Gashi (Asylum; Persecution) Kosovo [1996] UKIAT 13695 (22 July 1996)

IMMIGRATION APPEAL TRIBUNAL

Date of hearing: 15/03/1996

Date Determination notified: 22 July 1996

Before
R G Care Esq (Chair)
C A N Edinboro Esq
J L S Harrison Esq
Between

URIM GASHI, ASTRIT NIKSHIQI	APPELLANT
and	
Secretary of State for the Home Department	RESPONDENT

DETERMINATION AND REASONS

The appeals of both the appellants have been joined at this stage at the request of the appellants' representative Miss Winterbourne of the Refugee Legal Centre and without any objection from Mr Ramsden who appears for the respondent.

THE APPEALS

Both the appellants are young men and ethnic Albanians from Kosovo in Serbia Montenegro hereafter for ease of reference referred to as "FRY". Both were said to be citizen of the Federal Republic of Yugoslavia by the Special Adjudicators from whose determinations these appeals are heard. Because they involve the same limited issues of law it was considered to be most convenient to hear them together.

The first appellant's appeal was from the refusal by the respondent on 25th May 1995 of his application for asylum, which he made on 28th April 1995, and the dismissal of his appeal therefrom by Miss Eshun on 27th July.

The second appellant's appeal was from a refusal on 30th May 1995 and the dismissal of the appeal therefrom by Mrs Weinberg on 23rd August.

Leave to appeal was given against from determinations.

First Appellant

The adjudicator accepted that when the appellant failed, for the second time to report to the police for call up they broke up his house and stabbed his brother in the back. This was, so found the adjudicator, not very surprisingly, enough to instil fear into him. She noted that the law on draft evaders leaving the country from Kosovo and Sandzak carried a punishment of 1 to 10 years imprisonment - albeit the highest known term was 2. She considered that there was no evidence that ethnic Albanians were punished disproportionately from others.

She accepted that the conflicts in which he may have been called upon to serve were condemned by the international community as contrary to the basic rules of human conduct.

She did not consider the first ground of his claim that he was persecuted for his ethnic origin, or indeed any other possible ground.

Second Appellant

The adjudicator accepted that the appellant was of military age and likely to be a draft evader. Nonetheless, because she did not find him credible, she found his actual fear unfounded - how she reached this conclusion is difficult to follow in the light of her earlier remarks and on the documentary evidence, especially that of the UNHCR, concerning the violation of the human rights of Kosovo Albanians who refuse to serve in Serbian armed forces. The more especially as she must have noticed it was in a conflict which has been condemned internationally.

As to both the appellants, as Miss Winterbourne says, both special adjudicators accepted that each of them were ethnic Albanians from Kosovo and both were draft evaders.

It is also accepted that neither appellant is presently able to return to the Federal Republic of Yugoslavia because the authorities refuse to admit them.

THE ISSUES

There were several issues which have emerged at various points in these appeals. Miss Winterbourne however ultimately decided, very courageously, to run both appeals solely on whether there is a reasonable degree of likelihood that the appellants will be persecuted as ethnic Albanians if returned to Belgrade. This simple single issue however hides a number of complex issues.

It has not been challenged that removal to FRY inevitably means flying to Belgrade.

Miss Winterbourne called oral evidence and adduced additional documentary evidence before us.

On the basis of the totality of the evidence she argued that both appellants have a well-founded fear of persecution in the FRY by reason of their race and/or alternatively their nationality as ethnic Albanians: their inability to return and statelessness, by reason of the FRY's refusal to accept them back; and as failed asylum seekers.

We have the benefit of intervention by the UNHCR and the submission by Mr Towle. It was also valuable to have Mr Ramsden concede on behalf of the respondent the UNHCR submission as a correct statement of the law on the meaning of persecution.

Having regard to pending decisions of the IAT in Ivanov I agreed to accept further submissions later. Eventually all such submissions from Mr Ramsden, Miss Winterbourne and the UNHCR were received by 6th June: I regret that I was about to depart on leave and the delay is regretted. All the submissions were most carefully prepared and are particularly helpful.

The further submissions from the UNHCR refer to R v IAT ex parse Tawafig HX/75314/94 and HX/73795/95 where on 26.4.96 leave to move was granted to quash the decision of a Special Adjudicator and of the lAT's refusal of leave to appeal upon the issue whether an asylum claimant must satisfy first of all the requirement that he is a refugee as defined by Article 1A(2) and additionally that his return would threaten his life or freedom and not merely some lesser human right - (Article 33 of the Refugee Convention).

We are unaware of any date which may have been set for the hearing of these appeals but given the way in which the appeal developed before us, we are puzzled why the respondent should now in Tawafig appear to be maintaining a more restrictive interpretation of the 1951 Convention in respect to the meaning of persecution than it was before us. For this reason and certain of Mr Ramsden's contentions in his submissions we feel we must deal with what we see persecution covers.

Miss Winterbourne relied particularly upon the evidence of Dr Hugh Poulton, a specialist author on Balkan affairs, who, amongst his other achievements, wrote a paper entitled "Kosovo: Oppression of Ethnic Albanians" (Minority Rights Group 1993): and Ms Jenny Little, formerly with the Foreign Office. There were statements from Mr Tadeusz

Mazowiecki an ex UN Special Rapporteur for Serbia and Montenegro; and Ger Duijzings, expert in Kosovo affairs and an Associate of the Amsterdam School of Social Science Research; and Mr Owen Bennett-Jones, Correspondent for BBC World Service and Field Consultant for Writenet and his article "AIbanians in Kosovo: Prospects for the Future" dated 1994. Finally a statement by Miss Melanie Friend, a freelance photojournalist was also produced. There are other papers in the public domain to which reference is made, for example, the UNHCR Position Paper of June 1995, the ICFTU of October 1993 and a number of other publications, namely "Helsinki Watch" and Amnesty International. This list is not exhaustive but it suffices for the purposes of this appeal.

Mr Ramsden relied on a Newsagency report 'Tanjug' - concerning the reliability of which Miss Winterbourne produced further evidence in rebuttal.

