Case Nos: C/2001/2000, C/2001/1475, C/2001/1476, C/2001/1477, C/2001/1479, C/2001/1480, C/2001 1856, C/2001 1857

Neutral Citation Number: [2002] EWCA Civ 539
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE IMMIGRATION APPEAL TRIBUNAL

Royal Courts of Justice
Strand,
London, WC2A 2LL

Wednesday 24th April 2002

Before :

LORD JUSTICE WARD
LORD JUSTICE LAWS
and
LORD JUSTICE KEENE

- -

Between :

S & others	**Appellant**
- and -	
The Secretary of State for the Home Department	**Respondent**

- -

(Transcript of the Handed Down Judgment of
Smith Bernal Reporting Limited, 190 Fleet Street
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Official Shorthand Writers to the Court)

- -

Nicholas Blake QC and Rick Scannell (instructed by **Sutovic and Hartigan**) for the appellants
Sean Wilken and Kristina Stern (instructed by **Treasury Solicitors**) for the respondent

- -

Judgment
As Approved by the Court

Lord Justice Laws:

This is the judgment of the court.

INTRODUCTORY

1. There are before the court eight appeals, and a renewed application for permission to appeal.

2. All the appellants are Croatian Serbs, save one, M. He is an ethnic Hungarian who fought against the Croats, and is married to a Serb. Ward LJ has directed that they be not referred to by name, and so far as it is necessary to mention the appellants individually we shall do so by the initials listed at the start of the Secretary of State's skeleton argument.

3. All the appeals, and the application, are directed against determinations of the Immigration Appeal Tribunal ("IAT") given following a hearing on 21st & 22nd March 2001 at which the IAT considered all eight cases together. Given the nature of the issue in the appeals it is important to notice its reasons for doing so, and the purpose of the exercise:

> "2. There have been a very large number of appeals relating to ethnic Serbs and many have been adjourned by the tribunal pending the outcome of these appeals, which have been described as test cases... Furthermore, it is to be noted that a large number of appeals have been allowed by adjudicators during the course of last year (some as a result of concessions by the Secretary of State) and we have been provided with a list of some 264 such appeals. Equally, the tribunal has had a number of such appeals before it. While the results have varied, the approach has been consistent, but the tribunal has had to rely on whatever material has been put before it. This

> has meant that there has been a degree of apparent inconsistency and so it was thought desirable that there should be an authoritative decision as to what the current situation is to enable consistent results to be achieved because this tribunal has been able to consider all relevant evidence.
>
> 3. … [T]hese cases are to be regarded as definitive unless there is a material change in the situation in Croatia. Since, as will become apparent, we are persuaded that none of the eight individuals concerned here have established a well-founded fear of persecution, such a change will only be for the worse if most applications involving ethnic Serbs are not to fail."

4. The eight appellants had applied for asylum to the Secretary of State and been refused. They all mounted appeals to Special Adjudicators. Two were successful at that level: S and M. All eight cases went with leave before the IAT. The IAT held that none of the appellants harboured a well-founded fear of persecution, and so upheld the Secretary of State. In each case the IAT refused permission to appeal to this court. But on 1st August 2001 Pill LJ granted permission in all the cases except that of SN, which as we understand it was not before him. SN obtained permission to appeal on 8th February 2002, on the same ground upon which Pill LJ had granted the other applications. SN is also the appellant who advances a renewed application for permission on a separate basis. (As regards that we should say at once that at the hearing in this court we granted permission upon this discrete basis, and with the Secretary of State's consent quashed the determination in SN's case. we shall explain why that was done in due course.) The ground upon which all the appellants have permission lies within a relatively narrow compass. It is to the effect that the IAT failed to consider and weigh two reports which are said to have been of particular significance for the assessment of conditions in Croatia as at the time when the IAT had to consider the matter. These reports were made respectively on 29th

January 2001 and 22nd March 2001 by the Special Rapporteur of the United Nations Commission on Human Rights. We will refer to them as the SR reports.

5. There is no express reference to either of the SR reports on the face of the IAT determination in the case of S, given on 1st May 2001, which was chosen as the lead determination in which to set out the IAT's general conclusions as to the situation in Croatia and the risk of persecution of ethnic Serb returnees. We shall explain in due course the alleged significance or otherwise of the SR reports, and the circumstances in which they surfaced in the case. But we should first sketch the background.

THE FACTUAL BACKGROUND AND THE DETERMINATION OF THE IAT

6. Here, we can do no better than introduce the factual background to the appeals, and the IAT's approach to it, by citing paragraphs 10-12 of the IAT's determination in S, as follows.

> "10. The persecution alleged in these cases is by Croats and involves severe discrimination and hostile acts on the ground of ethnicity. Racial hatred has a long history in that part of Europe and in the course of the fighting which followed the break up of Yugoslavia terrible atrocities were committed by Serbs against Croats and by Croats against Serbs. In Eastern Slavonia, where most of the Serbs who have remained in or returned to Croatia now live, the Serbs were in the ascendancy between 1991 and 1995. In 1991 Vukovar was captured and there were a large number of murders of civilians perpetrated by forces under the command of Colonel Msric. IL and VL, who are son and mother, rely heavily in support of their claims on the fact that their father and husband was killed at Vukovar while serving under Colonel Msric's command. He together with other officers has been indicted for the murder of some 360 men taken from Vukovar hospital. Since 1995, when the Serb forces were driven out, initially UNTAES and since 1998 the Croats have

been in control. Initially, when President Tudjman was in power, widespread discrimination against the harassment of Serbs was encouraged. Tudjman's party, the HDZ, was fervently nationalistic. The acts of harassment of which all the appellants complain occurred before 1998 and 1999 at a time when the government was not only unwilling to provide protection against hostile acts towards Serbs but was positively encouraging them. In December 1999, Tudjman died and in February 2000 there was a change of government. The new President has adopted a conciliatory approach and is determined to uphold minority rights and to facilitate the return of Serbs who had fled. It is accepted by all who have reported on the situation in Croatia and both by Dr Gow and Judge Karphammer that the government is trying to achieve rapprochement. It is not mere rhetoric. There have been significant acts which show that the government is determined to overcome the hatred and divisions. Ethnic cleansing, which the hard-line Croats want to achieve, must not be allowed to succeed.

11... The government's intentions are undoubtedly being to an extent frustrated by those responsible at lower levels for implementing the relevant policies. Discrimination remains and acts of harassment on ethnic grounds are commonplace and are frequently not dealt with properly by the police or judiciary. That there have been improvements since last February cannot be doubted, but we have to ask ourselves whether those improvements are such as to prevent the appellants establishing that there is a real risk of persecution. If there is such a risk, the persecution will be for a convention reason, namely race or nationality.

