed ethnic origin, those associated with the Serbian regime, and those opposed to the former KLA), most of those remaining in asylum countries no longer had immediate protection needs, and asylum claims not falling into the specified categories "may be considered in accelerated procedures" (although, of course, each claim requires individual consideration).

3. Neither of these applicants falls into an endangered category. Both are citizens of the Federal Republic of Yugoslavia (FRY), single men of Albanian extraction whose homes were in Kosovo. Each left his village in about March 1999 when the Serb forces invaded, and each returned in June shortly after those forces withdrew and were replaced by KFOR. Each later left Kosovo and eventually came to the UK in the back of a lorry, Canaj on 28 September 1999, Vallaj on 6 April 2000.

4. Canaj's asylum claim was refused by the Secretary of State on 13 January 2000. His appeal to the Special Adjudicator was allowed on 6 June 2000. The Secretary of State's further appeal to the IAT was allowed on 28 September 2000. On 25 October 2000 the IAT refused leave to appeal to this Court.

5. Vallaj's asylum claim was refused on 12 April 2000, the Secretary of State certifying it as manifestly unfounded and subject, therefore, to the accelerated appeals procedure. On 19 May 2000 the Special Adjudicator agreed with the certificate and dismissed the appeal. Vallaj then obtained permission to apply for judicial review of the Special Adjudicator's decision, but failed on his substantive challenge before Dyson J on 21 December 2000 and failed also to obtain the judge's permission to appeal to this Court.

6. Both cases came before Buxton LJ on the documents. Having refused Canaj permission to appeal, he later ordered that Canaj's renewed application be linked to Vallaj's application and both be listed together for hearing by the full court, the appeals to follow if permission were granted. In the event, with the assistance of full and helpful skeleton arguments from both sides, we heard the applications for just over a day and, without calling on the respondents, refused them. We now give our reasons for doing so.

7. The starting point for considering all the various points sought to be advanced on the appeals is Dyson J's careful reserved judgment in Vallaj extending to 23 pages of transcript. No purpose would be served by repeating large tracts of it here. Rather it should be taken not merely as read but as incorporated in its entirety into this judgment, the two together forming, therefore, a composite whole, this judgment simply following on from that below.

8. On what grounds, then, does Mr McDonald QC for Vallaj now seek to overturn Dyson J's judgment? His principal argument below, it will be noted, was that the protection being provided by UNMIK and KFOR, because it was not provided by FRY as the country of nationality, is not in law capable of amounting to protection for the purposes of article 1A(2) of the 1951 Convention by which refugees are defined:

> "For the purposes of the present Convention, the term 'refugee' shall apply to any person who: … (2) owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group for 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 ... "

9. This argument was rejected below on each of three grounds advanced by the respondent i.e. because "that country" encompasses either (a) any entity which has the obligation in international law within Kosovo to provide the protection envisaged by the Convention, alternatively (b) any entity which in fact provides such protection with the consent of the "country of nationality" (as UNMIK and KFOR do here with FRY's consent), alternatively (c) any entity which in fact provides such protection with or without a duty under international law to do so and with or without the consent of the country of nationality (this being the view of the IAT in their starred determination in *Dyli v Home Secretary* [2000] INLR 372). It was, of course, unnecessary for the judge to choose between the three alternatives: it was sufficient to accept that article 1A(2) would certainly be satisfied were protection in fact to be provided by an entity which had both the international law obligation and the country of nationality's consent. None of this, indeed, is now contested: Mr Macdonald concedes that if, as a matter of practical reality, protection is being provided by UNMIK and KFOR, then that is capable of constituting protection for the purposes of the Convention. What I understand him now to argue, however, and it may be simply a repetition or elaboration of the second of his four grounds of challenge identified in paragraph 7(b) of the judgment below, is that UNMIK and KFOR are not *in fact* providing the necessary protection, at any rate to the standard suggested to be required by the House of Lords in *Horvath v Home Secretary* [2000] 3 WLR 379. Mr Macdonald relies in this regard upon Lord Clyde's speech at 397-8:

