

# The Researcher

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## Welcome to the November 2008 issue of The Researcher.

In this issue we continue our focus on the Immigration, Residence and Protection Bill with two articles: one by Catherine Kenny which examines the protection aspects of the Bill from a human rights perspective and the other by John Stanley BL on the relationship between the Bill and judgments of the Superior Courts. John Stanley has also contributed to our regular column, Recent Developments in Refugee and Immigration Law and we are very appreciative that Mary Fagan has summarised for that column the important European Court of Justice residency case known as Metock. A topic which has not been looked at before here is the impact of language and cultural barriers on refugee status determination and this is explored by James Healy BL. We also include a summary of the Hungarian Helsinki Committee Report, *Access to Protection at Airports in Europe* and we look at the implications of the APCI review of UK Home Office COI reports for researchers, legal representatives and decision makers. Elsewhere in this issue Patrick Dowling explores the Danakil Depression in Northern Ethiopia – one of the world's hottest places and David Goggins investigates xenophobic violence in South Africa. Zoe Melling gives an update on RDC Library Journals and Jacki Kelly writes about the newly formed Refugee and Immigration Practitioners' Network.

Paul Daly, RDC



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### Disclaimer

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## Is the Language Barrier a Problem for those Seeking Refugee Status in this Jurisdiction?



*By James Healy B.L.*

One of the key factors in Applicants effectively presenting their cases for refugee status is communication or more importantly the way such Applicants testify or convey their stories to Authorised Officers of the Refugee Applications Commissioner in the cases of applications of First Instance, or to Members of the Refugee Appeals Tribunal, in the cases of appeals to that Body. Very often the means of such communication is through interpreters, where such Applicants may encounter further difficulties and may not easily make themselves understood, more particularly where such interpreters may not be from the Applicant's Country of Origin and may not be familiar or aware of such cultural differences.

The new cultural landscape in Ireland has had a dramatic impact on communication. Nowadays more than 150 languages are spoken in modern Ireland. The assumption that everyone can speak or understand English and the way that it is pronounced and delivered in this country has to be left behind in favour of a more sophisticated approach that addresses both the languages being spoken and how they are spoken.

An important and frequently underestimated factor in communication is the understanding of cultural issues. It is entirely possible for two people speaking the same language to communicate ineffectively, whereas if an authority figure has some understanding of the cultural background of the person they are dealing with, it is possible to get the message across without fully understanding the language they speak.

Every country has its own nuances. For example, in some countries and cultures, saving face is very important, while in others it is common for people not to look directly at authority figures. Very often such body language is used as a means of creating credibility issues against applicants for refugee status, at first instance and again at their appeal hearings. Other inhibitors may be fear of endangering relatives or friends, fear of the consequence of rejection, fear of the hearing process, fear of reaction of others present at the hearing, trauma, cross cultural issues, psychological disturbance, memory difficulties and fear of the interpreter.

The credibility of a person's statements depends not only on their content but also on how they are expressed (Lind/O'Barr, 1979:67). There is ample evidence that the manner of speaking affects the credibility of persons involved in legal procedures. It has been noted, for example, that "defendants who are more polite and spoke in more grammatically complete sentences tended more often to be acquitted" and prosecutors who won their cases "were verbally assertive, speaking longer, asking more questions, referring to the witness and making more indicative statements than did less successful counterparts." (Danet, 1980:370 summarising Parkinson, 1979) In jury discussions, "voice quality and speech style are powerful tools, if not in winning friends, then certainly in influencing people (Scherer, 1979:118) and the trustworthiness of a witness depends, as has been experimentally shown, to a considerable extent on the individual's ability to render his or her statement in a "narrative" and coherent as opposed to a "fragmented" manner (Lind/O'Barr, 1979:71-79)

Although the ability to express oneself well depends, at least partly, on personality (Scherer, 1979; 118) and on educational background of the speaker, even well-educated refugees with strong personalities may be unable to present their claims forcefully for reason specific to asylum-seekers. Many of them are victims of what Oberg (1960) calls "culture shock" and Furnham/Bochner (1982:171) describe as the "bewildering, confusing, depressing, anxiety-provoking, humiliating, embarrassing and generally stressful" situation of persons who move from one culture to another". Especially in the case of refugees from Third World countries, the experience of culture shock obviously can gravely impair the applicant's ability to make a forceful statement. Such an asylum-seeker may speak in a confused, nervous, fragmented and unconvincing manner not because he or she is lying but because of the anxiety and insecurity caused by the difficulties of life in an entirely new social and cultural environment.