Turning to Miss Winterbourne's more detailed submissions they are very helpfully set out in a number of documents which she submitted to us in advance; firstly that entitled "Submissions by the Applicants on the Definition of Persecution" and secondly "Types of Human Rights Abuses". She took us through the spectrum of claimed ill-treatment of ethnic Albanians ranging from discrimination in jobs and education to outright murder and torture for reasons, she says, purely of ethnicity. As a result, so her argument proceeds, it is necessary to look at which Human Rights abuses amount to "Persecution" within Article 1A(2) of the Refugee Convention.

Absent any guidance as to the meaning of persecution within the Convention itself she suggests that we should look at the Vienna Convention on the Law of Treaties 1969 Article 31. This article requires that a Treaty should be interpreted (I) in good faith, (ii) in accordance with the ordinary meaning to be given to the terms of the Treaty and in their context and (iii) in the light of its object and purpose.

Taking the last guiding principle first she refers us to the preamble to the Convention which she submits can be used to determine the object and purpose (see Goder v UK [1975] 1EHRR 524). The preamble to the 1951 Convention reads, insofar as it is material:

> "The high contracting parties, [c] considering that the Charter of the United Nations and the Universal Declaration of Human Rights ...have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination.."

The most important and central fundamental human rights are, she maintains, contained within the International Bill of Rights, comprising the

Universal Declaration of Human Rights, the International Covenant of Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. She refers us to Hathaway's "The Law of Refugee Status" page 107. Professor Hathaway lays out four distinct types of obligation in a hierarchy of relative importance. He starts off first with those human rights which are non-derogible even in times of compelling of national emergency . These rights include the right to life and the prohibition against torture and cruel, B inhuman or degrading punishment or treatment. In the second category are those rights which are derogible during a life threatening public emergency to the nation. In this regard the emergency must be one which is officially recognised by the State. The third category are those which States are required to take steps to the maximum of their available resources progressively to realise in a non-discriminatory way. They include the right to earn a livelihood; the right to a basic education. Also an entitlement to food, housing, and medical care which can at an extreme level be tantamount to persecution if denied (see Hathaway ibid. page 111).

The fourth category is not in point in these appeals.

Miss Winterbourne's submission upon category three is that failure to implement a right within it which is either discriminatory or is not grounded in an absolute lack of resources can be persecution and points to support on this from the UNHCR.

To limit persecution solely to that which falls within a "sustained and/or systemic denial of core human rights" is not, she argues, enough because this implies a measure of persistence which will be unjust and must be wrong in one-off cases of torture. Even in Ravichandran. where this approach was apparently adopted by Staughton LJ, Simon Brown LJ, in the leading judgment, appears to support Hathaway's view. Carnwath J in Tawafig purported to follow Staughton LJ when he refused leave to move against refusal of leave to appeal by the IAT. In Tawafig Simon Brown LJ said:-

> "Perhaps Lord Goff's comment upon Article 33 was obiter (in Sivakumaran [1988] 1AC 958 at page 1001) but undoubtedly it is highly persuasive and it certainly seems to me properly arguable that, interpreted as international treaty obligations fall to be interpreted, drawing no doubt upon the approach of other countries and international bodies as well as travaux preparatoires, this Convention could perhaps be construed as prohibiting the imposition of any such additional requirement as is imposed by Rule 334 (iii) HC395."

For the sake of easy reference pare 334(iii) this reads as follows:-

"334. An asylum applicant will be granted asylum in the United Kingdom if the Secretary of State is satisfied that:-

> (iii) refusing his application would result in his being required to go (whether immediately or after the time limited by an existing leave to enter or remain) in breach of the Convention and Protocol, to a country in which his life or freedom would be threatened on account of his race, religion, nationality, political opinion or membership of a particular social group."

Returning to the Vienna Convention and the second criteria (giving a term its ordinary meaning). Miss Winterbourne referred to the decision of Nolan J (as he was then) in Jonah (1985 Imm AR page 7) when he said, in looking at the definition of persecution:-

"One should apply the ordinary dictionary definition, which is 'to pursue with malignancy or injurious action especially to oppress for holding a heretical opinion or belief'. This, so her argument went is somewhat too vague to be of great assistance to practitioners of asylum law although she accepts the correctness of the dictum.

Finally turning to the first criteria (expression of good faith). The purpose of the Convention is protection - a surrogate protection accepted by the international community in the absence of protection by the applicant's own state. Any restriction or delimitation of threats to life or freedom would be incompatible with an obligation in good faith humanely to protect those who cannot obtain protection from their own government.

Miss Winterbourne develops the relationship between Article 1A(2) and Article 33 and Paragraph 334 of HC395. Given Mr Ramsden's concession of the UNHCR submission which in no way challenges this it is sufficient for the purposes of this decision to refer to the main headings of Miss Winterbourne's argument that the apparent limitation of the nature of persecution contained in Article 33 should not govern the United Kingdom's obligations in interpreting the word "persecution" in order to arrive at a conclusion whether the appellants fall within the scope of Article 1. In other words Article 33 is not the objective threat that we must look at

Article 33(1) reads:-

"Article 33(1) Prohibition of expulsion or return ('refoulement')

1. No contracting state shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom

would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

She adds that whereas Article 1A(2) is descriptive Article 33 is instructive. As such each is compatible with the other. In other words Article 1 should be looked at to determine the scope of Article 33 not vice versa and Article 33.1 should be read in the light of 33.2 and this is supported by Lord Goff in Sivakumaran and Lord Bridge in Musisi ([1987] Imm AR 250). Miss Winterbourne argues Rule 334 is irrelevant in any event because that rule is concerned with the domestic implementation of a certain status that does not affect the process by which that status is achieved, (our underlining). We may add that we are not concerned with how the country decides to implement the recognition of the status of refugees provided it is not in a way which breaches Art 33; rule 334 says he will be granted asylum, but there is no obligation to do so.

Looking at Ravichandran Miss Winterbourne submits that Simon Brown LJ's 'single composite question' direction to fact finders in asylum claims is, insofar as it goes useful guidance. But she reminds us there is no issue of national emergency in the instant appeal as there was in Ravichandran and that Simon Brown LJ finds Professor Hathaway's work 'instructive' and the detentions (in Ravichandran, of Tami,s in Colombo) "are obviously directed not to the oppression of Tamils as such but rather to the maintenance of Public Order", thereby accepting, so she says, that States may act in limitation of certain human rights (the derogible rights, Profescor Hathaway's second category).

