

The Researcher

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Welcome to the March 2011 issue of The Researcher

The Spring 2011 issue of The Researcher contains a number of asylum related articles along with information on upcoming courses and events. Patricia Brazil BL presents a paper originally presented to the RIPN on 25 January 2011 relating to the issue of 'Applications for Asylum by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Persons'. Marion Walsh, Executive Director of the Anti-Human Trafficking Unit of the Department of Justice and Law Reform gives a background and summary of the situation as it relates to Human Trafficking here in Ireland and the measures which are in place on both a national and international level to help combat it. In his article, Colm O'Dwyer BL discusses the issue of Family Reunification for Refugees in Ireland and the Application of Section 29 of the Family Law Act 1995. Zoe Liston, External Relations Intern at UNHCR Dublin outlines the Landmark Commemorations for UNHCR in 2011 and the Refugee Documentation Centre of Ireland announces its EAC Blended Learning COI Courses for 2011. The issue concludes with a case summary by Mary Fagan of the Refugee Documentation Centre of Ireland.

Sincere thanks to all our contributors and wishing all our readers a healthy and happy Spring.

Deirdre Houlihan, RDCI



Disclaimer

Articles and summaries contained in the Researcher do not necessarily reflect the views of the RDCI or of the Irish Legal Aid Board. Some articles contain information relating to the human rights situation and the political, social, cultural and economic background of countries of origin. These are provided for information purposes only and do not purport to be RDCI COI query responses.

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Human Trafficking

By Marion Walsh, Executive Director, Anti-Human Trafficking Unit, Department of Justice and Law Reform.

WHAT IS HUMAN TRAFFICKING?

Trafficking in human beings is a gross violation of human rights, a modern form of slavery and an extremely profitable business for organised crime.

Governments first agreed on an international definition of trafficking in persons in 2000 in the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, which supplements the United Nations Convention against Transnational Organised Crime (commonly known as the Palermo Protocol)¹. The definition has three distinct elements, which must be fulfilled for a situation to be one of trafficking – there must be an act, a means and a purpose. The **act** can be issues such as the recruitment, transportation, transfer, harbouring or receipt of persons. The act must be done **by a means** such as the threat or use of force or other forms of coercion; abduction; fraud; deception, abuse of power or of a position of vulnerability or the giving or receiving of payments and it must be for the **purpose of exploitation**. The **exploitation** will include, at a minimum, exploitation for the purposes of prostitution or other forms of sexual exploitation; exploitation for forced labour, slavery or similar practices or exploitation for the purposes of organ removal.

The consent of the victim is irrelevant when any of the means outlined above have been used. Furthermore, in the case of children, defined as anyone under 18 years of age, actions taken for the purpose of exploitation constitute trafficking even where the means have not been used. There is no requirement that a person must have crossed a border for trafficking to take place – it can and does take place within national borders.

EXTENT OF THE PROBLEM

It is difficult to estimate the extent of the crime worldwide, since criminal activities related to trafficking are hidden behind widespread phenomena such as prostitution or immigration. In order to provide reliable and useful data on the nature and extent of trafficking in Ireland on an on-going basis the Anti-Human Trafficking Unit (AHTU) has implemented a data strategy based on systems being developed at EU level. The goal of this strategy is to collect information on cases of possible/suspected trafficking by means of a standardised template from a variety of organisations (including NGOs, Government organisations, Garda Síochána, etc) having regard to the definition of trafficking as contained within the Criminal Law (Human Trafficking) Act 2008.

A summary statistical report has been published on the Government's anti-trafficking website www.blueblindfold.gov.ie for 2009 on (both alleged and suspected) persons trafficked for the purposes of sexual and labour exploitation. The data for 2010 is currently being compiled.

TRAFFICKING vs. SMUGGLING

There is a general misconception that human trafficking and the smuggling of persons and illegal immigration are the same issue. This is not the case. Trafficking is a crime which infringes the fundamental rights of persons, while smuggling is a violation of legislation protecting the borders. In the case of illegal migration facilitated by a smuggler there is an agreement between the migrant and the smuggler. The relationship between the two usually ends when the former enters the territory of the receiving State. In the case of trafficking illicit means such as coercion, deception or abuse of a position of vulnerability are used at a certain stage of the trafficking process. In addition the transfer of the person is carried out for the purpose of further exploitation, which normally starts in the country of destination. However, while there is a distinct difference between trafficking and smuggling the practices can be interlinked. What may start out as a process of smuggling can end up as one of trafficking. For example, a person smuggled into a country may be unable to pay for the cost of smuggling and end up being exploited in the same manner as a victim of trafficking.

¹ Article 3(a) of the Protocol sets out the definition.

WHAT ARE THE ROOT CAUSES?

The reasons that make human beings victims of trafficking are generally broken down into two categories – the so called pull and push factors. These factors depend on whether the country is a country of origin, transit or destination for victims.

A number of causes of human trafficking in countries/regions of origin (the so called push factors) include:

- a low standard of living and/or lack of prospects
- abject poverty and unemployment, especially among women;
- a lack of political, social and economic stability;
- situations of armed conflict and oppression;
- domestic violence and disintegration of the family;
- gender discrimination and discrimination among minority groups;
- lack of education;
- the HIV-AIDS reality.

Causes of human trafficking in countries/regions of destination (the so called pull factors) include:

- the prospect of a better future
- the increasing demand for cheap labour – often for those sectors of the labour market for which it is difficult to recruit nationals.
- a rise in the demand for persons to work in a highly lucrative and globalising sex industry.

Other universal causes of human trafficking include:

- ever more limits and obstacles to legal migration channels to countries with stronger economies and/or regions with better prospects;
- a lack of public awareness of the dangers of trafficking;
- the high profit potential for those engaged in the criminal activity;
- the sophisticated organisation, resources and networking capacity of criminal networks;
- widespread corruption in countries of origin, of transit and of destination among the persons capable or responsible for combating trafficking.

It is important to be aware that people in desperate situations - especially those in countries of origin - can be trafficked by people they know like family members, partners, neighbours and acquaintances. It is estimated that the sale of people is the world's third most lucrative criminal activity after arms trading and drug dealing.

HOW TO RECOGNISE A VICTIM OF HUMAN TRAFFICKING?

Recognising that a person may be a victim of human trafficking is not an easy task. Trafficking in persons is usually an “underground” crime and it is difficult to readily identify a trafficking victim and/or a trafficking scenario or to accept that trafficking may be taking place in our communities. Being familiar with some of the general indicators² of trafficking will be of assistance. People who have been trafficked may act in one or more of the following ways:

- Be unable to leave their work environment;
- Show signs that their movements are being controlled;
- Show fear or anxiety;
- Be subjected to violence or threats against themselves or against their family members and loved ones;
- Suffer injuries that appear to be the result of an assault;
- Be distrustful of the authorities;
- Be threatened with being handed over to the authorities;
- Be afraid of revealing their immigration status;
- Not be in possession of their passports or other travel or identity documents, as those documents are being held by someone else;
- Not know their home or work address;
- Act as if they were instructed by someone else;
- Be unable to negotiate working conditions;
- Have no access to their earnings;
- Work excessively long hours over long periods;
- Live in poor or substandard accommodation;
- Have limited contact with their families or with people outside of their immediate environment;
- Be under the perception that they are bonded by debt;

² UNGIFT - United Nations Global Initiative to Fight Human Trafficking - Trafficking – Indicators of Human Trafficking. www.ungift.org

- Have had the fees for their transport to the country of destination paid for by facilitators, whom they must pay back by working or providing services in the destination countries;
- Have acted on the basis of false promises.

It is worth noting that no one willingly signs up to becoming a slave. Traffickers frequently recruit victims through fraudulent advertisements which promise legitimate jobs such as, for example, hostesses, domestics or work in the agricultural industry. Trafficking victims of all kinds come from rural and urban settings. There are tell-tale signs when commercial establishments are holding people against their will:

- Heavy security at the establishment including barred windows, locked doors, isolated location, electronic surveillance and people are never seen leaving the premises unless escorted;
- Victims live at the same premises as the brothel or work site or are driven between quarters and work by a guard;

COMPLEXITIES CAUSED BY CULTURAL DIFFERENCES

Slavery is an issue that many of us associate with distant lands and past times. Unfortunately this is far from the truth. The hidden nature of this crime is at odds with modern society. It can be difficult for us, as modern Irish citizens, to imagine the extreme poverty that causes a parent to sell their child or the cultural practices in some countries that enable the manipulation of men, women and children. In some cultures there is a relative acceptance of the concept of human servitude, in particular the servitude of women, children and the poor. This lack of equality translates into the acceptance of trafficking as a social “norm”. The extent to which trafficking is facilitated by social acceptance can greatly inhibit efforts to combat this offence. Awareness of social values that conflict with our own must be at least recognised, if not understood, if Ireland is to succeed in preventing and combating Human Trafficking.