Interpreters not only make communication between persons who do not share a common language possible, but act "as mediator(s) between cultures" (Bickley, 1982:107) Because of the close links between language and culture, however, even excellent translators fulfil this task only when they attempt to communicate in their translations the cultural context of words and concepts. Interpreters used in the asylum procedure often not only lack this sophistication; sometimes they are not qualified or they make mistakes because of fatigue resulting from lengthy hearings. All this may distort the communication between asylum-seeker and refugee.

The desirability of having an interpreter who is familiar with an Applicant's own culture and language requires a fine balance. In Switzerland, for example, interpreters are often of the same nationality as the asylum seeker because Swiss interpreters are not available. In these cases asylum-seekers regularly suspect the interpreter of being a collaborator with the embassy of their country, capable of passing information to the persecuting government. As a consequence, asylum seekers may be intimidated, restrict their statements to a minimum of critical information or even withhold facts which would be crucial for obtaining asylum. The drafters of the Swiss Asylum Act took this problem into account and Article 16 of that Act provides that the asylum-seeker can use an interpreter of his or her own choice. This provision only partially solves the problem as it often shifts to the decision-maker the suspicion of bias in interpretation. Such interpreters are often friends of asylum seekers or persons who share his or her political commitments. The decision maker, therefore, might suspect them of not merely translating but instead interpreting and improving upon the statements of the Applicant. In an Irish context, an asylum seeker or for that matter his or her legal representative have no choice in relation to the provision of interpreters and only become aware of who the interpreter is or see the interpreter for the first time, when about to commence their interviews or appeal hearings and very rarely are applicants given an opportunity to converse with their interpreters, to see whether they understand each other, before commencement.

In 2001 the European Council of Ministers published a framework decision on the standing of victims in criminal proceedings. One of the Directives was that each Member State should, in respect of victims having the status of witnesses or parties to the proceedings "take the necessary measures to minimise as far as possible communication difficulties as regards their understanding or involvement in, the relevant steps of the criminal proceedings in question". It could reasonably be argued that the provisions of this Directive should similarly apply to the asylum procedures in Member States, more particularly with the introduction of the Council Directive 2004/83/EC of 29<sup>th</sup> April, 2004, on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, which became operative in this jurisdiction on 1<sup>st</sup> December, 2006.

Unfortunately, at present in this country there is no training system in place for people with a knowledge of languages and an interest in working as legal interpreters, which in some cases leads to an "appalling" service, which was highlighted by a District Court Judge in a case that was before her last year. The

Irish Translators and Interpreters' Association has been concerned by these circumstances for some time. While it is accepted that some interpreters work to a very high standard here, it would be desirable to see the introduction of an accreditation system in place for all legal interpreters. After all, knowledge of languages does not necessary guarantee good interpreting. Legal interpreting is a specialised area and must be precise and accurate to do justice to all concerned who rely upon the translator's interpreting skills. Accordingly, they need structured courses which will allow them to develop their skills and provide a proper and adequate service to the legal and quasi-judicial bodies and agencies that rely upon them.

The filtering process that arises when evidence is given through an interpreter provides fertile ground for misinterpretation and misunderstanding. Decision makers run the risk of assessing the credibility, not on what the claimant actually said, but on the interpreter's version of what was said. Accordingly, when an interpreter is involved, such decision makers should stay very conscious of the fact that innocent misunderstandings are a real possibility and not be quick to assume that discrepancies have occurred, more particularly when cross cultural difference are factors and considerations also. Otherwise, grave injustices can occur in respect of people in genuine need of international protection.