Finally Ms Winterbourne referred us to three Tribunal appeals in which acts fell within Professor Hathaway's third category and were recognised as persecution. These reflected goals of social economic or cultural development; namely Chiver the inability to obtain employment; Lucreteanu (12126) - threatening phone calls and Padhu (12328) accommodation, employment and State benefits.

The evidence which was laid before us, dealt to some extent with different aspects of Albanians in Kosovo. It is unnecessary to record that evidence in detail because insofar as it was challenged at all Mr Ramsden's challenge by Tanjug newsagency did not impress us set against the rest of the evidence. The material details of the evidence laid before us by Miss Winterbourne fitted together in a pattern which we can, we hope, succinctly summarise as follows:-

1. The Albanian regards Kosovo historically as their distinctive part of Serbia/Montenegro.

2. It is not reasonable to expect any ethnic Albanian to live in any area other than Kosovo and its surrounds, where there is at least a large concentration of ethnic Albanians.

3. There is increasing Serbianisation attempted in Kosovo which verges on the racist, for example by the removal of senior Albanians in the courts and public sector generally and restrictions in even the most menial of employment e.g. street vendors. 80% of Albanians lost their posts in "the planned and thorough Serbinanisation of public and State sectors" (Ger Duijzings).

4. Emigration is encouraged and return discouraged - see the letter from the Government of FRY appearing in the bundle at page 97 dated 31.1.96

5. That the war in the area is or was internationally condemned and in this regard also see United Nations General Assembly 13.3.95. We will return to whether it is over and the decision of Radivojevic (13372).

6. There is no control or no evidence of any intended control by the central authority of the police in Kosovo and the police are all Serbians. There is a systematic state policy which, it is said, permits this police misbehaviour. In day to day life Albanians are harassed, subjected to house searches, beating, torture at police stations, constant checks carried out at random without any recourse to courts with an effective system to provide adequate remedies and protection to ethnic Albanians.

7. That they may have been in some way authors of their own misfortune. Even if true is in this context relevant.

8. The situation remains volatile with no prospect of an early solution notwithstanding Milosevic's claim that it is not in the country's interests to worsen the situation following the Dayton Agreement (see US State Department March 1996, UN paper February 1996, Swissaide January 1995).

Though our decision in no way turns upon it we observe that Denmark has refused to return ethnic Albanians to the country and this is a pattern followed in Sweden, though recently in Germany we believe repatriation has now commenced.

The preponderance of evidence laid before us, reveals a claim to a policy of ethnic cleansing against Albanians by Serbs. It is carried out by a system of general as well as random brutality against Albanians in the form of restrictions in employment, random call-up for military service of young Albanian males and a packing of the senior administration and judiciary with

non Albanians. All against a background of Kosovo being a traditional Albanian enclave.

SUBMISSIONS BY UNHCR

Mr Towle submitted for UNHCR office in London a helpful but difficult to paraphrase - statement. Given the debate presently proceeding in other fore we think we must set out Mr Towle's submissions in in extenso:-

"1. Introductory Comment

In reference to the present appeal before the Immigration Appeal Tribunal, UNHCR wishes to submit its opinion on the ambit of the term 'persecution' as it appears in Article 1A(2) of the 1951 Convention relating to the Status of Refugees ('the Convention'). In particular, it w~shes to comment on the relationship between that term and Article 33(1) of the Convention.

2. The Terrn 'Persecution'

The Convention does not, per se, offer any guidance as to how the term 'persecution' should be interpreted by states party to it. Neither do the travaux preparafories disclose any clear guidance as to how it should be applied. This omission was probably deliberate because the framers did not wish to delimit the flexibility and liberalness of the Convention at its infancy. There is, in our view, some force in Professor Guy Goodwin Gill's observation that 'there being no limits to the perverse side of human imagination, little point is served by attempting to list all known measures of persecution' (The Status of Refugees in Intemational Law 1991 193-6).

As a normal canon of construction in treaties, the literal meaning should first be examined. The Concise Oxford Dictionary defines 'persecution' as being 'subject to constant hostility and ill-treatment, especially on grounds of religious or political beliefs, harassment or worry'. In this respect, UNHCR does not disagree with the interpretation made by Nolan J. in Ex.parte Jonah [1985] Imm AR 7 (See shorter Oxford English Dictionary.)

Where the literal approach does not admit clear definition or where several meanings can be ascribed to the term, then the teleological or 'object and purpose' approach can be adopted. UNHCR is of the opinion that for the Convention to be a 'living instrument' of protection the term 'persecution' must be interpreted in a manner that best achieves its humanitarian object and purpose. Clearly, the Convention's humanitarian and human rights principles which lie at the core of international concern and protection of refugees, are as relevant today as they were in 1951 (Executive Committee Conclusion No 62 (XLI): Note on International Protection).

Thus, the term 'persecution' cannot be seen in isolation from the increasingly sophisticated body of international law on human rights generally. In recognition of the adaptable nature of the refugee definition to meet the ever changing needs of protection, the UNHCR recognises an important linkage between 'persecution' end the violation of fundamental human rights. In this context, the focus of any inquiry is to establish whether there has been a failure of domestic protection and therefore a need for surrogate international protection against persecution, irrespective of whether the persecutor is a non-state or state agent.

However, UNHCR also recognises that there may be circumstances where the persecution takes a form that does not directly involve traditional human rights insofar as they reflect the relationship between the state and the individual. In such cases, the focus should be not so much upon whether the state has violated a fundamental human right of the individual. but whether the state is able or willing to offer effective protection to the individual against the threat of persecution.

In general, UNHCR believes that the Convention must operate within the broader framework of human rights. By placing the term 'persecution' within the meaning of Article 1A(2) of the Convention. An unjustifiable:but isolated and egregious threat to an individual's life or liberty would amount to persecution, as would other serious violations of human rights.