HOW VICTIMS PRESENT THEMSELVES AND WHY

Victims of human trafficking may suffer from anxiety, panic attacks, memory loss, depression, substance abuse and eating disorders or a combination of these conditions. People who have suffered at the hands of traffickers may be

conditioned to mask the truth and severity of the trauma which they have experienced. Victims may have been led to believe that no one will believe their story and warned to be distrustful of people in authority and of the motives of those who are actually trying to help them. It is not uncommon that, as a relationship of trust builds between a victim and, for example, a member of the Garda Síochána, changes to the victim’s original statement may unfold. The changed version of events should not necessarily always be perceived to be lies or untruths. The impact of trauma can make the job of first responders and those trying to assist victims very difficult.

The repercussions of human trafficking on a victim are complex and varied. Those dealing with victims must show compassion and respect. They should familiarise themselves with the reverberations of trauma and how it manifests itself, both physically and psychologically, so that they have a better understanding of the manner in which victims present themselves.

An issue to be aware of is the use of voodoo (juju) in the trafficking of persons and its effect on victims. Voodoo/Juju is an old cultural religious practice of Africans rooted in the ancestral spirit worship. The Priests, of such voodoo/juju religious practices, are usually reputed to have the power of life and death and to be able to communicate with the dead. The services they provide are utilized by many people – the rich and the poor, the educated and the illiterate, men and women. Traffickers subject their victims to an oath of allegiance, confidentiality, loyalty and faithfulness as a precondition to be employed in their “business undertakings” abroad. The Priest takes body parts or samples e.g. fingernails, hair, blood, etc. as part of the oath. The victim believes that their being – that is, their very existence - is represented in those items collected and kept by the Priest at a “shrine”. A deviation from the terms of the oath is believed to result in death or insanity of the victim concerned in a manner that will cast shame and hatred on his/her immediate family within that society forever.

When the oath has taken place, the victim is then indebted to the trafficker and can, for example, be bonded to repay a loan on arrival at the destination country for the voodoo oath. The so called loan sometimes includes travelling expenses, protection, accommodation, food, clothing, etc at the

destination country. It symbolizes that the Priest can punish you remotely if you breach the contract. The powers of the Priest are perceived to be very real. Both victims and sometimes traffickers believe that the Priest can cause harm remotely. The fear of the Juju man is so real that victims will not disclose their traffickers under any condition in which they might find themselves. This highlights why an understanding of the nature and influence of voodoo is necessary and can be an important link in the criminal justice investigation system.

MEASURES BEING TAKEN TO COMBAT TRAFFICKING IN HUMAN BEINGS IN IRELAND

The Irish Government is determined to prevent and combat the trafficking of human beings into, within and out of Ireland. To demonstrate its commitment Ireland have ratified both the *Palermo Protocol* and the *Council of Europe Convention on Action against Trafficking in Human Beings*. In addition, a number of legislative and administrative measures have been undertaken.

Legislative Developments

The *Criminal Law (Human Trafficking) Act 2008* was enacted on 7 June 2008. This legislation creates an offence of recruiting, transporting, transferring to another person, harbouring or causing the entry into, travel within or departure from the State of a person for the specific purpose of the trafficked person's sexual or labour exploitation or removal of his or her organs. It provides for penalties up to life imprisonment and/or an unlimited fine for persons who traffick or attempt to traffick other persons for the purposes of labour or sexual exploitation or for the removal of a person's organs.

It also makes it an offence to sell or offer for sale or to purchase or offer to purchase any person for any purpose. Penalties of up to life imprisonment also apply in respect of these offences.

It is also an offence for a person to solicit for prostitution a person who s/he knows or has reasonable grounds for believing is a trafficked person. The penalty can be up to five years imprisonment and/or an unlimited fine on conviction or indictment.

The 2008 Act builds on the *Child Trafficking and Pornography Act 1998*.

Administrative arrangements were introduced on 7 June 2008. They provide for a period of recovery and reflection of 60 days in the State for suspected victims of trafficking and also, in circumstances where the person trafficked wishes to assist the Garda Síochána or other relevant authorities in any investigation or prosecution in relation to the alleged trafficking, a further six months period of residence, renewable, to enable him or her to do so. Further enhanced amendments to that scheme are envisaged shortly and the intention is that these arrangements will be given legislative effect in forthcoming Immigration legislation.

Prior to the enactment of the 2008 Act, An Garda Síochána utilised the provisions of the **Illegal Immigrants (Trafficking) Act, 2000** in cases where human trafficking was suspected.

Administrative Arrangements

The following administrative structures have been established to assist the process of dealing with this form of criminal activity:

- The **Anti-Human Trafficking Unit (AHTU)** in the Department of Justice and Law Reform was established in February, 2008. The Unit is working to ensure the State's response to human trafficking is coordinated, comprehensive and holistic. A key element of this strategy is the National Action Plan to Prevent and Tackle Trafficking in Human Beings in Ireland 2009-2012, which was published in June 2009. As at 31 December 2010 a total 92 of the 144 Actions specified in the Plan have been completed or significantly progressed and a further 52 Actions are ongoing. The AHTU is shortly commencing a mid-term review of the Plan.
- The **Interdepartmental High Level Group** was established by the Minister for Justice and Law Reform with representatives from key Government Departments and Public Sector Agencies. The Group recommend to him the most appropriate and effective responses to trafficking in human beings – much of which is addressed in the National Action Plan. The High Level Group is supported in its work by a **Roundtable Forum** consisting of senior personnel from Government Departments and Agencies, NGOs and International

Organisations and 5 interdisciplinary **Working Groups** dealing with:

- Development of a National Referral Mechanism
- Awareness Raising and Training
- Child Trafficking
- Labour Exploitation Issues
- Sexual Exploitation Issues.

In total, over 70 different Governmental, Non-Governmental and International Organisations are involved with the AHTU in anti-trafficking initiatives.

SERVICES FOR VICTIMS OF TRAFFICKING

Victims of trafficking who manage to escape from their traffickers need a broad range of support measures to enable them recover from their traumatic experience and re-integrate into society. It is, therefore, essential that the measures, which aim to protect and assist victims of trafficking, attend to their physical, psychological and social needs for recovery while taking into account the diversity of each victim's needs. Article 12 of the Council of Europe Convention on Action against Trafficking in Human Beings and Article 6 of the Palermo Protocol sets out assistance measures which State parties must provide for all victims of trafficking. With regard to the provision of legal aid and advice, the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children states at Article 6 that parties shall *provide counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand*. The Council of Europe Convention on Action against Trafficking in Human Beings states at Article 15 that *each Party shall provide, in its internal law, for the right to legal assistance and to free legal aid for victims under the conditions provided by its internal law*.

It is important to note that victims of trafficking have the same rights as any Irish citizen in relation to access to social services which includes access to accommodation, health care, education and material assistance, amongst others.

The range of assistance and support services in Ireland which are made available to victims of trafficking are:

- i. Accommodation
- ii. Medical care/care planning
- iii. Psychological assistance
- iv. Material assistance e.g. Supplementary Welfare Allowance
- v. Legal aid and advice
- vi. Access to the labour market, vocational training and education
- vii. Police services
- viii. Community-based services provided by NGOs
- ix. Repatriation
- x. Compensation
- xi. Permission to be in the State and/or non-removal pending a determination of an allegation of trafficking, and a Temporary Residence Permission if assisting with an investigation or prosecution
- xii. Asylum services
- xiii. Translation and interpretation, when appropriate
- xiv. Access to education for children.

Insofar as potential or suspected child victims are concerned the Health Service Executive (HSE) provide all necessary supports. All children in the State, under the age of eighteen years, are entitled to attend primary and post-primary schools.

ENFORCEMENT

Garda Síochána Annual Policing Plan

In 2011, An Garda Síochána in their Annual Policing Plan identify trafficking in human beings as one of the priorities with increased priority given to prevention and detection of human trafficking. It was also identified as a policing priority in 2010.

Human Trafficking Investigation and Co-ordination Unit

The Commissioner of An Garda Síochána established a *Human Trafficking Investigation and Co-ordination Unit* within the Garda National Immigration Bureau (GNIB) in 2009 to provide a lead role on policy issues in the field of human trafficking. The Unit acts as a centre of excellence for the organisation and oversees all investigations where there is an element of human trafficking and provides advice, guidance and operational support for investigations.

Director of Public Prosecutions (DPP)

The DPP has nominated particular prosecutors to deal with cases of human trafficking and issued them with guidelines. Their purpose is to guide prosecutors in examining which factors are to be considered in assessing whether to commence or continue with a prosecution including a consideration as to whether the public interest is served by a prosecution of a victim of human trafficking who has been compelled to commit offences (e.g. immigration or sexual offences) as a result of being trafficked.

INTERNATIONAL COOPERATION

Ireland has established strong international links to assist in the fight against human trafficking. Bilateral co-operation exists at the highest possible level between the United Kingdom (UK) Home Office, the UK Human Trafficking Centre, the Northern Ireland Office, the Police Service of Northern Ireland, An Garda Síochána and the Department of Justice and Law Reform. Officials meet regularly to monitor operations and exchange information on developments and best practice. An Garda Síochána also works in close co-operation with a number of organisations in addressing the issue such as Europol, Interpol, Eurojust and Frontex.