## The Immigration, Residence and Protection Bill 2008

### Introduction

The Immigration, Residence and Protection Bill 2008 provides for an overhaul of the existing legislative framework in relation to asylum and immigration. The Bill also aims to transpose a key European Union asylum Directive into Irish law - Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status (the Procedures Directive). It represents an historic opportunity for the Minister for Justice, Equality and Law Reform to ensure that legislation in this area fulfils the State's international human rights obligations, particularly under the 1951 Refugee Convention, and is a model of best practice.

The 2008 Bill is divided into nine sections – Part 1 of the Bill deals with preliminary issues including, interpretation and enforcement. Part 2 defines the categories of non-Irish national that can be considered lawfully and unlawfully present in the State and prohibits those whose presence is unlawful from accessing state services, unless there are exceptional circumstances. Part 3 of the Bill deals with issues relating to visas and provisions dealing with entry into the State are set out in Part 4. Residence including long term residence is provided for in Part 5 and this part also includes provisions in relation to Programme Refugees and family reunification rights for those granted protection. Part 6 sets out procedures for removal from the State.

Part 7 outlines new procedure for the assessment of refugee and subsidiary protection applications. Further matters relating to the grant of refugee and subsidiary protection status are also outlined in the Bill. In addition Part 7 provides for the detention of certain protection applications, the issuing of protection permits and allows the Minister and makes further provisions in certain circumstances to classify a country of origin or any other third country as 'safe'. Part 8 includes a number of provisions dealing with *inter alia* various issues including the provision of biometric data, obligations on hotel managers and others to keep registers of non-Irish nationals, restrictions on the right to marry and provisions for the treatment of trafficked persons. The Bill also seeks to further reduce access to Courts by placing strict limits on judicial review including making legal representatives liable for costs where claims are regarded as 'frivolous or vexatious' by the High Court. Part 9 of the Bill deals with transitional provisions.

This article focuses on Part 7 and other provisions of the Bill as they impact on those seeking the protection of the State. It attempts to provide a brief overview of a number of key provisions of the Bill from a human

rights perspective, in particular those provisions relating to the single determination procedure; access to the State; the principle of *non-refoulement*; detention; removal from the State; access to the Courts and the rights of those granted protection.

### Single protection determination procedure

One of the most significant provisions in the Bill is that providing for the establishment of a single determination procedure where one application is made and all grounds on which a person may seek to remain in the State (protection and humanitarian) will be assessed in a single procedure. The result of the investigation will be that the person is either (a) a refugee, (b) not a refugee but eligible for subsidiary protection (c) not eligible for any form of protection but will be given a residence permission or (d) not eligible for protection and will not be granted a residence permit so must leave the State. Persons who are found at first instance not to be eligible for protection (either refugee status or subsidiary protection) may appeal to the Protection Review Tribunal, which will replace the Refugee Appeals Tribunal.

At present all applicants for protection must apply for refugee status and have their application for this status dealt with first. If they are unsuccessful they may apply for subsidiary protection and/or leave to remain. There are lengthy delays at the appeal stage of the refugee determination process and also in making subsidiary protection and leave to remain decisions.

Refugee status will continue to apply in cases where a person has a well-founded fear of persecution for one or more of five grounds: race, nationality, membership of a particular social group, political opinion and religious belief. Subsidiary protection is defined narrowly (in line with the EU Qualification Directive) to apply only to those person fearing the death penalty, torture or inhuman or degrading treatment and serious and individual threat of serious harm arising from conflict situations.

(Humanitarian) leave to remain is not provided for in the Bill. However non-protection aspects of an application will also be examined and the person will not be permitted to remain in the State unless 'compelling reasons' exist.

It is envisaged that the introduction of the single procedure, will lead to a more stream-lined, expeditious and fair protection determination system. The correct implementation of the single procedure should be of benefit to both applicants and the State. Furthermore the creation of a determination system that ensures fair and sustainable decision-making should lead to a reduction in appeals. Speed and efficiency should not, however reduce or compromise the rights of all applicants to a full and fair consideration of their application.