Other lesser forms of ill-treatment or discrimination, not in themselves suffficiently serious to amount to persecution, may be persecutory if their cumulative effect on the asylum-seeker renders his continued stay in the country of origin intolerable for the reasons stated in the definition. Thus, discriminatory measures leading to consequences of a substantially prejudicial nature for the person concemed may amount to persecution. This may take a variety of forms and no useful purpose would be served by trying to exhaustively describe them.

In aid of this sometimes diffficult assessment, UNHCR generally agrees with Professor Hathaway's formulation that persecution is usually the 'sustained and systemic denial of core human rights' (J Hathaway at p.112). Clearly, some human rights have greater pre-eminence than others and it may be necessary to identify them through a hierarchy of relative importance. This can be achieved by reference to the International Bill of Rights as the universal measure of appropriate standards.

a)The first category includes inviolable human rights such as the right of life and the prohibition against torture, cruel, inhuman or degrading punishment or treatment. A threat to these rights would always be a serious violation amounting to persecution, as referred to in paragraph 51 of the Handbook.

(b)The second category includes rights where limited derogation or curtailment by the state in times of public emergency can be justified. They would include, inter alia, the right to be free from arbitrary arrest and detention, and the right to freedom of expression. A threat to these rights may amount to persecution if the state cannot demonstrate any valid justification for their temporary curtailment. In any event, the measures will usually be accompanied by other forms of discrimination treatment which if assessed cumulatively, could amount to persecution.

(c)The third category are rights which although binding upon states, reflect goals for social, economic or cultural development. Their realisation may be contingent upon the reasonable availability of adequate state resources. But the state must nonetheless act in good faith i the pursuit of these goals and otherwise in a manner which does not violate customary norms of non-discrimination. This category would include, inter alia, the right to basic education and the right to earn a livelihood. In appropriate circumstances, a systemic and systematic denial of these rights may lead to cumulative "consequences of a substantially prejudicial nature for the person concerned' of such severity as would amount to persecution within the meaning and spirit of the Convention. this would be particularly so where the state has adequate means to implement the rights but applies them in a selective and discriminatory manner.

Relationship Between Article 1A(2) and Article 33(1) We have referred to the argument that the scope of 'persecution' is circumscribed by the non-refoulement provision, Article 33(1). In particular, it has been suggested that only measures likely to threaten an asylum-seeker's 'life or freedom' can amount to persecution in terms of Article 1A92). In this context it is argued that 'life or freedom' is confined to a threatened loss of life or the imposition of imprisonment. Such a restrictive interpretation of Article 33(1) would, for example, lead to the remarkable conclusion that torture, in the absence of imprisonment or a threatened loss of life, could not amount to persecution. similarly, measures which totally deny an individual the right to choose and practice his religion, but which fall short of death or prolonged imprisonment, would also not amount to persecution.

UNHCR believes that this argument is quite untenable on any valid interpretation of the Convention.

Adopting the literal or textual approach, the Concise Oxford English Dictionary definition of 'freedom' embraces not only liberty from captivity but also . civi/ liberty, independence, liberty of action, right to do, exemption from disadvantage.....'. UNHCR believes that the ordinary meaning of the expression, life or freedom', encapsulates the essence of fundamental human

rights, rather than excluding or limiting them. In this way, Article 33(1) remains in harmony with the refugee definition in Article 1A(2).

Conversely, the adoption of a narrow and restrictive meaning of life and freedom' would unjustifiably restrict the scope of the refugee definition. It could even produce the curious result whe.reby refugees fearing certain types of persecution would be protected by the non-refoulement protection whereas others would not. The illogically of this result is self-evident.

If the expression is open to ambiguity, then the teleological approach requires a construction that best advances the object and purpose of the Convention. Thus, a narrow construction confimming the expression to the physical loss of life orphysical freedom' would be precluded as it undermines the object and purpose of the Convention. In those circumstances, intemational law requires the more generous construction to be applied.

Even if the 'founding fathers' approach to treaty interpretation were applied, it is clear from the Ad Hoc Committee's deliberations and the travaux Preparatories, that the framers of the Convention were anxious to ensure the Convention's flexible and humanitarian-application in the future. It was precisely for this reason that the temm persecution' was kept undisturbed. Equally, the travaux preparatories in respect of Article 33 give no indication that the words 'life or freedom' were, inserted to circumscribe and define the term 'persecutive' in Article 1A(2). The framers were preoccupied with the limitation provisions in Article 33(2) and the Article's relationship with Article 1A(2) does not appear to have been directly addressed.

The primacy of Article 1A(2) appears to have been recognised by the House of Lords in R v Secretary of State for the Home Depaffmenf, ex parte Sivakumaran, et al where it was held that

It is plain, as indeed reinforced in argument...with reference to the travaux preparatories, that the non-refoulement provision in Article 33 was intended to apply to all persons determined to be refugees under Article 1 of the Convention.

In other words, the scope of the term persecution in Article 1A(2) should inform how and to whom Article 33(1) should be applied, not vice versa."

SUBMISSIONS BY RESPONDENT

Mr Ramsden pointed to the Adjudicator's finding that the appellants were not credible. Therefore whatever may be the definition of persecution neither of them had a 'fear'. We had not understood him to have been challenging

subjective fear, but since this appears uncertain will return to it. In any event if there was a fear it was a fear of military service and as a draft resister or deserter and this did not fall within the definition of persecution for a Convention reason. Mr Ramsden argues the war is over and the Dayton Agreement is in place and relatively effective.

There was evidence to show that Albanians lived safely in Belgrade and as Miloservic said, "it is not in the Serbs interests to pursue the Albanians with malevolence" rather the opposite and finally even if there was a chance that on retum the appellants may be picked up by the police it would first of all be pure chance and secondly the police would be exceeding their powers. He did not accept they would be without remedy.

Turning to individual aspects of his submission in more detail.

As to any definition of persecution he urges firstly a lack of precision in definition is desirable in the interests of the refugee. The decision of Jonah has stood the test of time and provides a simple basic guide comprehensible to all. He referred us also to Staughton LJ's dicta in Ravichandran that persecution "must at least be persistent and serious ill-treatment without just cause by the State, or from which the State can provide protection but chooses not to".