Ireland has also developed strong links with the International Organisation for Migration (IOM), the Organisation for Security and Co-operation in Europe (OSCE), the Council of Europe (CoE), the United Nations (UN) and the European Union (EU).

AWARENESS RAISING

A number of awareness raising initiatives have taken place since the establishment of the Anti-Human Trafficking Unit. These include:

- The Blue Blindfold campaign, the central message of which is “*Don't Close your Eyes to Human Trafficking*”. The campaign initially launched in 2008 and re-launched in the North and South of Ireland on 18 January, 2011 to reinforce its central message.
- Articles and/or advertisements have been placed in a variety of publications such as the Judicial Studies Journal, Irish Taxi Drivers Federation yearbook, GAA sport programmes, Informatia – a Romanian newsletter, the Public Sector Journal, Forum – a magazine for GPs, etc.
- AHTU has made a number of presentations on human trafficking to a variety of organisations

including University students, members of An Garda Síochána, health professionals, education professionals, etc.

- AHTU printed bookmarks, leaflets and information cards for widespread distribution.
- AHTU organised a film festival on Human Trafficking to coincide with EU Anti-Trafficking Day on 18 October 2010. In excess of 650 persons received tickets to attend either the afternoon or evening event. In excess of 250 Secondary School students (Transition Year and higher) attended the afternoon event.

Full details of the awareness raising work undertaken to date can be seen on www.blueblindfold.gov.ie.



TRAINING

Examples of training completed since the establishment of the AHTU include the following:

Legal Aid Board

A specialised training course was held in September 2009 for staff of the Legal Aid Board who provide legal aid and advice to potential and suspected victims of trafficking in human beings since November 2009.

Train the Trainer Courses

The International Organisation for Migration (IOM) secured a contract in 2009 to develop, design and deliver a *'Train the Trainers'* programme on behalf of the AHTU, which was subsequently rolled out to personnel in Government agencies likely to encounter victims of trafficking. The idea of the programme was that participants on the course would train others in their organisations on the issues associated with human trafficking. Three *'Train the Trainer'* courses have been completed with 40 participants from 13 different organisations. Since the completion of this training a total of 180 persons in four of the organisations have received training on human trafficking given by those who attended the 'Train the Trainers' course. Further training is planned.

Awareness raising training

139 people participated in basic awareness training which was provided by the IOM with input from NGOs, the Garda National Immigration Bureau and the Anti-Human Trafficking Unit. Course participants included representatives of a number of organisations, including:

- National Employment Rights Authority
- Department of Enterprise, Trade & Innovation
- Irish Naturalisation & Immigration Service
- Health Service Executive
- Department of Social Protection.

Garda Síochána

A continuous professional development training course entitled *'Tackling Trafficking in Human Beings: Prevention, Protection and Prosecution'* has been designed by An Garda Síochána. The International Organisation for Migration (IOM), the United Kingdom Human Trafficking Centre, AHTU and the Health Services Executive (HSE) together with NGOs such as Ruhama, Migrants Rights Centre Ireland (MRCI) and the Immigrant Council of Ireland (ICI) assist in the delivery of this training in recognition and investigation of trafficking in persons to front line Gardaí, PSNI Officers, Officers from the UK and Romania. Training includes victim identification through recognising indicators of trafficking in human beings.

Further information on this issue can be obtained from:

Anti-Human Trafficking Unit
Department of Justice and Law Reform
51 St. Stephen's Green
Dublin 2
Telephone 01 6028874
Email ahtu@justice.ie
Website-www.blueblindfold.gov.ie



Applications for asylum by lesbian, gay, bisexual, transgender and intersex (LGBTI) persons*

Paper presented to the RIPN, January 25, 2011

(Further information on Refugee & Immigration Practitioner (RIPN) meetings including future dates & speakers is available from Enda O'Neill. Contact: endaoneill@gmail.com)



by Patricia Brazil BL

Introduction

As Bruce-Jones of the US Southern Law Refugee Legal Aid Network notes:

“Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) people are forced to lead lives of silence in many, if not most, places in the world. LGBTI identity and non-conformist sexual activity may be punished in many countries by torture and death. Today, an increasing number of LGBTI-identified people are unwilling or unable to exist in this state of fear and try to escape their persecution by seeking asylum in foreign states.”³

* The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, March 2007, state that “sexual orientation” refers to a person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender, or more than one gender. “Gender identity” refers to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body, and other expressions of gender, including dress, speech and mannerisms. Intersex is a word adopted to criticize conventional approaches to sex or gender assignment and refers to people with intermediate or atypical combinations of biological features that conventionally define ‘males’ and ‘females’ (including but not limited to sexual organs or chromosomes). Available at http://www.yogyakartaprinciples.org/principles_en.pdf

³ “Sexual Orientation and Gender Identity: Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Refugees” at http://www.srlan.org/beta/index.php?option=com_content&view=article&id=78&Itemid=141

Article 1(A)(2) of the 1951 Convention Relating to the Status of Refugees sets out the definition of a refugee as follows:

“As a result of events occurring before 1 January 1951 and owing to 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 opinion, is outside the country of his nationality and 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.”

LGBTI people who seek asylum must establish that they have a well-founded fear of persecution in their country of origin for a reason which has a “Convention nexus”. Some academic commentators have suggested that LGBTI people can invoke the “political opinion” ground on the basis that of political opinions held or perceived to be held particularly by LGBTI claimants. It has also been suggested that an LGBTI asylum applicant may invoke the religious ground in cases where sexual orientation “conflicts with conventional religious doctrine, compliance with which is enforced by state or private actors.”⁴ However, it is generally agreed that the “particular social group” is the most commonly invoked ground in asylum claims by LGBTI people.

Evolution of the concept of “particular social group”

As noted by Goodwin-Gill and McAdam, “the *travaux préparatoires* provide little explanation for why ‘social group’ was included. The Swedish delegate to the 1951 Conference simply stated that social group cases existed, and that the Convention should mention them explicitly”.⁵ Since 1951, the concept of “social group” has been the subject of considerable judicial focus, with the jurisprudence demonstrating that the notion of social group “possesses an element of open-endedness capable of expansion ... in favour of a variety of different

classes susceptible to persecution”.⁶ However, it is important to note that it is not a “catch-all” provision which offers protection to any person facing injustice; Hathaway states that whilst this approach is seductive from a humanitarian perspective, it is incorrect as it eliminates the need to consider the issue of linkage between fear of persecution and civil or political status, which goes to the heart of the refugee concept in the Convention.⁷

One of the key decisions on the correct approach to the concept of “social group” is the decision of the US Board of Immigration Appeals in *Matter of Acosta*, where it held:

“We find the well-established doctrine of *ejusdem generis*, meaning literally, ‘of the same kind’, to be most helpful in construing the phrase ‘membership in a particular social group’. That doctrine holds that general words used in an enumeration with specific words should be construed in a manner consistent with the specific words ... The other grounds of persecution ... listed in association with ‘membership in a particular social group’ are persecution on account of ‘race’, ‘religion’, ‘nationality’, and ‘political opinion’. Each of these grounds describes persecution aimed at an immutable characteristic: a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not to be required to be changed ... Thus, the other four grounds of persecution enumerated ... restrict refugee status to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution. Applying the doctrine of *ejusdem generis*, we interpret the phrase ‘persecution on account of membership in a particular social group’ to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one

⁴ See European Council on Refugees and Exiles “ELENA Research Paper on Sexual Orientation as a Ground for Recognition of Refugee Status” (June 1, 1997) available at www.ecre.org/files/orient.pdf

⁵ Goodwin-Gill & McAdam *The Refugee in International Law* (3rd ed OUP 2007) at p.74.

⁶ *Ibid* at p.76.

⁷ Hathaway *The Law of Refugee Status* (Butterworths 1991) at p.159.

that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or conscience. Only when this is the case does the mere fact of a group membership become something comparable to the other four grounds of persecution ...”⁸

Hathaway summarises the *Acosta* formulation as including within the notion of social group:

- (1) groups defined by an innate, unalterable characteristic;
- (2) groups defined by their past temporary or voluntary status, since their history or experience is not within their current power to change; and
- (3) existing groups defined by volition, so long as the purpose of the association is so fundamental to their human dignity that they ought not to be required to abandon it.⁹

It is clear that LGBTI asylum seekers can claim membership of a particular social group based on the *Acosta* criteria. In any event, the matter is put beyond doubt in this jurisdiction by the provisions of the Refugee Act 1996: section 2 defines “membership of a particular social group” as including:

“membership of a group of persons whose defining characteristic is their belonging to the female or the male sex or having a particular sexual orientation.”

Reference should also be made in this regard to the Qualification Directive (Council Directive 2004/83/EC), Article 10(1) of which provides:

“1. Member States shall take the following elements into account when assessing the reasons for persecution-

...

(d) a group shall be considered to form a particular social group where in particular:

— members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and

— that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society;

depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation”.