12. We are therefore largely concerned with persecution by non-state actors. The only qualification relates to prosecutions for war crimes which are said to amount to persecution. Thus the Convention can only apply if the government is unwilling or unable to provide the necessary protection to its citizens. The issues are whether there is a real risk of persecution and, if so, whether the government is unable or unwilling to provide protection. We have posed two questions. In reality, there is only one, since it is apparent from the decision of the House of Lords in *Horvath v Secretary of State for the Home Department* [2000] 3 WLR 379 that the test as to whether any ill-treatment amounts to persecution depends not only on the severity of that ill-treatment but also upon there being a failure by the state to afford protection against it: see per Lord Hope of Craighead at p. 385."

7. WE should set out in respect of each appellant the date when he or she fled Croatia, the date of the Secretary of State's refusal of the asylum application, the

date of the Special Adjudicator's determination, and the date of the IAT determination.

Name	Date Departure	Date of SSHD	Date of SA	Date of IAT
S	16.9.98	28.3.00	27.11.00	1.5.01
BN	9.2.99	26.07.00	22.10.00	16.5.01
VS	28.12.98	18.2.00	28.9.00	16.5.01
M	10.9.99	28.3.00	21.9.00	21.5.01
K	7.99	5.5.00	13.9.00	21.5.01
IL & VL	16.12.98	11.11.99	24.8.00	30.5.01
SN	26.3.99	18.2.00	08.11.00	25.5.01

8. Mr Blake QC, for all the appellants, points out that each of his clients fled Croatia during the period of the Tudjman government, and it is said that at that stage their fear of persecution at the hands of the Croats was plainly well-founded. In the case of IL and VL the Secretary of State's decision was made before the Tudjman government fell. These circumstances are material to a submission related to what has been called the evidential burden of proof in cases of this kind. We will explain that presently. The nature of the evidence before the IAT was described by the tribunal in paragraph 18-20 of the determination in S:

> "18. We must now consider the evidence before us of the situation facing such as these appellants if returned to Croatia. In this as in all asylum cases the tribunal has available a number of Country reports. There are the usual annual reports from the US State Department. There are reports from Amnesty International, from the UNHCR, from Human Rights Watch and from the Home Office (CIPU). There is a substantial report from the ECRE Focus Group on South-East Europe based on research carried out between November 2000 and January 2001 which is concerned specifically with the return of refugees. This points out some problems and makes recommendations for improvements. And there are regular reports issued weekly and consolidated regularly from the Organisation of Security and Co-operation in Europe (OSCE). There are in the bundles

before us many other reports from various organisations, letters to and from the British Embassy and newspaper cuttings all of which helps us to form a reliable picture of what is happening and is likely to happen. Since this is intended to enable the tribunal to form a definitive view as at the date of the hearing (updated by further material provided to us in written submissions at the beginning of April which does not in fact add significantly to what was before us at the hearing) of the situation in Croatia, the material has been somewhat more extensive than that which is usually deployed in similar cases. But it involves the same sort of material.

19. In all cases, we have to distil the facts from the various reports and documents. Bodies responsible for producing reports may have their own agenda and sources are not always reliable: People will sometimes believe what they want to believe and, aware of that, those with axes to grind may feed willing recipients. Many reports do their best to be objective. Often and inevitably they will recount what is said to have happened to individuals. They will select the incidents they wish to highlight. Such incidents may be wholly accurately reported, but not always. This means that there will almost always be differences of emphasis in various reports and sometimes contradictions. It is always helpful to know what sources have been used, but that may be impossible since, for obvious reasons, sources are frequently anxious not to be identified. We are well aware of criticisms that can be and have been levelled at some reports and are able to evaluate all the material which is put before us in this way.

20. In addition, we have had the advantage of hearing from two acknowledged experts in relation to Croatia. Dr Gow is a reader in War Studies at King's College, London. He has visited countries which formed Yugoslavia on average two or three times a year and has worked as an expert advisor and witness for the Office of the Prosecutor at the UN International Criminal Tribunal for the former Yugoslavia at The Hague. Judge Karphammer was a judge in Sweden and has since 1985 been senior legal advisor in the Eltsberg County Council in Sweden. More importantly for our purposes, between 1997 and June 1999 he was head of the legal unit of the OSCE in Eastern Slavonia and is now an international judge in UNMIK in Kosovo. He has close personal ties in Croatia and keeps himself informed of the situation in that country, which he visits on a monthly basis. It was his report in October 1999 which led to acceptance by the Home Office that those Serbs who have served in the army against Croats should be regarded as at risk of persecution if returned. We have been assisted by evidence; each we entirely accept was doing his best to help us to understand the realities of the situation facing ethnic Serbs in Croatia."

There was also a report from Ms Savic, of the appellants' solicitors, who had made what she described as a "fact finding" visit to Croatia about twelve months before the hearing at the Tribunal. The IAT did not find her report to be of any real assistance (paragraph 21). No one complains of that conclusion, and with respect we need not refer to that material further.

9. The IAT described the essential nature of the cases before it as follows, in the S determination.

> "22. The appellants rely on two generally applicable reasons to fear persecution. These are the risk of ethnically motivated violence against which the State is unable or unwilling to provide adequate protection and general discrimination in employment, provision of state benefits and welfare care and, in particular, in housing. Following the fighting, many homes occupied by Serbs have been destroyed and others have been taken over by Croats. The legal system has been at best reluctant to make orders requiring that the Croats leave and some judges who have made such orders have been intimidated. These reasons apply to all the appellants and their fears are fuelled by the harassment they suffered before leaving Croatia.
>
> 23. In addition, reliance is placed on two further matters relating to military service. First, those who served in the army, particularly the OS RSK, are likely to find themselves being prosecuted for war crimes merely because of such service. The attitude has been that there is general responsibility for the crimes that were undoubtedly committed and that it is unnecessary to establish individual responsibility... Secondly, males under 27 are liable to be conscripted into military service in the Croatian forces. That will result in a serious risk of violence towards and so persecution by Croats particularly of those who had served in Serb forces in the past..."

There follows in the determination some considerable citation from the reports, including a briefing by Amnesty International concerning Croatia, made on 28th March 2001, to which Mr Blake made specific reference. Then at paragraph 25 the IAT observed:

"Since the situation is somewhat fluid and improvements are undoubtedly occurring, it is necessary to look particularly at the most recent reports".