He referred to part of some document he identified as 'Home Offfice Guidelines'. He set out four paragraphs, but did not produce it all: at some point this partial disclosure may have to be addressed. Two of these read:-

PERSECUTION

2. "Persecution" is a term which has not been clearly defined. We should accept that acts seriously prejudicial to life or liberty, involving a degree of victimisation, will amount to persecution. Killing, maiming or torture, either physical or psychological, can be considered persecution. But the intention of those committing the acts is as important as their effects. If for example, a particular country's security forces routinely enforce a curfew by indiscriminately machine-gunning those out after dark it is not necessarily persecution, but it they only act that way in areas inhabited by a racial minority it could well be so.

DISCRIMINATION

3. In certain circumstances lesser ill-treatment, which we might call discrimination, can amount to persecution. This might be so if incidents of discrimination were frequent or could be expected to occur :over a long period of time or if the consequences of the discrimination were substantially

prejudicial for the person concemed, inhibiting his freedom to exercise basic human rights eg to earn his livelihood, to practise his religion, or to have access to the educational facilities-normally available in his country."

Guideline 2 accepts that inability to earn his livelihood may if prolonged amount to persecution.

In dealing with the facts Mr Ramsden sought to contain this within a submission that 'much of it refers to the historical background'. He did suggest the Albanians may have to some extent been authors of their own misfortune and Serbs had also suffered he said.

He did not and could not deny that there is clear evidence of human rights abuses in Kosovo by Serbs against Albanians nor that there are restrictions imposed upon them.

At one point he says:-

> "There is also clear evidence that the Serb Authorities mete out unfair treatment to the largely Albanian population in an effort to maintain law and order. However, much of this aggression appears to come from a disorganised and improperly controlled police force, and there have been some trials of Kosovo police accused of the 'degrading' treatment of citizens."

Crucially he does not accept there is evidence the ordinary ethnic Albanian is likely to suffer harassment.

As to the law, Mr Ramsden argues the appellants must show they left Serbia as a result of a well-founded fear of persecution for a Convention reason. He says there is no evidence they did so, nor is there evidence of excessive punishment awaiting their return as draft evaders: he refers us to Filtchev (11899) - which involved a Bulgarian appellant, and Radivojevic (13372) - which did not refer to the intemationai condemnation of the conflict and agreed there is no evidence of excessive punishment.

Somewhat at variance with what he said earlier, Mr Ramsden submits that whilst ethnic Albanians probably continue to be harassed and discriminated against it does not amount to persecution.

As to Statelessness and inability to return to FRY. The latter does not create statelessness and they have FRY citizenship. As to inability to return he says - somewhat strangely - that the FRY mission here does not say they can 'never' return; indeed when the United Kingdom has concluded a 'bilateral agreement' they can.

He does not offer any information on when, if ever, we will conclude this rather mysterious 'agreement'.

Finally, he refers to Maric (13128) which supports his argument that returnability is entirely separate from status as a refugee and in relying on inability the appellant must show he is outside the country o,f nationality because of a well-founded fear of persecution for a Convention reason.

It will not then be necessary to show any additional risk of future persecution.

CONCLUSIONS

Subjective Fear

The Adjudicator certainly did not find that Nishiqi was credible. It appears that it was on this basis she came to the conclusion that he had no subjective fear of persecution whether well-founded or not. She also appears to have found that the appellant is unlikely to be a draft resister or deserter but that if he were he is unlikely to be severely punished. She accepts that the war in Yugoslavia have been internationally condemned and it seems to us that she probably accepts that draft evaders such as the appellant may well be sent to fight in Bosnia if there were any hostilities there to fight in.

As to Gashi the adjudicator appears to have accepted the savagery of the behaviour of the police at his house: and the war is internationally condemned and there is punishment for deserters and draft evaders. She did, not, nonetheless, accept that there was a reasonable likelihood that whatever may happen on return could be persecution for a Convention reason.

We feel that there is much confusion over the extent to which and the , circumstances in which a finding that there is no subjective fear is I appropriate. In these appeals the adjudicator so found in Nikshiqi but not in Gashi.

In Radivojevic at page 14 Professor Jackson said.

> "In the Tribunal's view the subjective element of any "fear" which must be held means that the appellant must believe that a consequence of his return would amount to persecution for a Convention reason. Where objectively it is shown that there is a serious possibility of persecution then it may well be difficult to refuse an application on the basis that the applicant does not believe that the persecution will occur."

This illuminates the potential for artificiality of the two "fears".

It is useful to look at the meaning of 'fear', there are many, we take the following from The Concise Oxford Dictionary:-

> "an unpleasant emotion caused by exposure to danger, expectation of pain; danger; likelihood (of something unwelcome); feel anxiety or apprehension about."

Whilst there may be occasions when an adjudicator so completely disbelieves everything an appellant says (the situation contemplated by Glidewell LJ in Kingori) that he does not even accept that his claim to a fear the consequences he states await him.

But the adjudicator is in fact usually also finding that the situation which awaits his return - both personal and background - does not, viewed objectively, give rise to any reasonable likelihood of persecution.

Conversely Professor Jackson says in Radivojevic where it is shown there is a serious possibility of persecution then it may well be difficult to refuse an application on the ground he has no actual fear.

An adjudicator should we think, first, give his objective assessment, based upon the oral testimony, his evaluation of the available information in the domain and any specidc documentation of which he is aware. If he accepts there is objective fear to hold nonetheless fear in any sense of the word is absent is hard to contemplate.

If however he finds there is no objective fear the presence or absence of a subjective fear is irrelevant.

In a Kingori situation a very short determination would seem appropriate. The more the adjudicator feels compelled to say the less likely it is that the situation is indeed a Kingori one.

PERSECUTION

Lord Mostill in R x T 2 All ER 865 in the House of Lords in looking at the extent to which an asylum seeker whose claim is based on terrorist activities remarked that 'time does not stand still'. The Convention was the best that could be achieved by agreement at the time and represented considerable compromise.

We agree that it would be a mistake to attempt a definition of 'persecution' which could in any way restrict its growth to meet the changing circumstances in which the Convention has to operate.

We draw considerable assistance from the Vienna Convention Article 31. Three criteria are contained in that article; good faith, to afford the ordinary meaning to the Convention to be interpreted and finally to have regard to its object and purpose.