It is thus clear that for the purposes of Irish law, LGBTI asylum seekers have a good claim to membership of a particular social group. However, it is the case that LGBTI asylum seekers may face various other hurdles in seeking protection, including (1) Assessment of Credibility; (2) Well-Founded Fear of Persecution; (3) Discretion and Sexual Orientation/Gender Identity.

Assessment of Credibility

As is so often the case, credibility can be a major issue in asylum claims by LGBTI people; in particular, proving that the asylum claimant is, in fact, lesbian, gay, bisexual, transgender or intersex and/or that they are at risk of persecution for that reason. Some countries have resorted to invasive and entirely inappropriate procedures in order to test the credibility of a person’s claimed sexual orientation or gender identity. The ELENA Research Paper on Sexual Orientation as a Ground for Recognition of Refugee Status refers to a UK appeal where a refugee had to undergo an anal examination by a medical doctor in order for the adjudicator to determine whether the applicant was really homosexual.¹⁰ More recently, much criticism has been directed at the Czech Republic where gay asylum seekers are forced to submit to “phallographic testing” which involves being “hooked up to a machine that monitors blood-flow to the penis and are then shown straight porn. Those applicants who become aroused are denied asylum.”¹¹ The compatibility of such procedures with Art.3 ECHR (prohibition on *inter alia* inhuman and degrading treatment) must be questioned.

¹⁰ Available at www.eocre.org/files/orient.pdf

¹¹ BBC news “Czech gay asylum 'phallographic test' criticised by EU” December 8, 2010.

⁸ Interim Decision 2986, March 1, 1985 at pp.37-39.

⁹ Hathaway *op cit* at p.161.

In dealing with assessments of credibility in LGBTI asylum claims, it is useful to refer to the UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity.¹² The Guidance Note states:

“35. Self-identification as LGBT should be taken as an indication of the individual’s sexual orientation. While some applicants will be able to provide proof of their LGBT status, for instance through witness statements, photographs or other documentary evidence, they do not need to document activities in the country of origin indicating their different sexual orientation or gender identity. Where the applicant is unable to provide evidence as to his or her sexual orientation and/or there is a lack of sufficiently specific country of origin information the decision-maker will have to rely on that person’s testimony alone. As the UNHCR Handbook has noted “if the applicant’s account appears credible, he [or she] should unless there are good reasons to the contrary, be given the benefit of the doubt.”¹³

UNHCR emphasises that in the assessment of LGBT claims, “stereotypical images of LGBT persons must be avoided, such as expecting a particular ‘flamboyant’ or feminine demeanour in gay men, or ‘butch’ or masculine appearance in lesbian women.” Similarly, the Guidance Note cautions that a person should not automatically be considered heterosexual merely because he or she is, or has been, married, has children, or dresses in conformity with prevailing social codes: “Enquiries as to the applicant’s realization and experience of sexual identity rather than a detailed questioning of sexual acts may more accurately assist in assessing the applicant’s credibility.”¹⁴

The Guidance Note goes on to state at para.37:

“It is important that LGBT applicants are interviewed by trained officials who are well informed about the specific problems LGBT persons face. The same applies for interpreters present at the interview. Relevant ways to increase officials’ awareness, include short targeted training sessions, mainstreaming of issues relating to sexual orientation and gender identity into the induction of new staff and training of existing staff, ensuring awareness of websites with expertise on LGBT issues, as well as the development of guidance relating to appropriate enquiries and interview techniques to use during the different stages of the asylum procedure.”

The Guidance Note also points out that:

“A common element in the experience of many LGBT applicants is having to keep aspects and sometimes large parts of their lives secret. This may be in response to societal pressure, explicit or implicit hostility and discrimination, and/or criminal sanctions. The consequence is that they often have limited evidence to establish their LGBT identity or may not be able to demonstrate past persecution, in particular where they were not living openly as LGBT in the country of origin.”¹⁵

Decision makers should thus be aware that a person can be reluctant to talk about such intimate matters as sexual orientation or gender identity, particularly where this would be the cause of shame or taboo in the country of origin. Accordingly, it is important that decision-makers are aware that a person may at first not feel confident to speak freely or to give an accurate account of his or her case; delayed admissions of this nature should not therefore lead to automatic negative credibility findings. As the Guidance Note states:

“Even where the initial submission for asylum contains false statements, or where the application is not submitted until some time has passed after the arrival to the country of asylum, the applicant can still be able to establish a credible claim.”¹⁶

¹² UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity, November 21, 2008 available at <http://www.unhcr.org/refworld/docid/48abd5660.html>

¹³ *Ibid* at para.35.

¹⁴ *Ibid* at para.36.

¹⁵ *Ibid* at para.4.

¹⁶ *Ibid* at para.38.

Well Founded Fear of Persecution

The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status¹⁷ notes at para.51 notes that “there is no universally accepted definition of ‘persecution’”. Having regard to the principle of non-refoulement as expressed in Art.33 of the Convention, it seems clear that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group will always amount to persecution. More problematic are acts or measures, such as discrimination, harassment or disproportionate punishment. The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status notes at para.53 that:

“an applicant may have been subjected to various measures not in themselves amounting to persecution (e.g. discrimination in different forms), in some cases combined with other adverse factors (e.g. general atmosphere of insecurity in the country of origin). In such situations, the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on “cumulative grounds”.

Furthermore, the UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity notes that “while the element of discrimination is often central to claims made by LGBT persons, they also frequently reveal experiences of serious physical and, in particular, sexual violence.” Paragraph 11 of the Guidance Note states that:

“Discriminatory measures may be enforced through law and/or through societal practice and could have a range of harmful outcomes. Discrimination will amount to persecution where such measures, individually or cumulatively, lead to consequences of a substantially prejudicial nature for the person concerned”.

The Guidance Note cites by way of example a LGBT person who is consistently denied access to normally available services, whether in his or her private life or workplace, such as education, welfare, health, and the judiciary, which may give rise to a well founded fear of persecution.

Reference may be made in this context to Art.9(2) of the Qualification Directive, which states:

“Acts of persecution ... can, *inter alia*, take the form of:

- (a) acts of physical or mental violence, including acts of sexual violence;

- (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;
- (c) prosecution or punishment, which is disproportionate or discriminatory;
- (d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;
- (e) ...
- (f) acts of a gender-specific or child-specific nature.”

Some LGBTI people may claim a well founded fear of persecution on the basis of the criminalisation of homosexual conduct in their country of origin. On this issue, the UNHCR Guidance Note states the following:

“Criminal laws prohibiting same-sex consensual relations between adults have been found to be both discriminatory and to constitute a violation of the right to privacy. The very existence of such laws, irrespective of whether they are enforced and the severity of the penalties they impose, may have far-reaching effects on LGBT persons’ enjoyment of their fundamental human rights. Even where homosexual practices are not criminalized by specific provisions, others directed at homosexual sex such as those proscribing ‘carnal acts against the order of nature’ and other crimes, such as ‘undermining public morality’ or ‘immoral gratification of sexual desires’, may be relevant for the assessment of the claim.”¹⁸

Finally, it is worth noting that in order to demonstrate a well founded fear of persecution, it is not necessary that a person has experienced persecution in the past.¹⁹ In many cases, LGBTI applicants may not have experienced harm in the past by reason of having concealed their sexual orientation or gender identity in their country of origin. As noted by the High Court of Australia: “it is the threat of serious harm with its menacing implications that constitutes the persecutory conduct.”²⁰

¹⁸ UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity, November 21, 2008 at para. 11 (footnotes omitted).

¹⁹ Although past persecution does give rise to a presumption of future persecution: see Art.4(4) of the Qualification Directive which states “The fact that an applicant has already been subject to persecution or serious harm or to direct threats of such persecution or such harm, is a serious indication of the applicant's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.”

²⁰ *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs* [2003] HCA 71, 9 December 2003 (High Court of Australia), available at <http://www.unhcr.org/refworld/docid/3fd9eca84.html>

¹⁷ UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (1979).