> "I do not believe that any complete or comprehensive exposition can be devised which would precisely and comprehensively define the relevant level of protection. The use of words like 'sufficiency' or 'effectiveness', both of which may be seen as relative, do not provide a precise solution. Certainly no one would be entitled to an absolutely guaranteed immunity. … There must be in place a system of domestic protection and machinery for the detection, prosecution and punishment of actings contrary to the purposes which the Convention requires to have protected. More importantly there must an ability and a readiness to operate that machinery. But precisely where the line is drawn beyond that generality is necessarily a matter of the circumstances of each particular case. It seems to me that the formulation presented by Stuart-Smith LJ in the Court of Appeal may well serve as a useful description of what is intended …:
>
> 'In my judgment there must be in force in the country in question a criminal law which makes the violent attacks by the persecutors punishable by sentences commensurate with the gravity of the crimes. The victims as a class must not be exempt from the protection of the

> law. There must be a reasonable willingness by the law enforcement agencies, that is to say the police and courts, to detect, prosecute and punish offenders.'
>
> … The formulation does not claim to be exhaustive or comprehensive but it seems to me to give helpful guidance."

10. Mr Macdonald points to the UNHCR report of March 2000 stating that "Efforts are continuing to establish effective law enforcement, including an independent judiciary. Despite all efforts, fully functioning legal, judicial, policing and administrative structures are not yet in place." (material reflected in paragraph 47 of the judgment below) and submits that the minimum protection required by the Convention is clearly still not in place in Kosovo.

11. I would reject this argument. It is perfectly plain that Lord Clyde did not have this type of case in mind when discussing sufficiency of protection in the very different situation arising in *Horvath* – persecution of Roma gypsies by skinheads in Slovakia. Indeed, were Mr Macdonald's arguments sound, one would have the very remarkable position of UNHCR (the body both responsible generally for refugees under the Convention and, at the time of the March 2000 report, a component organ of UNMIK with direct responsibilities for the resettlement of persons displaced from Kosovo) advising that most Kosovar Albanians could safely be returned and their asylum claims considered in accelerated procedures notwithstanding that the level of protection available to them was insufficient for Convention purposes.

12. Perhaps recognising that his argument proved too much, Mr Macdonald sought to confine it to those asylum seekers such as Vallaj (although not Canaj) who, as will shortly appear, undoubtedly did suffer persecution during UNMIK and KFOR's regime before fleeing to this country. Having suffered persecution in the past, Mr Macdonald suggests, asylum seekers such as Vallaj necessarily satisfy the first limb of the refugee definition (they are outside their country of nationality owing to a well-founded fear of persecution for a Convention reason) and so become entitled under the second limb of the definition to a higher degree of protection than the general run of returning Kosovans. I have stated the argument to the best of my ability though frankly I do not follow it. Whether or not UNMIK and KFOR are providing sufficient protection – and in particular whether protection must be adjudged insufficient for want of adequate policing and a judicial system – cannot in my judgment depend upon whether or not the asylum seeker has been persecuted in the past. Of course the fact of past persecution may be evidentially probative of a future risk of persecution – see the Court of Appeal's decision in *Demirkaya v Home Secretary* [1999] INLR 441. But that is a quite different point and cannot affect the question whether generally speaking UNMIK and KFOR are providing proper protection under the Convention to returning Kosovar Albanians.

13. I come next to the particular facts of Vallaj's case because it is with regard to these that Mr Macdonald advances his remaining arguments. To the factual summary set out in paragraphs 66-68 of the judgment below, I would add just the following: the two attacks upon him were two or three months apart, the first occurring whilst the applicant was out on the hillside minding his sheep, the second in his village some two months before he left for the UK. The beatings were accompanied by threats that, if he did not leave, his attackers would kill him; the Special Adjudicator observed that the applicant had not given "any reason to suppose that if he chose to take their advice the peace keeping force could not provide him with protection."

14. For convenience I repeat the determinative paragraph in the Special Adjudicator's determination:

> "25. I accept the substance of what the appellant said happened to him. I do not consider that against the background of the present situation there is any reason to suppose that he cannot be protected or live in an area of Kosovo sufficiently close to his village to pick up the threads of his former life without danger from what seemed to me to have been an isolated and very small group of Serbs who are in no way in control."

15. Mr Macdonald founds two main arguments upon those facts. First he submits that the Special Adjudicator failed properly to apply the Court of Appeal decision in *Demirkaya*. Secondly he argues that the Special Adjudicator decided the case on the basis of an "internal flight alternative" but inadequately reasoned his judgment to that effect.