To look at the final act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons two paragraphs seem pertinent, firstly at D:-

"Considering that many persons still leave their country of origin for reasons of persecution and are entitled to special protection on account of their position. Recommends that governments continue to receive refugees in their territories and that they act in concert in a true spirit of international co-operation in order that these refugees may find asylum and the possibility of resettlement".

Turning to the preamble of the Refugee Convention:-

> "Considering the Charter of the United Nations and the Universal Declaration of Human Rights have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination.."

The reference to fundamental rights and freedoms is repeated. The element of international co-operation and protection are also repeated.

In order to interpret this treaty in good faith nothing which we say should operate to restrict its application having regard to the object and purpose of the Convention.

Given that we are entitled to look at the Preamble (see Golder v UK 1975 1 EHRR 524) the principles of an internationally shared surrogate protection, rooted in fundamental human rights constitutes the basic approach to interpreting the word 'persecution'.

We must also, as article 31 of the Vienna Convention requires, interpret the word in accordance with the ordinary meaning to be given to the terms of the Treaty in context as Nolan J said in Jonah .

Mr Ramsden in his submission, whilst accepting the definition of persecution put forward by UNHCR, suggests the definition in Jonah has stood the test of time is binding and provides a simple basic guide comprehensible to all.

The ordinary meaning of the term-is however only a part of an economically worded provision; that meaning must be taken in context and in the light of the object and purpose. This is not to say that we are suggesting, even if we could, that the decision in Jonah is flawed. We have little doubt that it is right but it is not the last word in interpreting the meaning of persecution. This is obvious from what Simon Brown LJ said in Ravichandran (1996 Imm AR 97 at page 109):-

> ".. the issue ...raises a single composite question. It is, as it seems to me unhelpful and potentially misleading to try to reach separate conclusions as to whether certain conduct amounts to persecution, and as to what reasons underlie it. Rather the question whether someone is at risk of persecution for a Convention reason should be looked at in the round and all the relevant circumstances brought in account."

Simon Brown LJ explicitly relied upon Professor Hathaway's four categories with approval.

Mr Ramsden appears to be using what Staughton LJ said in his judgment in the same appeal and some way to cut down the extent of what amounts to persecution. Staughton LJ said:-

"Persecution must at least be persistent and serious ill-treatment without just cause by the State, or from which the State can provide protection but chooses not to do so".

The words which precede this quotation were:-

"We should not seek to discriminate too nicely as to what is and what is not the appropriate response of the forces of law and order in such circumstances".

Systemic or persistent behaviour can be such when meted out to the asylum seeker or it can be simply descriptive of the behaviour and policies of that particular State. Were this not so such a restrictive interpretation could exclude the extreme end of violence to the person contemplated in Professor Hathaway's first category and it would in our view deal with only part of the case which will arise under categories 2 and 3 or even 4.

We do not think that when the Convention was drafted it was intended to include the right to be free of arbitrary deprivation of property or to be protected against unemployment (Professor Hathaway's fourth category) because as we understand the climate in which this Convention was created the former would not have been accepted by the Eastern Block and the latter would not have been accepted by the West. Even though time has not stood

still we think it unlikely that it has moved on so far that these aspirations are included within the definition of persecution. However there seems to be no dispute that it includes not only the first category but the second category as well and some aspects of the third category. The second of the Home Office Guide Lines which we have referred to earlier on in this determination reads thus:-

> "Discrimination. In certain circumstances lesser ill-treatment, which we might call discrimination, can amount to persecution. This might be so if incidence of discrimination were frequent or could be expected to occur over a long period of time or if the consequences of the discrimination were substantially prejudicially for the person concerned, inhibiting his freedom to exercise basic human rights, eg to earn his livelihood, to practice his religion, or to have access to the educational facility normally available in his country."

This accords with the decision of the Tribunal in Padbu (12318) (the inability to work and deprivation of State Benefits due to ethnic origin) and Lucreteanu (12126) (threatening phone calls in Rumania).

Parts of paragraphs 2 and 4 of the guide lines seem to run counter to Mr Ramsden's concession of the UNHCR position. In paragraph 2 it is said:-

"...the intention of those committing the acts is as important as their effects. If for example, a particular country's security forces routinely enforce a curfew by indiscriminately machine gunning those out after dark it is not necessarily persecution, but if they only act that way in areas inhabited by a racial minority it could then be so".

This paragraph appears to elide persecution into the Convention reasons. The intention behind the persecutory acts is generally irrelevant. On the one hand in Ravichandran Simon Brown LJ said:-

"lf the real purpose of these roundups was to deprive Tamils of their liberty simply out of hostility toward them I cannot think that the loss of freedom involved would properly held insufficient to constitute persecution. Equally, if there remained a practice of torturing those detained I very much doubt whether a finding of persecution on Convention grounds would be precluded merely because the torture was intended to discourage terrorism...".

The intention behind the legislation in Pakistan aimed at Ahmadis may, so far as the Orthodox Muslim is concerned, be simply intended to protect the integrity of Islam but that is of little comfort to the Ahmadlyya who are prevented from practising their faith and are driven out of the Mosque.

The example of indiscriminate machine gunning of curfew breakers is unfortunate. It would take little to convince us that a State adopting such practices had abandoned all attempt to protect its people and was merely maintaining itself in power.

We agree with the UNHCR submission, in response to Mr Ramsden's submission, that the machine gunning would amount to persecution, though whether of course any individual was able to use that persecution as part of his claim to be recognised as a refugee would depend upon whether in his own circumstances he could bring it within one of the five Convention reasons. At that point we agree intention can be relevant.

Tuming back to whether or not a deprivation of welfare benefits can amount to persecution. It is suggested that this can be so if either the deprivation is discriminatory or not grounded in an absolute lack of resources. We would imagine that if there is an absolute lack of resources no one, or no one other than citizens or residents would be likely to be in receipt of welfare payments. Otherwise we would agree that there must be present an element of discrimination.

It has been suggested that in the light of Paragraph 334 of HC395 the obligation under Article 33 not to expel or return a refugee to a territory where his life or freedom would be threatened "limits any definition of persecution for the purposes of ascertaining who is a refugee under the provisions of Article 1A(2).