Discretion and Sexual Orientation/Gender Identity

Decision-makers may sometimes refuse applications by LGBTI people on the basis that they can avoid persecution or other harm by exercising discretion in relation to their sexual orientation or gender identity. However, this is not a legitimate basis on which to refuse an application; as the UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity states:

“A person cannot be expected or required by the State to change or conceal his or her identity in order to avoid persecution. As affirmed by numerous jurisdictions, persecution does not cease to be persecution because those persecuted can eliminate the harm by taking avoiding action. Just as a claim based on political opinion or nationality would not be dismissed on grounds that the applicant could avoid the anticipated harm by changing or concealing his or her beliefs or identity, applications based on sexual orientation and gender identity should not be rejected merely on such grounds.”²¹

As noted by the Immigration and Refugee Board of Canada, “a hidden right is not a right”.²² The question to be asked by decision-makers is therefore whether the applicant has a well-founded fear of persecution, and not whether the applicant could live in his or her country or origin without attracting adverse consequences by exercising discretion or restraint. As the UNHCR Guidance Note further states:

“a requirement for discretion would ... imply that a person’s sexual orientation is confined to a mere sexual act, thereby overlooking a range of behaviours and everyday activities otherwise affected by that person’s sexual orientation and gender identity. It would, in fact, amount to requiring the ‘same submissive and compliant behaviour, the same denial of a fundamental human right, which the agent of persecution seeks to achieve by persecutory conduct’”²³

This principle was recently affirmed by the United Kingdom Supreme Court in *HJ (Iran) v Secretary of State for the Home Department & HT (Cameroon) v Secretary of State for the Home Department*.²⁴ Both applicants were homosexual

men who claimed asylum in the United Kingdom on the ground that, as members of a particular social group, namely individuals defined by the shared characteristic of their sexual orientation, they had a well-founded fear of persecution. The first applicant’s claim was refused on the basis that he “could reasonably be expected to tolerate the need for discretion in respect of homosexual activity” and that “the evidence did not show a real risk of discovery or of adverse action by the state authorities against homosexual men who conducted their activities discreetly”. The second applicant’s claim was also refused on the basis that “he would conduct himself discreetly if he returned to Cameroon and that he could relocate to another area of the country where his sexual orientation would not be known.”

The Supreme Court allowed both men’s appeals, noting that the purpose of the Convention was to provide protection in the receiving state which was not available in the home state where there was well-founded fear of persecution within the meaning of article 1A(2), and that such international protection was available where, as members of a particular social group defined by the shared characteristic of sexual orientation, the claimants should not be denied their fundamental right to live openly and freely, as themselves, without fear of persecution.

Sir John Dyson emphasised the rationale underpinning the Convention and the core value of human dignity, noting:

“The Convention must be construed in the light of its object and purpose, which is to protect a person who ‘owing to 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’. If the price that a person must pay in order to avoid persecution is that he must conceal his race, religion, nationality, membership of a social group or political opinion, then he is being required to surrender the very protection that the Convention is intended to secure for him. The Convention would be failing in its purpose if it were to mean that a gay man does not have a well-founded fear of persecution because he would conceal the fact that he is a gay man in order to avoid persecution on return to his home country.”

²¹ *Op cit* at para.25.

²² Decision VA5-02751, 16 February 2007 available at <http://www.unhcr.org/refworld/docid/48245a5f2.html>

²³ *Op cit* at para.26.

²⁴ [2010] UKSC 31, July 7, 2010.

Lord Rodger considered the impact of a person adopting a “discreet approach” in the following terms:

“At the most basic level, if a male applicant were to live discreetly, he would in practice have to avoid any open expression of affection for another man which went beyond what would be acceptable behaviour on the part of a straight man. He would have to be cautious about the friendships he formed, the circle of friends in which he moved, the places where he socialised. He would have constantly to restrain himself in an area of life where powerful emotions and physical attraction are involved and a straight man could be spontaneous, impulsive even. Not only would he not be able to indulge openly in the mild flirtations which are an enjoyable part of heterosexual life, but he would have to think twice before revealing that he was attracted to another man. Similarly, the small tokens and gestures of affection which are taken for granted between men and women could well be dangerous. In short, his potential for finding happiness in some sexual relationship would be profoundly affected. It is objectionable to assume that any gay man can be supposed to find even these restrictions on his life and happiness reasonably tolerable.”

Lord Rodger was at pains to emphasise that this was not the only issue arising, endorsing the dicta of Gummow and Hayne JJ in the Australian decision of *Appellant S395/2002 v Minister for Immigration* where it was held:

“Sexual identity is not to be understood in this context as confined to engaging in particular sexual acts or, indeed, to any particular forms of physical conduct. It may, and often will, extend to many aspects of human relationships and activity. That two individuals engage in sexual acts in private (and in that sense ‘discreetly’) may say nothing about how those individuals would choose to live other aspects of their lives that are related to, or informed by, their sexuality.”²⁵

The opening paragraph of Lord Rodger’s judgment neatly sums up the issue:

“A gay man applies for asylum in this country. The Secretary of State is satisfied that, if he returns to his country of nationality and lives openly as a homosexual, the applicant will face a real and continuing prospect of being beaten up, or flogged, or worse. But the Secretary of State is also satisfied that, if he returns, then, because of these dangers of

living openly, he will actually carry on any homosexual relationships ‘discreetly’ and so not come to the notice of any thugs or of the authorities. Is the applicant a ‘refugee’ for purposes of the United Nations Convention relating to the Status of Refugees 1951? The answer is Yes.”

Conclusion

The difficulties faced by an LGBTI asylum claimant do not cease even where he or she succeeds in obtaining a positive decision on the refugee application. Family reunification is a major issue, as same sex partners are not recognised as family members pursuant to s.18 of the Refugee Act 1996. However, there are anecdotal reports that “exceptional leave to enter for family reunification purposes has been granted to same-sex couples on an ad hoc discretionary basis but the bases on which this discretion has been exercised by the Minister for Justice, Equality & Law Reform is not clear.”²⁶ However, s.170 of the Civil Partnership Act 2010 (which came into force on January 1, 2010) now extends the definition of family members in s.18(3)(a) to civil partners, although the usefulness of this provision may be limited in practice.

While the decision in *HJ (Iran) & HT (Cameroon)* is to be welcomed as an important affirmation of the human rights of lesbians and gay men to family life, freedom of association and freedom of expression, the decision will not resolve all the issues arising for those seeking asylum on grounds of sexual orientation or gender identity. As Millbank notes, in the wake of the decision of the High Court of Australia in *Appellant S395/2002 v Minister for Immigration*²⁷ which rejected the “discretion based approach”, refugee decision makers in that jurisdiction simply turned their attention from “discretion” to “outright disbelief”²⁸ – an all too familiar concept to practitioners in this jurisdiction.

²⁶ Fundamental Rights Agency Report “Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity, 2010 Update, Comparative legal analysis” Report on Ireland, March 2010 available at http://www.fra.europa.eu/fraWebsite/lgbt-rights/lgbt_country-reports_2010_en.htm

²⁷ (2003) 216 CLR 473.

²⁸ “From Discretion to Disbelief: Recent Trends in Refugee Determinations on the basis of Sexual Orientation in Australia and the United Kingdom” (2009) 13 International Journal of Human Rights 391.

²⁵ 216 CLR 473, 500-501, para 81.

Family Reunification for Refugees and the Application of Section 29 of the Family Law Act 1995.

by Colm O'Dwyer BL

The rationale for family re-unification for Refugees

1. When refugees leave their homeland, family members are frequently separated as some are left behind and others are forced to flee at different times through separate means. Resettlement, as a tool of international protection, involves preserving and restoring the basic dignity of a refugee's life, including promoting the reunification of the refugee's family.

2. The United Nations High Commissioner for Refugees (UNHCR) has indicated that there are five guiding principles which underlie efforts to protect family unity and to promote and facilitate family reunification in the resettlement process. These are:

- a) *The family is the natural and fundamental group unit of society, and is*
- b) *entitled to protection by States.*
- c) *The refugee family is essential to ensure the protection and well being of its individual members*
- d) *The principle of dependency entails flexible and expansive family reunification criteria that are culturally sensitive and situation specific.*
- e) *Humanitarian considerations support family reunification efforts.*
- f) *The refugee family is essential to the successful integration of resettled refugees.*

3. While the 1951 Refugee Convention does not confer a right to family reunification on refugees, the UNHCR's policies and practice on family unity derive from the principle, set out in international law, that the "family is the natural and fundamental group unit of society and is entitled to protection by society and the State." (Article 16 of the Universal Declaration of Human Rights 1948).

4. It is well recognised that family reunification plays a significant role in meeting the long-term needs of resettled refugees and assists them to adjust and integrate to the country of resettlement. The family is often the strongest and most effective emotional, social and economic support network

for a refugee making the difficult adjustment to a new culture and social framework. A flexible and expansive approach to family reunification therefore not only benefits refugees and their communities, but also resettlement countries by enhancing integration prospects and lowering social costs in the long term.

5. Professor James C. Hathaway explains the rationale for family unity provisions as follows:

"The crises that force refugees to flee often shatter the unity of their families. Family members may not be able to leave together or may be separated in the chaos of flight. Refugees separated from their families are not only less well equipped to cope with life in an asylum state, but are prone to loneliness despair and anxiety over the fate of their loved ones left behind in dangerous situations." (The Rights of Refugees p533)

6. Given the disruptive and traumatic factors of the refugee experience, the impact of persecution and the stress factors associated with flight to safety, refugee families are often reconstructed out of the remnants of various households, who depend on each other for mutual support and survival. The UNHCR has warned that these families may not fit neatly into preconceived notions of a nuclear family (husband, wife and minor children) and that, in some cases the difference in the composition and definition of the family is determined by cultural factors, in others it is a result of the refugee experience.