16. I have already mentioned *Demirkaya*. The Court of Appeal there cited with approval Professor Hathaway's book *The Law of Refugee Status,* at p.88:

> "Where evidence of past maltreatment exists, however, it is unquestionably an excellent indicator of the fate that may await an applicant upon return to her home. Unless there has been a major change of circumstances within that country that makes prospective persecution unlikely, past experience under a particular regime should be considered probative of future risk. In sum, evidence of individualised past persecution is generally a sufficient, though not a mandatory, means of establishing prospective risk."

17. Allowing the appeal of a Turkish Kurd there, Stuart-Smith LJ said at p.449:

> "In my judgment, if it is the opinion of the Tribunal that there has been such a significant change that the appellant is no longer at risk, it is incumbent upon them to explain why this is so. In the absence of such explanation and reasoning, it seems to me there may be a real risk that someone who, because of his suspected association with the PKK, was subjected to such appalling treatment before he fled the country, will suffer more than transient ill-treatment [on return]".

18. In my judgment that authority has little application here. The Special Adjudicator in the present case was plainly prepared to regard the applicant's two beatings as past persecution for a Convention reason (that seems to me implicit in the determination as a whole) but he regarded the applicant as well able to adjust his life in Kosovo so as to be able to continue tending his sheep in the same place without danger of further Serb beatings.

19. *Demirkaya* was of course concerned with whether there had been a major change of circumstances in the country of nationality to eliminate the future risk of persecution and plainly no such change has occurred in Kosovo since Vallaj left. But whereas in *Demirkaya* there was no question of a Turkish Kurd sympathiser so adapting his way of life so as to avoid the risk of persecution on return, here, so the Special Adjudicator found, there was. The critical question in all cases is whether on return there is a serious possibility of persecution. Generally, no doubt, as in *Demirkaya*, it will be necessary for the returning State to show a major change of circumstances in the asylum seeker's home State. Sometimes, however, as here, it is sufficient to show that the asylum seeker himself can and should change his own ways so as to avoid future persecution. By the same token that it is reasonable to require someone to abstain from political action to avoid persecution – see Nolan J's judgment in *R v*

IAT ex parte Jonah [1985] ImmAR 7, 12 - so it seems to me perfectly reasonable to require Mr Vallaj to take KFOR's advice and cease living in an isolated tent so as to be able to continue caring for his sheep.

20. I turn to the internal flight alternative which was the fourth ground of challenge raised below. Essentially what Mr Macdonald says is that the Special Adjudicator, by finding that the applicant could live in Gjakova, has decided the case on the basis that he can safely relocate, without having properly raised and addressed the question whether it would be reasonable to expect him to do so. That the case was decided by reference to the internal flight alternative is confirmed, submits Mr Macdonald, by the use of the terms "locate" and "more harsh" in paragraph 21 of the Special Adjudicator's determination.

21. For my part, I find Dyson J's reasoning in paragraph 70 of his judgment a wholly convincing refutation of this argument. It seems to me quite unreal to suggest that the modest changes required in this applicant's accommodation and lifestyle to ensure protection involve an "internal flight alternative". In the absence of any authority to this effect, Mr Macdonald submitted that *Jonah* itself provided some support for such a view. Analysis of this decision, however, shows it to have been a very different case indeed. The applicant there deposed to having gone into hiding for some eighteen months before coming to this country:

> "I decided to leave Accra for a while and went to a very remote village in the jungle in Ghana where my family own some land. The village is inaccessible by car and can only be reached by a 15 mile walk through the jungle."

22. Perhaps unsurprisingly Nolan J rejected the respondent's contention that the applicant could avoid persecution on return because "there was no material risk to the applicant if he was to live in the remote village … where he would be, it seems, separated from his wife and unable to pursue the employment as a trade union official which he has carried out for 30 years."

23. It is perhaps difficult to regard *Jonah* as an "internal flight alternative" case at all and certainly it makes no overt reference to that concept (nor to paragraph 91 of UNHCR's 1979 handbook where the concept appears to have originated). But even if *Jonah* is such a case – and it is right to note that the ruling UK authority on this concept, *R v Home Secretary ex parte Robinson* [1998] QB 929, refers to it in that context – it affords no assistance to this applicant.