In R v ex parse Sivakumaran Lord Goff did not accept that approach:-

"It is, I consider, plain ....that the non refoulement provision in Article 33 was intended to apply to all persons determined to be refugees under Article 1 of the Convention".

No such limitation appears to have been in the mind of the court in Ravichandran nor in any of the decisions of the Tribunal.

So far as the respondent is concerned he is content, said Mr Ramsden to accept the position that "in essence there is no difference between the UNHCR submission and the Home Office interpretation of persecution".

The UNHCR position on persecution is clear and unequivocal and looks to Article 1 to determine the scope of Article 33 not vice a versa. In any event as Miss Winterboune points out the definition of freedom in Articie 33 allows it to be interpreted in conformity with the purposive interpretation of Article1A(2) argued for by the UNHCR. We agree with what Mr Towle for the UNHCR has set out.

CONVENTION REASON

Miss Winterbourne in essence concentrates her detailed submissions on two legs. Firstly that of race as an ethnic Albanian. She says that the treatment metered out to ethnic Albanians in the country amounts to persecution. The requirement of military service also amounts to persecution. Finally that the appellants have a well-founded fear of persecution in the FRY for a Convention reason because they have claimed asylum in the United Kingdom and have failed. This she says amounts to the expression impliedly of a political opinion in the eyes of the authorities.

The second leg to Miss Winterbourne's argument is statelessness and inability to return as discrete issues.

We agree with Miss Winterbourne that there is little to be gained from a fine consideration of whether the treatment complained of by an ethnic Albanian is by reason of his race or his nationality. It is rare that a claim to asylum can be neatly pigeonholed into one of the categories. In most refugee producing countries the government is in one way or another embattled and seeks to repress and suppress all activity which it perceives to be threatening to its absolute authority.

Concerning refusal to readmit and military service. There is no argument that in general terms the evasion of military service does not of itself fall within the Convention.

In both these appeals the adjudicators found that the hostilities from which essentially military service was required were hostilities which had been internationally condemned in the United Nations. That would of itself constitute a Convention reason if it could be established that on return there was a reasonable likelihood of punishment of draft evasion or desertion.

We have some concern that draft evasion, desertion and similar expressions have an emotive content; they relate to an outlook which considers service in the forces of one's country as an obligation. To make comparisons in the use of expressions appropriate to obligation and duties protecting one's country from an aggressor serves only to demean such obligations and indeed is the first step along the road to give support to policies which led to the heinous crimes presently before the International War Crimes Tribunal - and ultimately far worse - undermine the rejection of a defence of obedience to orders'.

Such a view is supported in a note of the Presidency of the Council of the European Union of February 20 1995 in a conflict which "takes the form of reprisals against opponents or sections of the population or of a campaign to

annihilate them (Working Party 4245/1/95,Rev.1 para 5). Though it is true the Council on 23 November 1995 takes a narrower approach.

This view is also that of Dr Joachim Henkel, a Judge of the German Federal Administrative Court in Berlin in a paper delivered at an International Judicial Conference in London on 1-2 December 1995, where he says:-

"lf a person can show, for example, that against his conscience he would have been compelled to participate in a military action contrary to basic rules of human conduct, in my view, the order to engage in such actions in itself would amount to persecution. Consequently, prosecution and punishment for draft evasion or desertion committed in order to avoid being compelled to participate in such actions also constitutes persecution irrespective of whether or not it would be disproportionately severer.

The UNHCR Handbook para 171 supports this view.

There is also support for such a view to be found in a usefully expressed way in the final report of the Commission of experts established pursuant to Security Council Resolution 780(1992). UN doc.S/884/674 27 May 1994 Para 129 at 33 where the Commission states:-

> "With respect to the practices by Serbs in Bosnia and Herzagovina and Croatia 'ethnic cleansing' is commonly used to describe a policy conducted in furtherance of political doctrines relating to 'Greater Serbia'. The policy is put into practice by Serbs in Bosnia and Herzegovina and Croatia and their supporters in the Federal Republic of Yugoslavia. The politicaldoctrine consists of a complex mixture of historical claims, grievances and fears and nationalist aspirations and expectations, as well as religious and physiological elements."

STATELESSNESS AND/OR INABILITY TO RETURN

Miss Winterbourne argues that, given the FRY authorities had refused to allow the appellants to return, and we think that the letters from the FRY do not admit of any construction other than "They cannot come back", they are ipso facto stateless. It would not seem to us that such a conclusion necessarily follows. Miss Winterbourne's alternative argument is the inability to return or the failure to re-admit either as a failed asylum seeker or on the basis of the ruling made by the Tribunal in Ivanov (R 12583b) which reasoned in the following way:-

> "The Convention does not provide for a person relying on an inability to show simply that he left the country of citizenship or former habitual residence because of a well-founded fear of persecution. It

> requires establishing that the applicant is "outside" the appropriate country because of such a fear. It follows that such an applicant must show that he is outside the country for reasons of fear of persecution when the inability to return [our emphasis] occurs and again in Radivojevic (13372) 'An appellant relying on inability must establish that he or she is outside the country of nationality ...because of a well-founded fear of persecution for a Convention reason and that that fear must coincide timeleously with the inability to return. So while inability once established means that an applicant need not show a risk of future persecution [our emphasis], for such a risk to become irrelevant it must be shown that there was a well-founded fear of persecution when the inability to return occurred and that that inability continues to exist at the date of hearing.'."

Mr Ramsden contended (at point 25) that the appellants must demonstrate to a reasonable degree of likelihood:-

1. That they left Serbia as a result of a well-founded fear of persecution for a Convention reason; and

2. Are unwilling to return as a result of the same; or

3. Or are unwilling to return because of such a fear, and are stateless; and

4. Are unable to return because of a refusal by the FRY to accept them.

The material parts of the Refugee Convention are contained in Article 1A(2) which reads:-

> "...owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or owing to such fear is unwilling to return to it."

Mr Ramsden's first point that the appellants must have left Serbia because of a well-founded fear must be wrong. If such were the case it would deny a claim which arose by reason of a change in circumstances after leaving his country giving rise to a Convention fear (a refugee surplace). In any event as the UNHCR says in its further submissions on Mr Ramsden's point the focus is whether the appellant has a well-founded fear of future persecution not whether in the past he left Serbia for a Convention reason.