In order for the determination process to be fair, effective and transparent, each application should be considered individually on its merits. Certain provisions set out in the Bill may serve to deprive of access to such a process. Section 62(1) for example, appears to increase the burden of proof for applicants from a safe country of origin, a person who has lodged a prior application for protection in another state or persons who have protection status in another country as these applicants are presumed not to be in need of protection. Such individuals should not be deprived of a full investigation of the merits of their application.

Sections 63(6) & (7) provide for an internal flight alternative where an applicant who ‘can reasonably be expected to stay in a part of his or her country of origin where there is no well-founded fear of being persecuted or real risk of suffering serious harm is not in need of protection’. The relevant sections fail to provide sufficient safeguards to ensure compliance with the principle of *non-refoulement* and does not acknowledge that while certain areas may be generally safe, they may not be safe for certain applicants, for example women alone or members of minority religious groups.

Under the Bill, individuals who have humanitarian or non-protection reasons to remain in the State must make an application for protection and other ‘compelling reasons’ will only be considered when the person is found not to be in need of the protection of the State. This may lead to persons who may have compelling reasons to remain in the State but who do not have any protection concerns making a claim for protection. This will lead to an unnecessary waste of resources as those who have compelling reasons to remain in the State which are not protection related will have to go through the protection determination process.

#### **Access to the State**

States have a right to control their borders, however, it can be argued that measures which directly or indirectly obstruct the entry of asylum seekers into their territory are incompatible with the spirit if not the letter of 1951 UN Refugee Convention. Refugee protection is rendered meaningless if those most in need of protection fail to reach the State or are denied entry. The Universal Declaration of Human Rights, which although not legally binding, lays down standards which States should strive to adhere to provides that ‘<sup>1</sup>Everyone has the right to seek and to enjoy in other countries asylum from persecution’. Under the Bill, considerable burdens are placed on carriers including ensuring that all non-Irish nationals have with them a travel document and if required a visa, to detain individuals on board until they can be examined by an immigration officer and to detain on board individuals

whose applications to enter the State have been refused. Carrier liability may be regarded as shifting responsibility for protection decisions from the State to carriers. As the Council of Europe Parliamentary Assembly has noted, ‘Some countries have imposed carrier sanctions which undermine the basic principle of refugee protection and the right of refugees to claim asylum which placing a considerable legal, administrative and financial burden upon carriers and moving the responsibility away from Immigration Officers’.<sup>2</sup>

There are insufficient safeguards in the Bill to ensure that those seeking protection will not be prevented from arriving in the State and to ensure that those individuals held on board a ship or plane will only be held for a specified period of time and their fair and dignified treatment will be guaranteed. Furthermore the State should allow for a protection-related defence to carrier liability whereby carriers would be exempted from fines in the case where a person with inadequate documents made an application for protection on arrival in Ireland.

#### **The Principle of *non-refoulement***

The principle of *non-refoulement*, which means that no person should be returned to a country where he or she could face persecution, is enshrined in the 1951 Refugee Convention. Article 33.1 of the Convention states that ‘No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion’.

The right to be free from torture and other cruel, inhuman or degrading treatment or punishment is enshrined in international and regional human rights law in particular, Article 7 of the International Covenant on Civil and Political Rights and Article 3 of the European Convention on Human Rights. These provisions have been held to mean that not only are States prohibited from engaging in such practices, they are also prevented from returning individuals to where they could face such treatment. The Convention against Torture expressly provides that no state shall expel, return (“refouler”) or extradite a person to another state where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

This implies that if a person comes to Ireland to seek protection, the State has a clear duty to assess that person’s claim and not to return the person if there is a risk of serious harm to him or her. Ireland must also not

<sup>2</sup> Recommendation 1163 (1991) of the Parliamentary Assembly of the Council of Europe on the arrival of asylum seekers at European Airports, 43<sup>rd</sup> Ordinary Session, 1991, paragraph 10.

<sup>1</sup> Universal Declaration on Human Rights, Article 14(1).

return a person to a country that may in turn return him or her to where he/she would be at risk of serious harm. The State has no obligations to persons who, after a fair and transparent determination process, are found not to be in need of protection and may remove them from Ireland.