We should next set out paragraphs 28-30 in part:

"28. The latest full report by the OSCE is dated 14 March 2001. It is intended to provide a review of progress since the previous full report in November 2000. It notes a number of positive developments, particularly in relation to the judiciary and the police. There have been 'some promising steps' taken to address property repossession and new instructions issued to facilitate assistance in reconstruction of damaged property. It is noted that, although there have been a significant number of returnees, many do not remain. The approach to war crimes has improved; statements have been made recognising the need to establish individual responsibility. There is in train a review of prosecutions for war crimes and the police have, in carrying it out, conducted themselves 'professionally and promptly'. It states:-

> 'The Mission expects that all cases will be dealt with expeditiously by the judiciary and based solely on individual responsibility'.

The report deprecates the failure to make progress to remedy the effects of previous discriminatory legislation (now abolished) affecting property rights. Overall, it is relatively optimistic.

29. The report notes that the government has reaffirmed its commitment to a multi-ethnic police force throughout Croatia, and in Eastern Slavonia, as we shall see, it composition reflects the ethnic balance. Its performance is assessed as being good, with more members of minority communities expressing satisfaction. It states:-

> 'In the Vukovar area, police commanders took a number of steps including meeting the parents and school administrators, to ease ethnic tensions in two schools. However, the classification of ethnically motivated incidents by the police as being only violations of public order was still noted throughout Croatia – OSCE police monitors maintained regular working meetings to retroactively monitor as well as to provide advice and assistance to local police officers'.

With reference to the judiciary, the report notes:-

> ‘Amendments to the laws incorporated some recommendations of the Council of Europe experts. For example, the amendments provided for more transparency and for an increased role of professional bodies within the procedures for appointment, dismissal and discipline of judges. They also allow for a Constitutional Court review of disciplinary decisions on the request of the individuals concerned, providing grounds for an increased independence of the judiciary’.

> “30. Dr Gow and Judge Karphammer both take the view that the reports are too optimistic and that there remains a risk of persecution, largely because, whatever the government may say and do, the HDZ and those who support its aims are still in control at lower levels and their actions maintain the discrimination and enable harassment and violence to occur with impunity... Essentially, the burden of both witnesses’ evidence was that it was too early to say that the reforms had borne fruit and the risk of persecution remained. The state was certainly unable to provide the necessary protection.”

Then the IAT’s general conclusions are expressed thus.

> “32. ... Judge Karphammer was obviously surprised that the latest report [sc. of OSCE] was so optimistic, but we do not know what may have led to the observations of those with whom he discussed it. It may have been a desire to agree with his concerns. We have, of course, looked critically at the reports, but it contains significant reservations despite its optimism. In general, it seems to us to fit in with the other recent reports which are before us. We take the view that, although we recognise and take account of the criticisms, we can accept the positive approach indicated by the OSCE reports, supported as they are by the UNHCR and by other reports. It follows that we do not accept that the criticisms made by the witnesses are sufficient to make us reject the overall picture painted by the reports.
>
> 33. In the end, we are not persuaded that ethnic Serbs as such face a real risk of persecution based on violent attacks or harassment. There is, in our view, no real risk that such activities will not be properly dealt with by the police and the judiciary. There can of course be no guarantee for an individual that he or she will not suffer an attack from a Croat or a group of Croats, but we are concerned with whether there is a **real** risk. We have not referred to all the passages in all the reports which have been relied on by the parties. We have of course considered them all and, we hope, have fairly summarised their effect. We also take into account the attitude of the UNHCR. In August 2000 it told the Home Office that it had begun to encourage ethnic Serb refugees who were prepared to do so to return to Croatia,

although it could not be ruled out that they might suffer discrimination or harassment 'sometimes to a degree that entitles them to refugee status'. We note that in a further letter of 15 March 2001 it recognises that individuals may be able to substantiate valid refugee claims and so recommends that 'each case be carefully examined on its own merits to ensure that individuals in need of international protection receive it'. While we recognise the criticisms that can be and have been levelled at the UNHCR, in particular that it wants to encourage refugees to return so that they cease to be a responsibility of UNHCR, as a responsible body it would not in our view encourage return unless satisfied that in general there was no real risk of persecution. To do otherwise would be to encourage breaches of the Convention.

34. We now have to ask ourselves whether past military service or the prospect of conscription tip the balance in favour of the appellants. Past military service may have two effects. First, it may make the individual more likely to be subjected to harassment or violence once it is known, as it would almost inevitably be, that he or she had served in the army against Croats, especially in the OS RSK. This would apply not only to those who had served but to their families or relatives. Such individuals would be at even greater risk in the war affected areas. This had led Mr Nathan to submit that Serbs in those areas must be recognised as refugees because they are at risk of persecution. There are undoubtedly stronger feelings in those areas because of the damage inflicted by both ethnic groups at different times against each other. But we do not think that the evidence supports the conclusion that in all cases where there has been military service refugee status should be recognised so that return cannot be made. Thus, while we recognise that individuals may because of special circumstances be at risk, we are not persuaded to the low standard required that even service which involved fighting against Croats suffices to create a real risk of persecution, particularly in the light of the measures adopted to protect against ill-treatment and the nature of persecution within the meaning of the Convention.

35. Secondly, past military service is said to lead to a risk of persecution for alleged war crimes, itself persecution because of the reliance on collective as opposed to individual responsibility. There is persuasive evidence that the approach is changing. We have already referred to the reports which indicate that. It is true that there is evidence that some returnees have been persecuted for and convicted of war crimes despite being included in any amnesty or cleared by the authorities before return. We do not know what the evidence was in those cases; in particular, we do not know whether there was evidence of individual participation in war crimes. It is obviously right that genuine war criminals should be convicted and punished. However, the credibility

> findings must lead us to accept that none of those appellants was guilty of any criminal behaviour.
>
> 36. There have been suggestions of hidden and secret lists of alleged war criminals and of many convictions in absentia. There is little concrete evidence that such lists exist or that such convictions (if they have occurred) have been pursued to any significant extent. We note the suggestion that these stories are spread to discourage Serbs from returning. This may be so. If it is, there will be no persecution if in reality no action is taken against the individual in question. We are particularly sceptical at the Danish report which records that 'almost all male Serbs of military service age were prosecuted for offences covered by the amnesty and 95% of them convicted in absentia'. We would expect there to be evidence of far more prosecutions of returnees, even if they did not remain, than is the case. In our view, only in an exceptional case could a valid asylum claim be established because of past military service. That is the position now; it was not the position some months ago. And we note too that the UNHCR has not confirmed the suggestions."

Those then were the IAT's general conclusions.