On the assumption which we make that the appellants are not stateless they must, as Miss Winterbourne submits, have some nationality and that nationality seems to us to be FRY. It appears clear that they are unable to return. The only question therefore is whether they have a well-founded fear for a Convention reason, that is to say as ethnic Albanians, or perhaps argues Miss Winterbourne the mere denial of re-entry. In this regard we are referred to that part of Radivojevic which states:-

> "It may well be argued that in refusing re-entry the State is simply removing the protection which the appellant is owed as a matter of International Law and under the Refugee Convention. It is refusing the appellant the exercise of the fundamental right on which the Convention is based in that it is refusing the appellant the exercise of his right and freedom to live within the country which owes him protection. It is shuffing him out from the territory in regard to which he is entitled to enter and live without persecution, [which] is the very foundation of the Convention itself."

Mr Ramsden counters the argument by referring to Maric (13128) and also to Radivojevic.

We have carefully studied Maric, which also concerned a citizen of the FRY who was a draft evader and whose appeal was dismissed. There are two statements which with the greatest of respect must be wrong. Firstly at page 3 the Tribunal states:-

> "One cannot overlook the near contradiction in a claim to asylum advanced on the two-fold basis of a fear of persecution if returned to Yugoslavia and the denial of the right to return there."

and, further:-

> "The individual's removability is an entirely separate issue from that of his status as a refugee."

As to the first, the contradiction to which the Tribunal refers is purely superficial and poses the wrong question. The issue is that which arises under Article 1A(2) of the Convention to which we have referred above namely, are the appellants able to go back?'; subject to the other requirements, if the answer is 'no', they come within the Convention. This also answers the second point. Removability is not a separate issue from the status of the refugee, where the issue at stake is the inability to go back to his country it is at the root of the issue of recognition as a refugee.

The argument posited in Radivojevic that the mere refusal of entry could amount to persecution is a strong one. It must be borne in mind that Article 33 of the 1951 Convention obliges a contracting State not to expel or return a refugee to the frontiers of territories where his life or freedom would be threatened on account of e.g. his race. There are many examples where inability to retum is due to a refusal to readmit a citizen seen to be a dangerous dissident. Returnability and removeability and the status of a refugee are inextricably bound up. As to statelessness, we remind ourselves, that there is a separate Convention, the wording of Article 31 of which is very similar to Article 33 of the Refugee Convention. If the decision of the Tribunal concerning this Convention in Kelzani (1978 Imm AR 173) were to be decided today we have some doubts whether it would be decided in the same way.

CONVENTION REASON

We need say little more under this head. It is agreed by all parties that the appellants are ethnic Albanians and in our view that is a race within the contemplation of the Refugee Convention Article 1A(1) and Article 33.

A Well-Founded Fear of Persecution

We need deal no further with the issue of a subjective fear.

We have heard and seen a considerable body of evidence concerning the policies of the government in the FRY with regard to ethnic Albanians and their treatment We are satisfied from this evidence that the Serbian Government in Belgrade does have a system or policy which targets ethnic Albanians and is directed in the long term to their complete removal: 'ethnic cleansing' is the euphemistic term applying to this evil. The fact that the actual chance of an ordinary Albanian being individually targeted or singled out will not, if the actions towards ethnic Albanians is serious enough and both extensive and sustained. Given the background policy of the Serbian Government one can readily conclude that the degree of risk to any ethnic Albanian is sufficient to raise it to the level of a serious possibility. In our view the evidence laid before us from for example Dr Poulton and Dr Duijzings admits of no other reasonable conclusion at least on the criteria to establish it in asylum claims.

To use but one extract from the wealth of evidence before us, which is in no way contradicted, we take what Dr Duijzings said in his letter of May 28:-

> "Not many but the huge majority (about 80%) of Kosovo Albanian workers have lost their jobs (more than 120,00 people). Most of them did not have the choice to keep their jobs by co-operating with the

> Serbian regime, although initially a number of Albanians were dismissed because of refusing to sign a declaration of loyalty to Serbian rule in Kosovo. In most cases however Albanians did not refuse to work...the policy that the Serbian regime has conducted in Kosovo since then can best be characterised as a planned and thorough Serbianisation of the public and State sector by using all available means to effectively dispel Albanians from their jobs. There is massive evidence of grave human rights abuses."

The evidence appears to us to support the argument that if the appellants were able to go back to FRY it would not be reasonable to expect them to remain in Belgrade as they would be even more exp^sed there than elsewhere. Those risks are of physical abuse, prosecution for draft evasion, the inability to obtain employment and the constant and persistent harassment by police whom the central Government will not control or discipline All this falls within the definition of persecution which we have carefully examined earlier in this determination.

In deference to Mr Ramsden's further arguments concerning the facts we would simply say that whether history or the Serbian political attitude was the cause of the behaviour by the Serbs is not the question. The question is simply how do the Serbs behave now they are in power? An examination of who did what in the past is not, in our view particularly helpful at least in this appeal.

Miss Winterbourne asked us to make a specific finding on whether the appellants have a well-founded fear of persecution because they unsuccessfully claimed asylum on the Convention basis that it is imputed political opinion. We do not think that in these cases this needs to engage us and we decline therefore to deal with it;

BASIS OF DECISION

It is sufficient to base the decision, as we do, firstly upon the appellants' inability to return and secondly a fear of persecution as ethnic Albanians which is objectively well-founded and based on the treatment we think there is a serious possibility they may receive.

We close by referring to one particular paragraph in Mr Towle's submission on behalf of the UNHCR which we think encapsulates the dangers in failing to treat the Convention as a practical and living tool which the signatories co-operate to provide that substitute protection of the more basic fundamental human rights.

He said:-

> "The term persecution' cannot be seen in isolation from the increasingly sophisticated body of international law on human rights generally. In recognition of the adaptable nature of the refugee definition to meet the ever changing needs of protection UNHCR recognises an important link between persecution and the violation of fundamental human rights. In this context the focus of any enquiry is to establish whether there has been a failure of domestic protection and therefore a need for surrogate international protection."

Both the appellants' claims must be recognised and both the appeals are allowed.