*Refoulement* is clearly prohibited under Section 53(1) of the Bill. It states that 'A foreign national being removed from the State under this Act shall not be sent to a territory if doing so would be a refoulement'. In addition the definition of refoulement, set out in Section 52 has been strengthened. However, it could be argued that the a number of provisions in the Bill including those relating to safe-third-country and safe-country-of-origin concepts, as well as rules on carrier sanctions, limited access to interpreters, restrictions on access to the Courts and the lack of suspensive effect of certain appeal procedures may serve to undermine the principle of non-refoulement.

The increased provision in the Bill for protection applications to be 'deemed withdrawn' may also potentially lead to refoulement. The Bill sets out eight circumstances in which an application may be deemed withdrawn for various acts or omissions considered to amount to a failure to cooperate with the investigation of the application. Section 70 provides that an immigration officer shall issue a protection applicant with a Protection Application Entry Permit. If this is not practicable, the officer may require the person to remain at a specified place. The applicant will be informed of this in writing. If he/she fails to comply, his/her application will be deemed withdrawn.

It is in the interests of all parties to the protection process to ensure the co-operation of asylum seekers with this process. Many asylum seekers arrive in Ireland traumatised after experiencing torture, rape and other forms of degrading treatment. In many cases they arrive in Ireland unable to speak English. It should be clear therefore, that many people seeking protection who are considered not to have met certain obligations have not done so deliberately and removing their applications from the process without the possibility of appeal is an unduly harsh response.

The consequences of an application being withdrawn are potentially very grave for the applicant. The investigation of the application will be terminated and a determination that the person is not entitled to protection in the State will be issued. The person is then unlawfully in the State and has an obligation to remove him/herself.

### **Detention of protection applicants**

The Bill provides additional grounds for detention for those who are seeking the protection of the State. Under current legislation, asylum seekers may be arrested and detained at any time during the determination for one or

more of six grounds and people may also be detained for the purposes of removal from the State. In addition, the Bill provides that when a person seeks protection in the State, an immigration officer shall issue that person with a protection application entry permit if it is 'practicable' to do so. If it is not practicable for the immigration officer to issue the person with a permit then the immigration officer can arrest and detain the person to facilitate the issuing of the permit. The person shall only be detained until the permit can be issued to him/her.

The Bill fails to provide a time-limit for detention in such circumstances not does it provide a guarantee that individuals will be informed of the reasons for their detention in a language they understand. Detained persons should always understand the reasons for their detention and their rights while they are in detention and this information must be provided in a language they understand. The detention described above may take place very soon after the person arrives in the State, at a time when s/he is very vulnerable.

The detention of those seeking protection is permitted in certain limited circumstances. The European Convention on Human Rights permits the detention of a person who has sought the protection of the host state only to prevent his/her effecting an unauthorized entry into the country or where action is being taken with a view to the deportation or extradition of that person. The 1951 Refugee Convention states clearly that persons seeking protection should not be penalised for entering the host country without authorization. UNHCR and the European Council for Refugees and Exiles state that in general people seeking protection should not be detained. UNHCR has identified a number of limited circumstances in which a protection applicant may be detained.

The Bill provides for sweeping powers of detention which could see a protection applicant detained for most of if not the entire determination process. Such extensive powers of detention would appear to go beyond that provided for in international law and best practice. Persons seeking protection are very often vulnerable and traumatised and will have suffered human rights violations in their country of origin, including detention. The consequences of further detention in Ireland, where they have come for protection, could cause further emotional and psychological trauma and impact negatively on the mental and physical health of these individuals in the future.

### **Removal from the State**

The Bill provides that any person who is unlawfully in the State is obliged to remove him/herself. If he/she fails to do that he/she will be removed (Section 4.4). Such a person need not, in accordance with Section 4.5 of the

Bill, be given notice of a proposal to remove him/her from the State. Under current law, 'where the Minister proposes to make a deportation order, he or she shall notify the person concerned in writing of his or her proposal and of the reasons for it and, where necessary and possible, the person shall be given a copy of the notification in a language that he or she understands' (Section 3(3)(a), Immigration Act, 1999).