THE SR REPORTS

10. Now we shall explain how the SR reports came into the case. By the time the hearing was concluded on 22nd March 2001 the hour was late (SN's counsel sought and obtained permission to put his final submissions in writing). And so the IAT adjourned, reserving its decisions. The SR reports were not then before it; indeed the second one, as we have said, bore the very date 22nd March 2001. On 10th April 2001 the solicitors acting for all the appellants wrote to the clerk to the IAT enclosing the reports. They advanced certain further submissions in reliance on them, and cited substantial extracts. The Treasury Solicitor made observations on the respondent's behalf by letter to the IAT dated 17th April 2001. The first report covered a period between September and December 2000. The second, which was presented by way of an addendum or update,

reflected a visit to Croatia from 26th February to 1st March 2001. We must set out a number of passages, starting with the first report as follows.

> "41. While recognising the positive achievements of the Government of the Republic of Croatia in recent months, the Special Rapporteur expresses his continuing deep concern over the unequal application of the rule of law and the politicization of local judiciaries, as demonstrated by the recent escalation in seemingly arbitrary arrests of Croatian citizens (both domiciled and returnees) of Serbs ethnicity - mainly elderly persons, pensioners, and farmers - on war crimes charges. Lists of ethnic Serbs suspected of war crimes, reportedly prepared by the previous regime, appear to have been revived by judicial bodies at the local level. Arrests are now being made on the basis of these lists (some prepared as many as eight years ago). In spite of assurances by President Stjepan Mesic that Croatia is a democratic society in which no citizen should feel targeted on account of ethnicity, these arrests have led to a deterioration of confidence in the country. Of particular concern, they are contributing to a slowing down of the already uneven process of minority return.
>
> 42. In September 2000, meanwhile, at least nine ethnic Croats – including members of the Croatian army and secret services – were detained in several cities in Croatia on charges of war crimes. Less than a month later, 13 Croatian Serbs (from a list of 121 suspected war criminals) who had long been resident in Baranja were taken into custody, also on alleged war crimes charges, although it remains unclear upon what new evidence these arrests were based. The 13 were held in the Osijek county prison, purportedly to prevent their influencing witnesses or otherwise provoking unrest among citizens. Three of the 13 were active police officers who, prior to signing an employment contract with the Ministry of the Interior in 1997 (following a thorough background check), received assurances that no war crimes investigations were pending against them. On 23 November 2000, five of them were released after a ruling by the Supreme Court requiring the Osijek county court to reconsider its decision to detain the prisoners for a further two months. The eight remaining suspects were to be held, at a minimum, until 6 January 2001.
>
> 43. Soon after two of the Baranja Serbs began a hunger strike on 13 October on grounds of unlawful detention, another list of names of 237 Serbs appeared in the city of Beli Manastir, signed by a previously unknown organisation calling itself the Croatian National Guard which has, additionally, threatened to act if the Government failed to prosecute (Serb) war criminals. Lists of thousands of alleged war criminals have also been posted on the

Internet pages of the Croatian Information Centre, which was set up by the former ruling party.

…

46. The arrests in Baranja reveal lack of transparency in the application of the 1996 Amnesty Law, but they are also widely believed to be politically inspired and intended to convey the illusion of a politically balanced – and therefore 'impartial' –judicial process in local areas where, in an attempt to appease both Croats and Serbs, alleged war criminal of both ethnicities are being arrested. In any case, the large number of arrests of both returnee and domiciled Serbs in Croatia appears to be based on ethnicity and intended to force the remaining Serbs in the Danube region and other parts of the country to leave. Unofficial reports indicate that at least four Serb families left the Danube region for the Federal Republic of Yugoslavia within a week after the Baranja arrests.

47. Meanwhile, other war crimes arrests and trials are continuing. On 25 October 2000, a Serb male returnee was arrested on the basis of an in absentia indictment dating from September 1997. On 27 October 2000, two male Serbs were arrested in Borovo Naselje in the Danube region and transferred to the Pozega county prison. In the Slunj area, another Serb returnee, Milan Strunjas, was arrested on suspicion of having commanded the Territorial Defence Forces in 1991 and 1992 in the nearby village of Veljun, and an investigation was launched by the Karlovac county court into war crimes allegedly committed by him and 39 others, all suspected of being members of local Territorial Defence Forces. Borislav Stojanovic, a Serb returnee from the Republika Srpska, also suspected of war crimes, was arrested on 18 November at the Croatian border with Bosnia and Herzegovina. Another Serb returnee, Milan Grubjesic, was arrested on suspicion of war crimes in Vojnic on 4 November for his role in the death of Dragutin Drusic in Toboriste in 1991. The suspect was allegedly a member of the so-called Krajina Army and war presidency of Slunj municipality during the war. In Sisak, the trial of Nebojsa Jelic – a Serb returnee accused of severely beating a group of Croatian policemen who had been taken prisoners-of-war in June 1991 – ended on 14 November at the county court with Mr Jelic being found guilty and sentenced to five years in prison.

…

53. Although the Government recognizes that the observance of human rights and the protection of refugees and IDPs are of vital importance to stability in the region, and while it has committed itself publicly to respect the right of refugees and IDPs freely to return to their places of origin, their return continues to be

obstructed in many ways. The central issue of property rights – in particular, property restitution and the question of lost tenancy or occupancy rights… – continues to impede successful refugee returns. The Special Rapporteur calls upon the Government to address the issue of the loss of occupancy rights to socially-owned property. The return process is also undermined, mainly at local levels, by other obstacles which hinder return because of their cumulative effect. These include damaged or occupied houses; bleak economic conditions that provide scarce employment opportunities; and difficulties with local administrations in obtaining the necessary documents and permits allowing access to social benefits.

…

57. Although return statistics for 2000 provided by the Government Office for Displaced Persons and Refugees (ODER) show an increase over the 1999 figures, for both spontaneous and organised return, the precise number is difficult to determine since many persons choose to return to their former homes and then leave permanently after settling their affairs. In general, the conditions for sustainable return, especially in the war-affected areas, remain largely unchanged. As of 24 November, the total number of refugees and IDPs who had returned stood at 39,318. This figure comprises 26,702 spontaneous as well as assisted returns from third countries and 12,616 returns of displaced persons, most of whom returned to the Danube region. Also as of 24 November, there were 13,689 pending applications – mostly from Bosnia and Herzegovina, and the Federal Republic of Yugoslavia – for repatriation to Croatia under the official return programme. Of this number, 11,089 will reportedly be allowed to return immediately, while the cases of the remaining 2,600 are on hold pending the provision of additional information".