Refugee family reunification in Ireland

7. Refugee family reunification in Ireland is governed by section 18 of the Refugee Act 1996:

"18 (1) Subject to section 17(2), a refugee in relation to whom a declaration is in force may apply to the Minister for permission to be granted to a member of his or her family to enter and to reside in the State and the Minister shall cause such an application to be referred to the Commissioner and a notification thereof to be given to the High Commissioner."

8. Section 18 (3) (a) provides:

“If, after consideration of a report of the Commissioner submitted to the Minister under subsection (2), the Minister is satisfied that the person the subject of the application is a member of the family of the refugee, the Minister shall grant permission in writing to the person to enter and reside in the State and the person shall be entitled to the rights and privileges specified in section 3 for such period as the refugee is entitled to remain in the State”

‘Member of the family’ in relation to a refugee appears to mean member of his direct or nuclear family. Section 18 (3) (b) provides that ‘family members’ include

“If the refugee is married, his or her spouse (provided that the marriage is subsisting on the date of the refugee’s application”

“a child of the refugee who, on the date of the refugee’s application pursuant to subsection (1), is under the age of 18 years and is not married”

9. It is clear that once the Minister is satisfied that the person with whom the refugee wants to reunite, or remain united with if the person is already in the country (as is quite often the case), is his or her spouse or child, he must grant reunification unless there is an issue of national security or a serious public policy consideration which might counterbalance the right to family unity. Section 18 (5) provides:

“The Minister may refuse to grant permission to enter and reside in the State to a person referred to in subsection (3) or (4) or revoke any permission granted to such a person in the interest of national security or public policy”

I am not aware of this section ever being specifically invoked to prevent reunification of direct family members.

Whether a child qualifies as a ‘child’ for the purposes of the Act can be determined by DNA evidence which proves with a very high degree of certainty the paternal or maternal link. However, there can be an issue with adopted children. Adoption certificates are generally required but these documents may not be available either because the refugee was in hiding from the State authority or because there is no State authority.

10. Section 18 (4) provides that the Minister may also at his discretion grant permission to “a dependent member of the family of a refugee” to enter and reside in the State:

18 (4) (a) The Minister may, at his or her discretion, grant permission to a dependent member of the family of a refugee to enter and reside in the State and such member shall be entitled to the rights and privileges specified in section 3 for such period as the refugee is entitled to remain in the State.

(b) In paragraph (a), “dependent member of the family” in relation to a refugee, means any grandparent, parent, brother, sister, child, grandchild, ward or guardian of the refugee who is dependent on the refugee or is suffering from a mental or physical disability to such extent that it is not reasonable for him or her to maintain himself or herself fully.”

The statutory role of the Refugee Applications Commissioner

11. Section 18 (1) makes it clear that an application for family re-unification has to be referred to an independent person, the Refugee Applications Commissioner, and that the Commissioner is mandated to investigate the application and submit a report to the Minister setting out the relationship between the refugee and the person the subject of the application. The investigation and determination of nature of the relationship between the refugee and the person the subject matter of the application is a matter for the Commissioner, in the same way that the investigation and determination of whether a person should be granted a refugee declaration is a matter for the Commissioner (and, on appeal, for the Refugee Appeals Tribunal). Decisions upon refugee status frequently involve a preliminary decision as to whether an applicant is a member of the particular family but there would be no question of this issue, or, indeed, of any other legal issue that might arise, being referred to the Circuit Court.

12. There are obvious reasons why it is the Commissioner that is charged with the role of investigating the relationship between a refugee and another person in the context of an application for refugee family reunification. The Commissioner already has an investigative function, and has access to country of origin information, legal staff with expertise in refugee

law, and to the refugee applicant's refugee file. If the Authorised Officer of the Commissioner isn't satisfied that the refugee is the spouse of, or the father or mother of, the person the subject matter of the application, he or she can request further documentation and information, affidavits of laws and/or DNA evidence. He or she can also simply inform the Minister that the Commissioner is not satisfied that there is a familial or marital relationship between the refugee and the other person. However, in practice this rarely happens. No actual investigation takes place. The Commissioner simply comments upon whether the spouse or child was mentioned in the refugee application and records the documents submitted. The section 18 (2) report generally concludes with the comments "the information provided by Mr X is (or is not) consistent with that given in his initial application for asylum" and "this office is unable to verify the authenticity of documentation provided in support of this application".

13. Throughout 2009 and 2010, a practice developed whereby the Minister would insist that a declaration as to the validity of the marriage under Irish law from the Circuit Court was provided before he would grant reunification or even deal with the family reunification application. This practice appeared to apply to all Muslim marriages, traditional African marriages and any marriages 'by proxy'. The general idea appeared to be that these marriages were not valid under Irish family law and that the wife or husband was not therefore the 'spouse'.

The section 29 declaration as to marital status

14. Section 29 of the Family Law Act 1995 states:

29.—(1) The court may, on application to it in that behalf by either of the spouses concerned or by any other person who, in the opinion of the court, has a sufficient interest in the matter, by order make one or more of the following declarations in relation to a marriage, that is to say:

(a) a declaration that the marriage was at its inception a valid marriage,

(b) a declaration that the marriage subsisted on a date specified in the application,

(c) a declaration that the marriage did not subsist on a date so specified, not being the date of the inception of the marriage,

15 The question therefore to be asked by the Circuit Court is whether the marriage was valid at the time of its inception in the other State, not whether it meets the procedural requirements for marriage in this State. There is no question but that the marriages in most family reunification applications are valid in the other State and meet the procedural requirements in that State.

Traditional African marriages, involving less formal ceremonies or no ceremony at all, are valid and binding in many African countries. Marriages 'by proxy' are also the norm in many countries (indeed, marriages 'by proxy' are lawful in 4 States of the United States of America, and these marriages are recognised in the other States.) There is no need for the Minister to refer these cases to the Circuit Court. It is well established that the formal validity of a marriage is governed exclusively by the *lex loci celebrationis*: the law of the place in which the marriage is solemnised.

16 The only issue that arises is with cases involving Muslim marriages that were properly solemnised in the country of origin. In almost every State in which Islam is recognised as the primary religion, including, for example, Iran, Iraq, Afghanistan, Pakistan, Syria, Sudan, Somalia and Egypt, a husband or wife is permitted by law to marry more than once without divorce and to have two or more marital partners at the same time. This means that these marriages are 'potentially polygamous' at their outset. The bride and groom may have no intention of taking a second wife or husband but they know they could possibly do so.

17 Does this mean that the marriage isn't valid in Ireland? The answer appears to be both yes and no. In *Conlon v Mohammed* [1987] ILRM 5623, until recently the only significant decision on the subject, Barron J. in the High Court decided that a Muslim marriage between an Irish woman and a South African man celebrated in South Africa was potentially polygamous and could not be valid in Ireland (the fact that interracial marriage was banned in South Africa at that time was not the determining issue as it was claimed that the marriage was still a valid common law marriage).

However, on closer examination of the High Court decision, it is apparent that Barron J. found that Ms Conlon's marriage could not be valid because Ms Conlon was domiciled in Ireland before the marriage, and polygamous marriage is prohibited in Ireland. Due to her pre-nuptial domicile, she had no capacity to enter into a potentially polygamous marriage.

18 In his recent decision in the case of *Hamza v Minister for Justice, Equality and Law Reform* (Unreported High Court Cooke J. 25 November 2010) Cooke J. re-visited the decisions of the High Court and Supreme Court in *Conlon v Mohammed* and decided:

In the judgment of this Court, the better view of the general conflict of laws issue is that a foreign marriage validly solemnised in accordance with the lex loci may be recognisable as valid in Irish law, even if it was potentially polygamous according to that law, provided neither party was domiciled in Ireland at the time and neither has also been married to a second spouse, either then or since. As pointed out by Binchy (Chapter 10, p. 213 above), there is older common law authority for the proposition that a marriage potentially polygamous when contracted remains polygamous, even though the husband does not, in fact, take a second wife (Hyde v. Hyde, L.R. 1P and D 130 [1866]). Later authority in some common law jurisdictions, however, suggests that a marriage which was polygamous when contracted may be transformed into a monogamous one, particularly in circumstances where the parties to a marriage which is in fact monogamous, acquire a new domicile of choice in a country where polygamous marriage is not possible (see, in this regard, Rule 71, as stated by Dicey and Morris (above) and the cases cited in support of it at footnote 87 on p. 697 of the above edition) : "A marriage which was polygamous at its inception, but is de facto monogamous may be converted into a monogamous marriage (1) where, through a change of, or in, personal law or the happening of some event, neither party any longer has the capacity to marry another spouse, or (2) (perhaps) where the parties go through a monogamous ceremony of marriage." (paragraph 42)

19 In most refugee family reunification cases, the refugee was domiciled in the country of origin when he or she got married but, since then, fled to Ireland. The pre-nuptial domicile of both parties to the marriage was Somalia or Sudan or Afghanistan, not Ireland. In these circumstances, it is certainly arguable that a marriage that was potentially polygamous is valid under Irish law because both of the parties had capacity at the time of the marriage. The refugee now has domicile in Ireland and, for this reason, does not have capacity to enter into another (polygamous) marriage now.