If the Bill is enacted in its current form, persons facing removal will not have the opportunity to challenge the decision that lead to their being unlawful in the State. For a person seeking protection in the State, a negative decision made in error, may lead to the return of that person to where s/he could face persecution in contravention of Ireland's human rights obligations.

If it 'appears' to a member of the Garda or an immigration officer under Section 54(1) of the Bill, that a person is unlawfully in the State, the person may be removed. The person may be removed not only to his/her country of origin but any state of which it appears to the Garda or immigration officer that the person may be a national or any state which in the opinion of the officer or member be permitted to enter. This is a matter of serious concern and removal should only take place when there is clear evidence that the person is unlawfully in the State and that removal would not place that individual at risk of persecution.

#### **Restrictions on access to the Courts**

The Bill provides for further restrictions on access to the Courts. Under existing legislation (Section 5 of the Illegal Immigrants (Trafficking) Act, 2000), persons wishing to challenge immigration and asylum related decisions, recommendations, refusals or orders by way of judicial review must apply for leave within 14 days. In other areas of law the time limit is generally three months. Leave in immigration and asylum cases shall not be granted unless the High Court is satisfied that there are substantial grounds for contending that the decision, determination, recommendation, refusal or order is invalid. In addition leave to appeal the determination of the High Court to the Supreme Court is only granted in exceptional circumstances. Similar provisions are included in the Bill. In addition, where an application for leave is considered as vexatious or frivolous, costs may be awarded against the legal representative of the victim. This may dissuade lawyers from representing persons seeking protection and other migrants.

Under the Bill, where it is proposed to remove an individual whose application for protection has been rejected, that individual may not challenge by way of judicial review or otherwise this removal solely on the basis of the existence of information that would or could have reasonably been available to the person but was not available to the Minister or to the Tribunal

before the rejection of the application. There are no exceptions in the case of vulnerable applicants including children and survivors of torture.

#### **Rights of people granted protection**

The Bill sets out a number of rights to which 'holders of a protection declaration' (recognised refugees and persons granted subsidiary protection) are entitled. These include the rights to family reunification. The provisions in the IRP Bill 2008 in this regard are identical as those in the 2007 Bill and are an amalgamation of the provisions of the Refugee Act 1996 and the European Communities (Eligibility for Protection) Regulations 2006.

Holders of a protection declaration are entitled to apply for family reunification for their spouse and children under 18. Minors may apply for their parents. Applications may also made for specified family members who are dependent on the holder of a protection declaration and decisions in such cases are made at the discretion of the Minister for Justice, Equality and Law Reform. The Bill makes no provisions for family reunification in respect of other categories of migrants.

While the inclusion of family reunification rights for recognised refugees and beneficiaries of subsidiary protection is welcome, there are a number of omissions, which may lead to applicants and their families not being able to enjoy family life as is their right under human rights law. The definition of 'family' is too narrow. Minor refugees are permitted under existing law and under the Bill to apply for their parents as immediate family members and to apply for their siblings as dependent family members. It is impossible for minor applicants, the majority of whom are attending school, to prove dependency and such applications may therefore be rejected. This can place parents in an unacceptable dilemma of whether to join their child in Ireland or remain in their country of origin with their other child/children. In addition, the family for the purposes of reunification is the family based on marriage and unmarried partners are not permitted to reunite irrespective of the duration of their relationship.

The Bill fails to provide for the right of appeal for those whose applications for family reunification have been unsuccessful. Article 8 of the European Convention on Human Rights (ECHR), states that everyone has the right to respect for his/her family life. Persons recognised as in need of international protection of necessity must be permitted to enjoy their family life in the host country. Persons whose rights under the ECHR including family life are violated should have the right of an 'effective remedy before a national authority' (Article 13 ECHR). Denial of the right of appeal to persons, whose applications for family reunification may be in violation of the right to an effective remedy.