Then we should cite these following passages from the second report.

"8. The Special Rapporteur undertook his sixth mission to the Republic of Croatia from 26 February to 1 March 2001. In Zagreb, he met with the President of the Republic, senior government officials, representatives of international organizations, academics, members of Parliament, Croatian journalists and others.

9. In his meetings and statements, the Special Rapporteur commended the efforts and achievements of the Government in the past year. There have been many positive developments, including the removal of legislative and administrative impediments to return. However, problems persist because of discrepancies between the intentions of the Government and implementation at the local level. The Special Rapporteur

expressed the hope that the situation in Croatia will improve after the forthcoming local elections.

…

11. During his mission, the Special Rapporteur expressed concern over some of the serious problems that continue, especially regarding discrimination in property restitution and the provision of alternative housing. Large numbers of refugees and displaced persons are still not returning because property rights are not being adequately addressed. According to the Government, some 3,000 property cases have been solved of a total of some 16,000 (all relating to private property that was, or continues to be, occupied). Of the remaining 13,000 cases, the Government claims that only 20 per cent relate to illegal or multiple occupancies. In this regard, the Special Rapporteur stresses again that respect for property rights is absolutely essential. If property rights are truly respected, then the problems of return and solutions to the questions of refugees and internally displaced persons will be much easier to achieve than they have been until now.

12. Returnees who previously had tenancy rights are in the worst possible situation because their cases have not been resolved at all. The problem concerns mostly urban Serbs, tenancy right holders, who have no other solution. The most important problem in the Knin area is the large caseload of unresolved requests for the return of property. In the meantime, the greatest obstacle to returns of both Croats and Serbs in the Danube region in the impossibility of finding any employment, as the economy remains devastated.

13. The Special Rapporteur notes with concern that cases of illegal occupancy are still not effectively addressed, even in Zagreb, and court ordered evictions are not implemented....

14. The Government should demonstrate its commitment to property rights by evicting illegal occupants. One year ago, OHCHR in Croatia submitted to the Government a list of 15 ‘easy’ cases, requesting immediate annulment of the right of temporary occupants in Korenica, of which the Government claims to have resolved only 5. The 15 temporary occupants were neither refugees nor internally displaced persons but ethnic Croats from Croatia – including some government officials – who were encouraged by the previous regime to use the properties mainly for business purposes.

> 15. War crimes prosecutions of ethnic Serbs are continuing, and the Special Rapporteur expresses concern, once again, over the fairness of these trials. According to international observers in Zagreb, 28 persons of Serb nationality – most of whom are returnees – were retained on war crimes charges in Croatia between December 2000 and March 2001. The Special Rapporteur calls for all war crimes to be investigated in accordance with international standards and for the war crimes perpetrators of any ethnicity to be brought to justice. War crimes investigations and trials should be conducted in such a way as to reassure the Serb population that they are based on due process, not victor's justice.
>
> 16. The Special Rapporteur condemns in the strongest terms the rise of nationalism and right-wing extremism in Croatia, as shown in recent mass demonstrations in Split and elsewhere in support of Mirko Norac, a former Croatian Army General charged with war crimes committed in the Gospic area. Such demonstrations will pose a great danger if allowed to go unchallenged. Extremism has also been evident in hate-based articles in *Slobodna Dalmacija*, a Split-based government-owned newspaper. The Special Rapporteur calls on the media in Croatia to refrain from promoting discrimination, intolerance and hatred and to take measures to promote reconciliation."

11. Mr Blake accepts that the SR reports do not contain any new, as it were raw facts. This is how it is put in paragraph 35 of his skeleton argument:

> "It is not the Appellants' case that the Special Rapporteur was reporting on new events that had taken place since the oral hearing before the IAT. The importance of the material was that it was the latest objective opinion of an important international expert on the significance of changes since January 2000 and whether there was a continued risk of discriminatory ill treatment of Serbs by the local state in the light of the experience of the previous few months. It was the freshness of that opinion, and not the reporting of new undigested events that was significant."

12. Mr Blake's central submission is that the IAT cannot have had the SR reports in mind when they framed the S determination, for if they had, certain passages – notably in paragraphs 32, 35 and 36 - must have been written differently; and

had they been present to the mind of the tribunal, there is more than a fanciful possibility that their conclusion might have been in favour of the appellants' asylum claims. It may be, says Mr Blake, that the IAT had not read the reports at all: perhaps as a result of some administrative mishap arising from the fact of their having been sent to the tribunal after the end of the hearing. Whether the IAT actually never saw the reports, or (having seen them) failed to consider and weigh them, matters little for the force of Mr Blake's submission. In fairness to the IAT, however, we should record the terms of a letter from the Treasury Solicitor of 12th September 2001:

> "Mr Justice Collins is almost certain that he did have these reports and is content that the Court of Appeal should approach the appeal on the basis that they were before the appeal at that stage."

That was a wholly proper and responsible response by the President.

THE 'ARIF' POINT

13. Before confronting Mr Blake's central argument it is convenient at this stage to deal with a subsidiary submission, to which we referred in passing in paragraph 8, concerning what has been called the evidential burden of proof in cases of this kind. The appellants say that the impact of the SR reports should have been especially acute in light of the approach to be taken by the appellate authorities to cases where the established history demonstrates that at a stage earlier than the time of decision by Adjudicator or IAT, the claimant was undoubtedly or very likely a refugee within the meaning of the 1951 Convention – a stage such as the time when he fled his country of origin. In these cases, all the appellants fled the Tudjman regime, and it is said that then they must clearly have been

refugees. Mr Blake referred to a Home Office guidance document, Bulletin 4/99, which was issued on 25th November 1999, very shortly before the death of President Tudjman:

> "… ethnic Serbs are very likely to suffer persecution and discrimination based on ethnicity. Our Embassy in Zagreb has confirmed that this is so, and it has also been confirmed in a more recent report by the Special UN Rapporteur.
>
> While not every case of an ethnic Serb will meet the Convention criteria, caseworkers should be aware that the likelihood is that many ethnic Serbs will be able to make a case for asylum under the Convention and each application should be considered very carefully before reaching a conclusion."