- a) In the circumstances, the test for validity of a foreign marriage, I would argue, should now involve 3 straightforward questions:
 - a) *Is the type of marriage one recognised in the country in which it took place?*
 - b) *Was the marriage properly executed so as to satisfy the requirements of the law of the country in which it took place?*
 - c) *Was there anything in the law of either party's country of domicile that restricted his/her freedom to enter the marriage?"*

Is a section 29 declaration relevant at all in a refugee family reunification application?

20 There is a separate and distinct issue which is whether a section 29 Family Law declaration is really relevant to an application for refugee family reunification. In the *Hamza* decision, Cooke J. dealt with this issue in the following manner:

"the Court would indicate, for the avoidance of doubt in other cases that, in its judgment, it would not in any event be competent or appropriate for the Minister to require the obtaining of such a declaration as a condition for the making of a decision on a family reunification application under s. 18. In that section, the Oireachtas has designated the Minister as the sole authority to decide whether permission should be granted or refused under subsection (3). It is to the Minister that the application for permission is made under subsection (1) and it is the Minister alone who must be satisfied that "the person the subject of the application is a member of the family of the refugee" under subsection (3) (a). It is envisaged by the provision that he will do so on the basis of the report furnished by the Office of the RAC under subs. (2) which has "set out the relationship between the refugee concerned and

the person the subject matter of the application". The Minister cannot delegate to any third party, therefore, (including a Circuit Judge) the decision he is required to make under subs. (3)(a), namely, that the person comes within the definition of a family member or, in a case such as the present, that the person concerned and the refugee are parties to a subsisting marriage." (paragraph 15)

21. Furthermore, the application for a section 29 declaration, which specifically relates to separation or divorce proceedings, takes many months and is an entirely unsuitable process for the consideration of refugee family reunification applications which are often quite urgent. The applicants in these cases are not seeking judicial separation, divorce or annulment and, in the circumstances, have no reason to go before the Court for declarations under the Family Law Acts.

Is a formal marriage necessary at all?

22. Refugees often find it difficult to prove the fact or reality of a marriage. As with adoption, there are many less formal arrangements in place because of fear of the authorities or because there is no proper central authority to register births, deaths, and marriages. 'Spouse' and 'family' are not actually defined in the Refugee Act and I think it is open to the Commissioner and the Minister to consider 'family type' arrangements and grant refugee family reunification to, for example, the mother or father of the refugee's children, as the 'spouse' even if there wasn't a formal marriage or there is no documentary evidence of a marriage.

23 As I pointed out earlier, there is no legal obligation on the State to permit refugee family reunification at all. It is not provided for in the Geneva (Refugee) Convention and Ireland has not opted into the European Union legislation in this area, namely Council Directive 2003/86/EC on the right to family reunification (O.J.L. 251/12 of 3rd October, 2003) However, it must be desirable that, where possible, our laws are interpreted in a manner that is consistent with a Council Directive and that we try to comply with UNHCR guidelines in relation to Refugee issues.

The UNHCR Executive Committee reached the following conclusions in relation to refugee family reunification:

"5. It is hoped that countries of asylum will apply liberal criteria in identifying those family members who can be admitted with a view to promoting a comprehensive reunification of the family.

6. When deciding on family reunification, the absence of documentary proof of a formal validity of a marriage or of the affiliation of children should, not, per se, be considered as an impediment."

(Conclusions of the UNHCR Executive Committee on Family Reunification of 21st October, 1981)

The Directive also refers to 'spouse' and 'family' without specific definitions of these terms in the same manner as the Irish Refugee Act but Article 4.3 provides that the participating Member States may authorise entry and residence of the applicant's/sponsor's unmarried partner, being a third country national, with whom the applicant is in a duly attested stable, long-term relationship. Article 5.2 provides that when an application concerning an unmarried partner is examined,

"Member States shall consider, as evidence of the family relationship, factors such as a common child, previous cohabitation, registration of the partnership and any other reliable means of proof".

24 In the *Hamza* decision, Cooke J. found:

"37. It is clear, accordingly, that the approach of the Directive towards the relationship between refugee (sponsor) and spouse is based upon the assessment of the reality of the conjugal relationship rather than upon the availability of formal verification of the legality of the marriage contract.

38. This corresponds closely with the approach recommended by the UNHCR which recognises relationships wider than that of legally married spouses. It recommends that reunification assistance be afforded to "couples who are actually engaged to be married, who have entered into a customary marriage or who have lived together as husband and wife for a substantial period" ('UNHCR Guidelines on Reunification of Refugee Families, 1983').

39. In the judgment of the Court, in the absence of any contrary requirement imposed by the literal interpretation of s. 18(3)(b) of the Act, a purposive construction of the provision consistently with such

authoritative guidance leads to the conclusion that the recognition of the marital relationship of spouse and refugee ought not to be confined to cases in which proof is forthcoming of a marriage validly solemnised in foreign law and recognisable in Irish law. A refugee who is able to demonstrate the existence of a subsisting and real marital relationship with the person the subject of the application is entitled to have the marital relationship recognised for the purposes of reunification under section 18 unless some reason of public policy intervenes to prevent its recognition. This will be particularly so in cases such as the present one where it can be demonstrated that the relationship has subsisted over many years; that the marriage has been consummated and it is not disputed that there are children of the relationship of whom the refugee is a parent. In the judgment of the Court, it is incumbent on the Minister, in such cases, to give due weight to those factors above all, notwithstanding deficiencies that may be apparent in formal documentary proofs of the ceremony.” (paragraphs 37 -39)

25 In the circumstances, I would argue that an assessment under section 18 (3) of the Refugee Act, 1996 can be, and should be, based upon the reality of the conjugal relationship of the refugee rather than the fact of marriage or the availability of formal verification of the legality of the marriage contract. To explain why this should be so, it is worth looking at the facts in the Hamza case. The applicant, a recognised refugee in Ireland, had 2 children with his wife while living in Sudan. The children were granted family reunification visas but their mother was refused as she was not considered to be the ‘spouse’ of a refugee because her Muslim marriage to Dr. Hamza was by ‘proxy’ (as is the norm in Sudan). The practical effect of the Minister’s decision was that the children would have to be separated from their mother and leave her behind in very uncertain circumstances in Sudan in order to benefit from family reunification. The refugee would also remain separated from the person he considers to be his spouse, and to whom he had been married for many years. Can such an outcome have been in the contemplation of the Oireachtas when section 18 (3) was clearly enacted to facilitate the reception of refugees and to ensure their personal wellbeing in Ireland?



EAC Blended Learning COI Courses for 2011

by Refugee Documentation Centre (Ireland)

The RDC is pleased to announce that two Blended Learning Courses.

"Researching Country of Origin Information (COI)" will take place in March and September 2011 with a face-to-face training day later in the RDC. This involves on-line course work for 4 weeks (average 14 hours) followed by a training day. You can access the course from any PC as it is not restricted to the workplace. The training material which will be used is the Module on Country of Origin Information (COI) of the European Asylum Curriculum (EAC).

The Blended Learning Programme will provide you with information on how to conduct country research that results in relevant, reliable and balanced, accurate and up-to-date country of origin information. New skills will be directly applied in a case study at the face-to-face meeting in Dublin.

The March course is organised through the COI Training Network and as such is open to participation by colleagues from other European country agencies. The courses offer the unique opportunity to discuss the role and standards of country of origin information with colleagues from other agencies and different countries.

Dates :

COURSE I Starts 21st March 2011 – 15th April 2011 with a face to face day on 19th April 2011
Closing date 4th March 2011

COURSE II Starts 26th September 2011 – 21st October 2011 with a face to face day on 25th October 2011
Closing date 16th September 2011

Places are available to all Asylum agency staff. I would be grateful if you could bring this notice to the attention of any staff in your area whom you feel would benefit from this training. Interested participants should let me know by email before the closing dates. Applications will be processed on a *first come first served basis*. Places are limited so you are requested to apply as soon as possible.



Recent Developments in Refugee and Immigration Law

by Mary Fagan, *Refugee Documentation Centre (Ireland)*

S [a minor] & Ors v MJELR & Ors, Unreported, High Court, Hogan J., 21st of January 2011, [2010] IEHC 31

DEPORTATION ORDERS - JUDICIAL REVIEW - MOTION TO AMEND PLEADINGS - GROUNDS FOR CHALLENGING VALIDITY OF DEPORTATION ORDER - COMMON LAW SUBSTANTIVE JUDICIAL REVIEW RULES - ARTICLE 13 ECHR - RIGHT TO EFFECTIVE REMEDY - DECLARATION OF INCOMPATIBILITY - S.5 (1) EUROPEAN CONVENTION OF HUMAN RIGHTS ACT 2003 - WHETHER RELIEF COULD BE OBTAINED ON A FREESTANDING BASIS - WHETHER NECESSARY TO DEMONSTRATE ABSENCE OF "ADEQUATE OR AVAILABLE" REMEDY - AMENDMENT BASED ON RELIANCE ON EU CHARTER OF FUNDAMENTAL RIGHTS

Facts

The applicants took judicial review proceedings challenging the validity of deportation orders made by the first named respondent. In the proceedings as originally constituted, they sought a declaration of incompatibility pursuant to S. 5(1) of the European Convention of Human Rights Act 2003. They contended that their right to an effective remedy under Article 13 ECHR had been infringed on the ground inter alia that the common law rules on judicial review (review for reasonableness, rationality and proportionality) did not allow the Court in exercising its supervisory function to engage in a merits based review of the impugned decisions. The court raised the question of whether the applicants were entitled to the relief sought on a freestanding basis or whether pursuant to S. 5(1) of the 2003 Act they were obliged to demonstrate that no other remedy was "adequate or available". As a result, the applicants brought a motion seeking to amend the grounds by which they challenged the validity of the deportation orders. They sought to amend the proceedings to enable them to challenge the constitutionality of the common law rules on judicial review. An amendment to assert on the part of the mother a derivative right of residence in the State during the minority of the first named applicant pursuant to the provisions of the EU Charter of Fundamental Rights particularly Article 24 thereof was also sought.