## Conclusion

The Immigration, Residence and Protection Bill 2008 has been debated by the Select Committee on Justice, Equality, Defence and Women's Rights for several months. A large number of amendments have been proposed and some have been accepted. The Bill will shortly go to the Report Stage where further amendments will no doubt be made. It is to be hoped that the final Act will comply fully with Ireland's human rights obligations to those who seek the protection of the State.

*Catherine Kenny, Refugee Information Service*

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*The views expressed in the above article are not necessarily the views of the Refugee Information Service*

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## Recent Developments in Refugee and Immigration Law

***Case C – 127/08 Metock and Others v Minister for Justice, Equality and Law Reform; Unreported; Court of Justice of the European Communities 25 July, 2008***

PRELIMINARY RULING –INTERPRETATION OF DIRECTIVE 2004/38/EC – FREEDOM OF MOVEMENT OF EU CITIZENS AND THEIR FAMILY MEMBERS - FAMILY MEMBERS WHO ARE NATIONALS OF NON – EU COUNTRIES– NATIONALS OF NON EU COUNTRIES ENTERING A HOST MEMBER STATE PRIOR TO BECOMING THE SPOUSE OF AN EU CITIZEN – PRIOR LAWFUL RESIDENCE IN ANOTHER EU COUNTRY – LEGISLATIVE COMPETENCE OF MEMBER STATES AND THE EU.

### Facts

The applicants were four married couples each of whom comprised a national of a non – EU country and an EU citizen who, though not an Irish national, was residing and working in Ireland. While resident in Ireland the four nationals of the non – EU countries married the EU citizens. Subsequent to their marriage each non - community national applied for a residence card as the spouse an EU national working and residing in Ireland. Their applications were refused. The applicants challenged the respondent's decisions by way of Judicial Review in the High Court and sought *inter alia* orders of Certiorari quashing the respondent's refusal to grant the residence cards. They submitted that Regulation 3(2) of European Communities (Free Movement of Persons) (No 2) Regulations 2006 which had transposed Directive 2004/38/EC into Irish law was incompatible with the Directive. They further submitted that a third country national who becomes a family member of a Union citizen while the latter is resident in a member state of which he is not a national accompanies that citizen within the meaning of Articles 3(1) and 7(2) of the Directive. The High Court

considered that in order to give judgement an interpretation of Directive 2004/38/EC was required and referred the following questions for a preliminary ruling under Article 234 EC:

1. Whether the Directive permits a member state to have a general requirement that a non – EU national spouse of a Union citizen must have been lawfully resident in another member state prior to coming to the host member state in order to avail of the provisions of the Directive.
2. Whether a non – EU national being a spouse of an EU citizen who resides in the host member state with a right of residence for longer than 3 months pursuant to article 7(1) of the Directive and is then residing in the host member state as a spouse with that Union citizen irrespective of when or where the marriage took place or when or how the non - EU national entered the host member state, comes within the scope of article 3(1) of the Directive.
3. If not, whether a non-EU national spouse who has entered the host member state independently of the Union Citizen and subsequently married the Union citizen in the host member state and is residing in the host member state as a spouse of an EU citizen with a right of residence in excess of 3 months, comes within the scope of article 3(1).

### Findings

#### Question 1

Directive 2004/38/EC precludes legislation of a member state which requires a national of a non - EU country who is a spouse of a Union citizen residing in that member state but not possessing its nationality to have previously been lawfully resident in another member state prior to arriving in the host member state in order to benefit from the provisions of the Directive.

The Directive must be interpreted as applying to all non - EU country nationals who are family members of a Union citizen and accompany or join the Union citizen in a host member state irrespective of whether or not they had prior lawful residence in a member state. This interpretation is confirmed by several articles in the Directive. It is also supported by the Court's case law on freedom of movement for persons prior to the adoption of Directive 2004/38/EC. The Court's judgement in the Akrich case must now be reconsidered. The interpretation adopted is also consistent with the division of competences between member states and the EU. The Community's competence to enact measures to bring about freedom of movement for Union citizens derives from Articles 18(2) 40, 44 and 52 EC. The Community legislature has competence to regulate conditions of entry and residence of family members of a Union citizen in the territory of the member states where the impossibility of being joined or accompanied by his family in the host member state would be an interference with the EU citizen's freedom of movement by discouraging him from his exercising his right of free movement. Furthermore, to allow each member state exclusive competence to grant or refuse



entry into and residence in their territory to non - EU nationals who are family members would result in variation in conditions of entry and residence to each of the Member States. This situation would be incompatible with the objectives of Article 3(1) (c) EC. The establishment of an internal market implies that the conditions for entry and residence of a Union citizen into other member states should be uniform.