24. Insofar as Mr Macdonald sought to raise other arguments in support of Vallaj's application for permission to appeal, it is sufficient to say that there was nothing in them and that Dyson J was right to reject this challenge for the reasons which he gave.

25. I turn, therefore, to Canaj's application. It too raised the "internal flight alternative" albeit on a wholly different basis from that advanced by Mr Macdonald. The argument advanced by Mr Nicol QC for Canaj comes essentially to this: if there is any part of the asylum seeker's country of nationality where he would have a well-founded fear of persecution for a Convention reason if ever he found himself there, then his case must be treated as one involving the "internal flight alternative" – or, as others have termed it, the "internal protection alternative" – and the question must be asked: would it be unduly harsh to return him? – or, as is suggested by recent international jurisprudence and the New Zealand Refugee Status Appeals Authority in *Refugee Appeal No 71684/99* [2000] INLR 165, can the refugee claimant genuinely access domestic protection which is meaningful? And this is so even if the claimant has no connection whatever with the unsafe part of his country, has never been there in the past and, if returned, will not be going there in the future.

26. On this approach, of course, no Kosovar Albanian could properly be returned without first specifically asking whether it would be unduly harsh to return him since it must be assumed that, whether in Belgrade or indeed in most of the FRY save for Kosovo (at any rate whilst Milosevic remained in power), he would have had a well-founded fear of Serb persecution.

27. Were all these cases properly to be regarded as involving the internal protection alternative (as Mr Nicol contends) he would then seek to argue that it would indeed be unduly harsh to return these Kosovar Albanians - or rather, in line with the New Zealand case, that they cannot access meaningful domestic protection because "local conditions in the proposed site of internal protection [do not] meet the standard of protection prescribed by the Refugee Convention" – see paragraphs 20-22 of the Michigan Guidelines set out in the New Zealand case at pages 190-191 and paragraph 73 of that decision. There would, to my mind, be very considerable difficulties in Mr Nicol's path if ever one got to that second stage of his argument. Since, however, in my judgment one does not, we never really explored them. I would merely point out that, as with Mr Macdonald's central argument, it would mean that UNHCR have been quite inappropriately advising that Kosovar Albanians can properly be returned to Kosovo under accelerated procedures.

28. With regard to stage 1 of the argument - Mr Nicol's contention that the issue of alternative protection arises irrespective of whether or not the asylum seeker's proposed return would involve his moving from one part of his home country to another - a convenient starting point for its refutation is paragraphs 64 and 65 of the judgment below (albeit these were in fact directed to whether it could be said that Vallaj was being required to relocate to a different part of the country). Mr Nicol takes issue with these paragraphs as also with the IAT's determination in *Dyli*:

> "(34) Thus the expectation of internal flight is transformed into a rule of internal relocation: on return to his own country a person may have to live in an area that is different from his own home area. It is, however, important to remember the origins of the rule. The question of internal flight only arises when a claimant has a well-founded fear of persecution in his own home area. If he has no such fear there, the possibility of his movement elsewhere simply does not arise. He is not a refugee. If, on the other hand, he has such a fear in his own home area, he may be a refugee: but only if he can show that there is no other part of his own country where he would be safe, which he can reach in safety, and where it would be reasonable (that is to say not unduly harsh) to expect him to live. A person who has discharged the positive burden of showing that he is at risk of persecution in his own area has still to establish that internal relocation is not feasible in his case.
>
> (35) The concepts of unreasonableness and undue harshness have to deal with a person who will have to move to an area that has not been his home. No questions of unreasonableness or undue harshness arise if the claimant has no well-founded fear of persecution in his own area. That is so even if there are other areas of his country where he might have such a fear. Such a person will be a refugee only if he cannot get to his own area without being at risk of persecution on the way."

29. Mr Nicol submits that there is no binding authority to this effect, that neither paragraph 8 of the 1996 Joint Position of the Council of the European Union nor the relevant Immigration Rule (r.343 of HC 395) support it, and that there is no reason in principle why the concept of

alternative protection should not apply equally to those whom it is sought to return to their own home area. He submits too that the concept of "own home area" (or "the part of the country from which he has fled" as Dyson J called it) introduces its own difficulties of definition.