14. Against this background, the appellants rely on *Arif* [1999] INLR 327 and *Saad* [2001] EWCA Civ 2008. *Arif* was a case in which the immigrant's appeal had been allowed by the Special Adjudicator. The Secretary of State appealed to the IAT, which allowed his appeal. There was an appeal to this court. The court was satisfied – indeed it was accepted – that at an earlier stage (before a change of government in Azad Kashmir in 1996) the appellant had been entitled to be accorded refugee status. Accordingly when the case fell for decision by the appellate authorities an evidential burden lay upon the Secretary of State to show that the appellant could safely be returned to his country of origin. Then in *Saad* the Master of the Rolls (delivering the judgment of the court), after referring to the passage in the judgment of Simon Brown LJ in *Arif* dealing with the evidential burden, said this:

> "55. That passage draws attention to the course that appellate proceedings are likely to follow. The appellant is likely to focus on the circumstances prevailing at the time that the Secretary of State refused his application for asylum. If he demonstrates that at that time he was a refugee, the evidential burden will shift to

> the Secretary of State to demonstrate that circumstances have changed so that he has ceased to be a refugee."

15. We cannot see that the fact that some or all of these appellants were or probably were refugees within the meaning of the 1951 Convention at the time they fled Croatia, or, if it be so, when the decision of the Secretary of State was made in their respective cases, can have any critical effect on the outcome of these appeals. With very great respect *Arif* was plainly right on its facts as a matter of common sense. The observation in *Saad* at paragraph 55 of the judgment is no more than a reflection on the kind of situation which arose in *Arif*. With deference we should say that we entertain some reservations as to the utility of the language of burden of proof, which tends to suggest the existence of a special rule. As the IAT said in the S determination (paragraph 9), "[t]he appellate authority… must look at all the evidence and decide whether at the time of the hearing any fear of persecution is well-founded". In a case like the present, moreover, where conjoined appeals are heard together in order to produce a decision which is to be taken to be factually authoritative, the exercise upon which the IAT is engaged assumes something of an inquisitorial quality, although the adversarial structure of the appeal procedure of course remains. In any case, it is to our mind entirely obvious that the IAT was well aware of the grave danger to Serbs during the Tudjman regime, and rightly focussed on the question, what was the extent of later improvements. It is important not to lose sight of the fact that the jurisdiction of the IAT is as pragmatic as any other. There is a danger that the anxious scrutiny which it is the duty of tribunals and courts to apply to issues of fundamental rights may give rise to, or even be confused with, an excessive rigidity of approach to the exercise of finding facts.

ARGUMENTS AS TO THE IMPACT OF THE SR REPORTS

16. In my judgment we have to ask ourselves whether the SR reports, in the setting of all the other evidence, disclose material of such substance that the IAT was obliged to address them expressly and explain what it made of them. We have set out above lengthy extracts from the SR reports, sufficient for this exercise to be embarked upon. As we have indicated, Mr Blake submits that the IAT could not properly have reasoned as it did if it had had the SR reports in mind. He says that the IAT's observation in paragraph 32 of the S determination that the latest OSCE report (quoted by the IAT at paragraphs 28 ff, cited above) "[i]n general, … seems to us to fit in with the other recent reports which are before us" is simply not right in relation to the SR reports, particularly in relation to such matters as the conduct of the police and the judiciary, and the bringing of prosecutions against Serbs. He says that the SR reports contradict the approach taken in paragraph 35 of the S determination to the effect that the question whether political prosecutions (for alleged war crimes) amounting to persecution are taking place is really an open-ended one. And he says that they also contradict the assertion in paragraph 36 that "[t]here is little concrete evidence that such [hidden and secret] lists [of alleged war criminals] exist…" In short, Mr Blake submits that the SR reports were material of very considerable importance in the context of these appeals, cutting across the grain of other material on which the IAT particularly chose to rely. He does not contend that their impact ought to have been so great that the only lawful conclusion open to the IAT was to accept that the appellants were refugees. But he says that these reports must have supported the evidence of Judge Karphammer, and it was incumbent on the IAT to state in express terms what it made of them.

17. Mr Wilken for the Secretary of State submits that the SR reports must be looked at alongside the rest of the evidence before the IAT; so far as it goes that is plainly right. His case is that when that exercise is carried out, it can be seen that the reports do not contain material whose nature is so striking as to call for any special or express treatment by the IAT. Mr Wilken places some emphasis on the scale of the material before the IAT: nearly 700 pages' worth of information. He says there is no inconsistency of any substance between the SR reports and paragraphs 32, 35 and 36 of the S determination. Amongst other points made in his skeleton argument, he submits that the merits of these cases might properly start from the fact that the UNHCR recommends the return of Serbs to Croatia (see for example paragraph 33 of the S determination, and a letter from UNHCR Zagreb dated 2nd February 2001 – though Mr Blake says that part of the reasoning in this letter is contradicted by material from Amnesty). He says also that the IAT specifically rejected the pessimistic approach of Dr Gow and Judge Karphammer (as they clearly did), and the SR reports were no more pessimistic. He points out that the second SR report makes no reference to the alleged secret lists, nor to any escalation of war crimes prosecutions; and if those matters remained a primary anxiety in the Special Rapporteur's mind, one would expect to find them emphasised in the later report.

18. Mr Wilken had some more detailed points to make. In considerable measure they were designed to show that issues raised in the SR reports were also, in one way or another, addressed in other documents placed before the IAT and avowedly considered by it. By way of example, the reference to the detention of 28 Serbs which appears in paragraph 15 of the second SR report also appears in paragraph 17 of the latest OSCE report (though the number given is 29), a

document on which, as we have shown, the IAT placed particular reliance. Mr Wilken was also at pains to submit that there was a good deal of material considered by the IAT which must have greatly qualified any pessimistic apprehensions arising from the SR reports. Thus the report prepared by the appellants' expert Dr Gow, dated 15th March 2001, has this passage (paragraph 12) relating to lists of war crimes:

> "An example of the well-founded suspicion that the Croatian authorities could not be relied upon concerns the designation of 'war crimes suspects'. Although an Amnesty Law was introduced, the application of its provisions has not been reliable. Originally, the Croatian authorities issued a list of 811 individuals excluded from the Amnesty on the grounds that they were suspected of having committed war crimes and crimes against humanity. This list was later reduced to 150 and eventually to 25, the current figure for those officially excluded from the Amnesty and against whom indictments stand in Croatia."