Held by Hogan J. in allowing the amendment insofar as it related to the applicants contention that the common law rules were unconstitutional but not insofar as it concerned reliance on the Charter, that the ECHR has no direct effect in Irish law and can only be relied on in the circumstances specified in the European Convention of Human Rights Act 2003. By virtue of the provisions of S.5 (1) of the 2003 Act, the Court is not permitted to grant a declaration of incompatibility unless it is clear that "no other legal remedy is adequate and available". Article 34.3.1, Article 40.3.1 and Article 40.3.2 of the Constitution ensured that the State guarantees so far as is practicable an effective legal remedy to all litigants. This guarantee was attested by a wealth of case law which demonstrated that the courts will ensure that the remedies available to a litigant are effective for the protection of the rights at issue and that the procedural law respects basic fairness of procedures and is neither arbitrary nor unfair. If the common law judicial review rules are unfair or fail adequately to provide an appropriate remedy to ensure that the State "respects" and "vindicates" substantive rights, the rules will be found to be unconstitutional. The constitutionality of the common law judicial review rules had never been tested with the result that the question of whether the remedy of a constitutional challenge might be said to be not "available" within the meaning of S.5(1) of the 2003 Act did not arise. Accordingly, there was another legal remedy which was adequate and available for the protection of the applicants' constitutional and ECHR rights viz. challenging the constitutionality of the common law judicial review rules.

The applicants' failure to challenge the constitutionality of the rules while at the same time maintaining an Article 13 challenge was surprising, particularly when the objective of the proceedings was to challenge the validity of the deportation orders. Even if the Court were to grant a declaration of incompatibility, S. 5(2) (a) of the 2003 Act makes it clear that the validity of any statutory provision or any rule of law remains entirely unaffected by the declaration. It is otherwise with a declaration of unconstitutionality which has the effect of crystallizing the invalidity of the law in question at the date of the judicial decision.

Despite the fact that the application to amend was well out of time and the fact that granting an amendment to allow the applicants to challenge the constitutionality of the common law judicial review rules was potentially prejudicial to the respondents given the prospect that the validity of these rules fundamental to the operation of the asylum and immigration system would be put in jeopardy, there were two reasons why such amendment should be allowed. Firstly, the applicants had always maintained that the existing common law rules were inadequate to secure an effective remedy. The proposed amendment merely amplified the case made by the applicants and as such did not constitute an entirely new ground of challenge. The amendment was also necessary by virtue of the jurisdictional bar in S.5(1) of the 2003 Act which required the applicants to exhaust their constitutional remedies. In other cases where the Article 13 ECHR effective remedy point was canvassed, the Court's attention had never been directed to the jurisdictional bar or the general implications of *Mc D v L* in respect of arguments of this nature with the result that the applicants might have been forgiven for believing that they were free to raise the effective remedy point without the necessity of an amendment of the pleadings. These highly specialised circumstances outweighed the potential prejudice to the respondents.

The applicants contended that they had been prompted to seek the amendment in reliance on the EU Charter in light of the discussion contained in the Advocate General's opinion of September 30, 2010 in *Case C-34/09 Zambrano*. The Charter has been in force since 1 December 2009 yet the first application to amend was nearly a year later even though any arguments based on the Charter could have been made from the outset. More critically, the applicants had never previously raised the possible application of the Charter. The special and almost unique factors present in the case of the constitutional argument did not apply in respect of the amendment sought in reliance on the Charter and accordingly such amendment would not be allowed.

Cases Cited

Mc D v L [2009] IESC 81, *RX v Minister for Justice, Equality and Law Reform* [2010] IEHC 446, *Re Loftus Bryan's Estate* [1942] I.R. 185, *Macauley v. Minister for Posts and Telegraphs* [1966] I.R. 345, *Byrne v. Ireland* [1972] I.R. 241, *Meskill v. CIE* [1973] I.R. 121, *Grant v. Roche Products* [2008] IESC 35, [2008] 4 I.R. 679, *Herrity v. Independent Newspapers Ltd.* [2008] IEHC 249, *O'Brien v. Keogh* [1972] I.R. 144, *White v. Dublin City Council* [2004] IESC 35, [2004] 1 I.R. 545, *Re McAllister* [1973] I.R. 238, *Murphy v. Dublin Corporation* [1972] I.R. 215, *S. v. S.* [1983] I.R. 68, *Blehein v. Minister for Health and Children* [2008] IESC 40, [2009] 1 I.R. 275, *Pesca Valentia Ltd. v. Minister for Fisheries* [1985] I.R. 193, *GK v. Minister for Justice, Equality and Law Reform* [2002] 1 I.L.R.M. 401, *B. v. Minister for Justice, Equality and Law Reform* [2010] IEHC 296, *Murphy v. Attorney General* [1982] I.R. 241, *A. v. Governor of Arbour Hill Prison* [2006] IESC 45, [2006] 2 I.R. 262,



UNHCR and Landmark Commemorations in 2011

by Zoe Liston, External Relations Intern, UNHCR Dublin.

On 14 December 2010, UNHCR marked its 60th Anniversary and will in 2011 commemorate several other significant anniversaries. This year, the core international legal instruments on refugee protection and the reduction of statelessness will enter their 60th and 50th years respectively.

60th Anniversary – ‘60 Years, 60 Lives’

The 60th Anniversary of the UN Convention relating to the Status of Refugees will be marked on **July 28th** with an international and national photographic exhibition called ‘60 Years, 60 Lives’. UNHCR Ireland will host a vibrant photographic exhibition documenting the people who found refuge in Ireland in the six decades leading up to this anniversary. It will include photographs and stories of Hungarian refugees who came to Ireland in 1956, the Chilean refugees forced to flee in the 1970's after the rise of Pinochet, the Vietnamese 'boat people' who arrived in Ireland in the late 1970's following the fall of Saigon and stories from refugees of a contemporary nature from Afghanistan and Iraq. The exhibition will tell the stories of people who came to Ireland looking for refuge and how many of them found a home here. It represents a ‘hidden history’ of Ireland’s significant contribution to international protection. This exhibition will be launched on World Refugee Day, **June 20th**. (Venue to be confirmed)

World Refugee Day and Fair Play

Also, in advance of World Refugee Day, UNHCR will organise together with SARI (Sport Against Racism Ireland) the ‘Fair Play Football Cup’ – a collaborative 1 day sporting event now in its second year. For one day, this summer event brings together refugees, asylum seekers, authorities, NGO’s and journalists in a celebration of sport and culture. This will take place on Saturday **June 18th** in the gardens of the Law Society, Blackhall Place, Dublin.

The 50th Anniversary of the Convention of the Reduction of Statelessness will be marked on **August 30th**. In advance of this date a worldwide campaign, will highlight the issues of concern around statelessness and will raise awareness about UNHCR’s mandate in relation to statelessness. The

2011 events will culminate with a ministerial level meeting in Geneva in **December 7th - 8th**. This will be an important forward thinking opportunity for States, including Ireland, to make concrete pledges to address specific displacement and statelessness issues.

Commemorating these milestones in 2011 provides UNHCR with a significant opportunity to bring forced displacement and statelessness issues to the centre of international attention and to reinforce core international protection principles and values. As António Guterres, High Commissioner of UNHCR says, “refugee protection has remained an enduring European value”, and one that we should be proud of.

For organisations wishing to get involved in any of these events, or if you are looking for further information please get in touch with Yolanda Kennedy, UNHCR Ireland / email iredu@unhcr.org



The Refugee Documentation (Ireland)

The Opening hours of the RDC library

The opening hours of the RDC library are from 10.00am to 12.30pm and 14.00pm to 17.00pm. It may be possible to accommodate visitors prior to 10.00am and between 13.00pm and 14.00pm if you contact us in advance.

Contacting the Refugee Documentation Centre

You may contact the RDC in the following ways:
Tel: 01 477 6250
Fax: 01 661 3113
email: RDC@legalaidboard.ie
You may also email in a query form as you would for a COI query.