30. I am wholly unpersuaded by any of these arguments. Paragraph 91 of the UNHCR handbook in terms postulates that the fear of persecution is in the claimant's part of the country and that the contemplated "refuge" is in "another part of the same country". Paragraph 8 of the Joint Position, contrary to Mr Nicol's submission, is against him: it expressly raises the question whether a claimant can find "effective protection in *another* part of his own country, to which he may reasonably be expected to *move*" (emphasis added). The Federal Court of Australia in *Randhawa* (1994) 124ALR 265 (cited in paragraph 65 of the judgment below) expressly considers whether it is reasonable "to expect a person who has a well-founded fear of persecution in relation to the part of the country from which he or she has fled to relocate to another part of the country of nationality". Similarly, the Federal Court of Canada in *Thirunavukkarasu* 109 DLR(4^{th}) 682 asked whether it would be "unduly harsh to expect this person, who is being persecuted in one part of his country, to move to another less hostile part of the country". Even in Refugee Appeal No 71684/99, the New Zealand case upon which Mr Nicol so strongly seeks to rely, one of the specific questions to be asked in an internal alternative protection case in determining whether meaningful domestic protection can be accessed is:

> "Is the proposed site of internal protection one in which there is no real chance of persecution, or of other particularly serious harms of the kind that might give rise to the risk of return to the place of origin?"

31. It is, of course, implicit in that question that the "place of origin" is somewhere different to "the proposed site of internal protection". The New Zealand case is one of great interest and should, I suggest, be cited (in addition to *Robinson* and by way of elaboration upon its thinking) in any future internal protection alternative case raising the question whether the claimant should be returned to a different area (i.e. not his own home area) of his country of nationality, and in particular the criteria to be applied in answering that question. It does not, however, assist Mr Nicol on the present point, namely whether this <u>is</u> an internal protection alternative case. I should perhaps add that the judgment in *Robinson* too proceeds throughout on the assumption that the internal flight alternative is relevant only in those cases where it is contemplated that the claimant should relocate from his home area to some different safe part of his home country (and not merely from the UK to his home country generally).

32. None of this, moreover, is to my mind in the least surprising. As a matter of principle it would be remarkable were it necessary to ask in every case: is there a part of the claimant's home country in which he would be unsafe? That would be an entirely hypothetical and academic question if in fact the claimant had never been there and was never going to be returned there. If it is plain that the claimant can safely be returned to his own home area and so is not being required to uproot himself and move to a different area, there is simply no reason to temper the strict interpretation of words in article 1A(2) "is unable to avail himself of the protection of that country" by "a small amount of humanity", as Brooke LJ put it in *Karanakaran v Home Secretary* [2000] ImmAR 271, 279. Why ever should it be "unduly harsh" to expect a claimant to return to live in his own home area once it is accepted that it is safe for him to do so?

33. Again there is no authority which on its facts in any way supports Mr Nicol's contention unless it be *Jonah*. Again, however, as in Vallaj, *Jonah* cannot on analysis help the applicant.

Really it is authority for no more than that someone is not to be regarded as safe from persecution if they have to live away from their wife and unable to work in a village accessible only by a 15 mile walk through the jungle. One might as well say they would be safe hiding in a cellar.

34. The IAT allowed the Secretary of State's appeal in *Canaj's* case on the basis that:

> "He will in fact be returned to Pristina, he has no well-founded fear of persecution in Pristina that is effectively controlled by KFOR and UNMIK. He can in the opinion of the Tribunal return to his own village. He will be in no different situation from any other returning villager in his village."

35. I did not understand Mr Nicol to advance any ground of appeal against that decision save with regard to the internal protection alternative but in any event it seems to me unappealable.

36. By way of footnote I add just this. Although our judgments in this Court are ones dismissing applications for permission to appeal and, therefore, fall for consideration under paragraphs 6.1 and 6.2 of the recent Practice Direction (Citation of Authorities) [2001] 1 WLR 1001, we envisage that they may well need to be cited in future, certainly with regard to any other cases involving Kosovar Albanians (one of which, *Artan Morina*, was mentioned to us as raising similar points), and perhaps more generally with regard to the 'internal protection alternative'.

LORD JUSTICE CHADWICK:

37. I agree.

LORD JUSTICE LONGMORE:

38. I also agree.

ORDER: Applications refused; costs subject to detailed assessment.

(Order does not form part of approved Judgment)