19. Mr Wilken referred in particular to the weekly reports from OSCE. Weekly Reports nos. 1/2001 (for 19th December 2000 – 8th January 2001) and 5/2001 (30th January – 5th February 2001) referred to an internal review of war crimes accusations or prosecutions, described by the Acting State Prosecutor to the OSCE Mission in December 2000, which was intended to bring outstanding cases to a conclusion, either by conviction or discontinuance of the prosecution. The review appeared to be "part of an independent and impartial action by the judicial system" (1/2001, paragraph 1). Weekly Report no. 5/2001 paragraph 2 shows that following the review certain recently arrested persons were released within days for lack of evidence. Other investigations remained pending. Paragraph 2 of 5/2001 also refers to the 13 Serbs from Baranja who had been arrested in October 2000 (September 2000 according to paragraph 42 of the first

SR report), and states that there remained before the Constitutional Court an outstanding appeal against detention. The paragraph concluded with the sentence, "[t]he Mission expects that all cases will be dealt with expeditiously by the judiciary and solely based on individual responsibility" – a statement repeated in the latest full OSCE report before the IAT, and quoted by it at paragraph 28 of the S determination. Then in the context of protests against the war crimes investigation of the activities of a retired army general suspected of having ordered and participated in the massacre of about 40 Serb civilians in 1991, Report no. 6/2001 (6th – 12th February 2001) (paragraph 1) states that the President, Prime Minister, and President of the Parliament "presented a strong, united position in support of the rule of law and the independence of the judiciary, while endorsing the right of peaceful protest" (cf Report no. 8/2001 paragraph 3). A little later, on 26th March 2001, five Croatian Serbs serving prison sentences for war crimes and acts of genocide were pardoned by the President (Report no. 12/2001).

20. Mr Wilken referred to some other materials, but we have set out enough to do justice to the thrust of his case. He submits that when all this evidence is taken into account the IAT's conclusions generally, and those in paragraphs 32, 35 and 36 to which Mr Blake called particular attention (and whose contents we will not repeat), are perfectly well justified. So far as the SR reports offer a different slant it is to be borne in mind that the IAT acknowledged in terms (paragraph 33) that they had not referred to all the passages in all the reports which had been relied on.

21. Mr Wilken had a particular point based on a later determination of the IAT in a case by name *Lazarevic*, decided by a division of the Tribunal presided over by the Deputy President, Mr Ockelton, and notified on 17th September 2001. This case also concerned a Croatian Serb. The S determination was before the IAT. So were the SR reports, and the IAT cited them extensively. Its determination includes these passages:

> "16. In our view it is crucially important to consider the numerical element of the evidence before us. It is our experience that, in Croatian cases in particular, there is a tendency to represent worrying individual cases as though they were the norm. There is no internal reason to think that the statements made by the Special Rapporteur are merely intended as examples…
>
> 17. The number of arrests of Serbs for war crimes is said to be 'large'… and indeed it is unacceptably large if it is in truth based primarily on ethnicity. It is not, however, very large in comparison with the numbers said to figure on lists, in particular the lists said to be available on the internet. Twenty-eight arrests in the period covered by the supplementary report might indicate an average of about 120 per year. Some of the individuals arrested will no doubt be released, as were five of those detained at Baranja… Some of those arrested are presumably genuinely thought to have some guilt for atrocities that undoubtedly took place. The number of arbitrary arrests resulting in undue detention or an unfair trial or an improper conviction cannot, in absolute terms, be large. The number of actual convictions is tiny.
>
> 18. Looking at this evidence as a whole as we do, although we share the concerns about individual cases, we see no reason to depart from the general assessment made by the Tribunal in paragraphs 34 – 36 of *S*. Our view is that the evidence now produced (if it be the case that the Tribunal did not consider it) supports the conclusion reached there. The risk of persecution as a result of these arrests is so small that it can in an ordinary case be disregarded."

22. Mr Wilken does not of course suggest that the reasoning of the IAT in *Lazarevic* is itself conclusive of the issue whether in the S determination the same Tribunal

ought to have dealt in terms with the SR reports. He says, rather, that when all the material is examined the approach taken in *Lazarevic* is obviously right. Mr Blake submits that nothing in *Lazarevic* shows that the IAT in these present appeals might not have arrived at a different conclusion if in its reasoning it had confronted the SR reports.

CONCLUSION ON THE SR REPORTS ISSUE

23. We would first reiterate two propositions, both stated earlier in paragraph 16. (1) The question for the court is whether the SR reports, in the setting of all the other evidence, disclose material of such substance that the IAT was obliged to address them expressly and explain what it made of them. (2) It is not contended that their impact ought to have been so great that the only lawful conclusion open to the IAT was to accept that the appellants were refugees. This latter position taken by Mr Blake is to my mind obviously correct. Indeed, if these cases have to be reconsidered the appellants may well face an uphill struggle in seeking to persuade the IAT to reach conclusions favourable to their claims, in light of all the material to which Mr Wilken referred, bolstered, perhaps, by the decision in *Lazarevic*. However since for reasons we am about to explain these appeals should in our judgment succeed, it would be wrong to say any more about their future prospects.

24. The broad effect of the two propositions we have stated in paragraph 23 is that in the end these appeals amount essentially to what may be called a 'reasons' challenge. No authority needs citing for the elementary proposition that the extent of the duty to give reasons varies from case to case. There are some

situations where the duty demands no more than a very summary treatment of the subject-matter. It is no less elementary that, in general, a public decision-maker is not obliged to deal with every single point (or every single relevant document) raised in the case before him; it is generally sufficient that the principal points are addressed.

25. It may well be that on what may loosely be called the standard approach to the duty to give reasons, the S determination more than passes muster. The IAT certainly explains why it reaches its conclusion. The SR reports were merely one piece of evidence; there was no obligation to refer to every piece of evidence. There is much force in Mr Wilken's submission that on the whole of the material before the IAT its conclusions are not at all affronted by the content of the SR reports.

26. However we have reached the view that the S determination cannot stand. We have so concluded because of its special nature, as it appears from the passages from paragraph 2 and 3 which we have cited (paragraph 3 above). The IAT intended this decision to be determinative: that is, it should thereafter be followed by Special Adjudicators, and the Tribunal itself, absent evidence of a deterioration in the conditions in Croatia relevant to the circumstances of Serb asylum seekers. Now, the notion of a judicial decision which is binding as to *fact* is foreign to the common law, save for the limited range of circumstances where the principle of *res judicata* (and its variant, issue estoppel) applies. (There is also, of course, provision in CPR 19.10-15 for the case management of group litigation, but we need not take time with that.) This principle has been evolved – we put the matter summarily – to avoid the vice of successive trials of

the same cause or question between the same parties. By contrast, it is also a principle of our law that a party is free to invite the court to reach a different conclusion on a particular factual issue from that reached on the same issue in earlier litigation to which, however, he was a stranger. The first principle supports the public interest in finality in litigation. The second principle supports the ordinary call of justice, that a party have the opportunity to put his case: he is not to be bound by what others might have made of a like, or even identical case.

27. The stance taken by the IAT here, to lay out a determination intended in effect to be binding upon the appellate authorities as to the factual state of affairs in Croatia absent a demonstrable change for the worse *vis-à-vis* the plight of Serbs, to an extent sacrifices the second principle to the first. By no means entirely: an applicant will of course be heard on any facts particular to his case, and (as the IAT made clear) evidence as to any deterioration in the state of affairs in Croatia would be listened to. Otherwise, however, the debate about the conditions in Croatia generally affecting Serbian returnees or potential returnees has been had and is not for the present to be had again.

28. While in our general law this notion of a factual precedent is exotic, in the context of the IAT's responsibilities it seems to us in principle to be benign and practical. Refugee claims *vis-à-vis* any particular State are inevitably made against a political backdrop which over a period of time, however long or short, is, if not constant, at any rate identifiable. Of course the impact of the prevailing political reality may vary as between one claimant and another, and it is always the appellate authorities' duty to examine the facts of individual cases. But there

is no public interest, nor any legitimate individual interest, in multiple examinations of the state of the backdrop at any particular time. Such revisits give rise to the risk, perhaps the likelihood, of inconsistent results; and the likelihood, perhaps the certainty, of repeated and therefore wasted expenditure of judicial and financial resources upon the same issues and the same evidence.

29. But if the conception of a factual precedent has utility in the context of the IAT's duty, there must be safeguards. A principal safeguard will lie in the application of the duty to give reasons with particular rigour. We do not mean to say that the IAT will have to deal literally with every point canvassed in evidence or argument; that would be artificial and disproportionate. But when it determines to produce an authoritative ruling upon the state of affairs in any given territory it must in our view take special care to see that its decision is effectively comprehensive. It should address all the issues in the case capable of having a real as opposed to fanciful bearing on the result, and explain what it makes of the substantial evidence going to each such issue. In this field opinion evidence will often or usually be very important, since assessment of the risk of persecutory treatment in the *milieu* of a perhaps unstable political situation may be a complex and difficult task in which the fact-finding tribunal is bound to place heavy reliance on the views of experts and specialists. We recognise of course that the IAT will often be faced with testimony which is trivial or repetitive. Plainly it is not only unnecessary but positively undesirable that it should plough through material of that kind on the face of its determination.

30. It may be thought that this approach is not far distant from the way in which the IAT generally discharges its duty to give reasons, and not only in cases where it

resolves to produce an authoritative determination as to the position in a particular country. Indeed we do not mean to suggest that in this latter class of case the IAT's duty is of an altogether different quality. The experienced members of the IAT, not least if we may say so its President and Deputy President, will we am sure have no difficulty in gauging the quality of the reasons given so as to ensure that these authoritative determinations will be, and will be seen to be, effectively comprehensive.

31. In the present case the SR reports constituted substantial recent opinion evidence from an important source. While, as Mr Blake acknowledged, they may not have uncovered new or otherwise unknown primary facts, they presented a relatively gloomy picture on a series of important issues – so-called secret lists, arrests, detentions, prosecutions, the conduct of the police and judiciary, and to some extent discrimination in economic treatment and the distribution of property rights – which is in our judgment significantly at variance with the much more upbeat impression given by the OSCE. Having regard to all the points made by Mr Wilken the difference is not perhaps as stark as Mr Blake would have us accept, particularly in relation to such matters as the numbers still facing outstanding prosecutions. The SR reports, however, convey the suggestion that whatever the good intentions at the level of the State political leadership, there remain problems, even growing problems, at the local level: see for example paragraphs 41, 46 and 53 of the first report. In the circumstances we entertain no doubt but that, if the IAT's duty to give reasons in a determination of this kind is of the nature and quality weI have sought to describe, its failure to explain what it made of the SR reports means that the duty has not been fulfilled. The position is the more stark given the IAT's own observation at paragraph 25 of the S

determination, "[s]ince the situation is somewhat fluid and improvements are undoubtedly occurring, it is necessary to look particularly at the most recent reports".

32. Accordingly we these appeals, and remit all these cases to the IAT to be re-determined. There will be a question what form the re-determination should take. That will be a matter for the IAT. It may be that a full re-hearing will not be necessary. We have heard no argument as to the scope of the IAT's procedural powers, and we make no ruling or finding on the question.

THE APPLICATION FOR PERMISSION IN SN's CASE

33. As we have already said, at the hearing in this court we granted permission to appeal to SN upon a discrete basis put forward on her behalf, and with the Secretary of State's consent quashed the determination in her case. The single point in question may be explained very shortly. Amongst other claims SN asserted a fear of discrimination in employment. At paragraph 13 of the determination in her case the IAT said this:

> "Turning to the question of discrimination in employment, it may well be that the appellant has been discriminated against in the past but again, for the reasons which are set out in the S determination and, whilst accepting that the appellant may well have been discriminated against in her employment prior to leaving Croatia, we do not consider, for the reasons which are set out in the S determination, that there is a reasonable likelihood of such discrimination being sustained were the appellant to return now."

But at paragraph 26 of the S determination the IAT had said:

> "There can be no doubt that, despite the improvements, grave difficulties remain for Serbs. There is general discrimination which means that, in a country which has the most serious economic difficulties and high levels of unemployment, Serbs find themselves more likely to be out of work and deprived of access to any state assistance. Homelessness remains a major problem…"

34. It is plain that these two passages cannot stand together. The first misrepresents the second. There have been some crossed wires here. It is perhaps unsurprising, given the nature of the exercise involved in producing one lead determination and then multiple satellite determinations in linked cases. There is bound to be a certain amount of intricate cross-referencing. Moreover the repetitive language of paragraph 13 of the SN determination, does not, with respect, inspire confidence.

35. Mr Wilken's only point was that the IAT in SN appeared (paragraph 8) to agree with the Adjudicator's view that SN's evidence of harassment did not pass "the threshold" of persecution; and if her complaints of being harassed did not show persecution, discrimination in employment could certainly not demonstrate as much. But no comparison between the two was undertaken by the IAT, and a fear of persecution may rest on cumulative factors. This argument cannot sustain the SN determination.

36. In our judgment, the inconsistency between paragraph 13 in SN and paragraph 26 in S clearly entitles SN to succeed in this appeal, which accordingly is also allowed on that basis. Her case must be re-considered on its individual merits.

Order: appeal of each of the appellants allowed and appeals remitted to the Immigration Appeal Tribunal for re-determination as the Tribunal may direct; respondent to pay the appellants' costs of the appeals; full assessment of the appellants' public funded costs.

(Order does not form part of the approved judgment)