With regard to the argument that the interpretation adopted would result in a large increase in the numbers entitled to a right of residence in the EU, it was pointed out that only those who are family members within the meaning of Article 2(2) of the Directive of a Union citizen who has exercised his right of freedom of movement by becoming established in a member state other than that of which he is a national acquire the rights of entry and residence. Member states are not debarred from all possibility of controlling entry into their territory. They may refuse entry on grounds of public policy, public security or public health having examined each individual case. Furthermore, they may adopt measures to refuse, terminate or withdraw any rights conferred by the Directive where there is an abuse of rights or fraud.

### Question 2

The non - community spouse of an EU citizen residing in the host member state who accompanies or joins the citizen benefits from the provisions of the Directive irrespective of when and where the marriage took place and of how of the national of the non - member country entered the host member state.

There are no requirements as to the place where the marriage between the Union citizen and the national of a non EU country is solemnised contained in the Directive. By making provision in the Directive for the family members to join the Union citizen in the host country, the possibility of the Union citizen founding a family after moving to the host country was accepted. The fact that the non - EU family member entered the host member state before or after becoming a family member of the EU citizen makes no difference. The refusal of a grant of residence by a host member state in either instance would be likely to discourage the Union citizen continuing to reside there. Having regard to the context and objectives of the Directive and the necessity of not interpreting its provisions restrictively or rendering them ineffective, the non EU family members in the Directive must be interpreted as referring to those who entered the host member state with the Union citizen and those who reside with him there irrespective of whether they entered the host member country before or after becoming a family member or before or after the Union citizen. The host member state is entitled to impose penalties in compliance with the Directive for entry and residence by the third country national in breach of its national rules on immigration.

### Question 3

The Court ruled that in light of the response to Question 2, question 3 did not require an answer.

### Cases Cited

Case C-60/00 *Carpenter* [2002] ECR I-6279; Case C-459/99 *MRAX* [2002] ECR I-6591; Case C-157/03 *Commission v Spain* [2005] ECR I-2911; Case C 503/03 *Commission v Spain* [2006] ECR I-1097; Case C-441/02 *Commission v Germany* [2006] ECR I-3449; Case C-291/05 *Eind* [2007] ECR I-0000; Case C- 212/06 *Government of the French Community and Walloon Government* [2008] ECR I-0000  
Case C -109/01 *Akrich* [2003] ECR I- 9607

*Mary Fagan, RDC*



### ***B.N.N. v Minister for Justice, Equality and Law Reform & Anor, Unreported, Hedigan J., 9<sup>th</sup> October 2008***

JUDICIAL REVIEW – LEAVE – CERTIORARI – REFUGEE APPLICATIONS COMMISSIONER – REFUGEE STATUS DETERMINATION – EXHAUSTION OF REMEDIES – AVAILABILITY OF JUDICIAL REVIEW AS A REMEDY - FAIR PROCEDURES – CREDIBILITY - SECTION 11B REFUGEE ACT 1996 – DEMOCRATIC REPUBLIC OF CONGO

### Facts

The applicant, a national of the Democratic Republic of Congo, claimed asylum in the State, and was interviewed by the Refugee Applications Commissioner. The Commissioner recommended that the applicant not be declared a refugee, and the applicant lodged a notice of appeal, while also seeking Certiorari of the Commissioner's decision. The applicant claimed there were four flaws in the decision making process: (i) that the Commissioner failed to put relevant information to the applicant, (ii) that the credibility assessment was flawed, (iii) that the Commissioner, in stating that Section 11B(b) of the Refugee Act 1996 as amended had particular relevance, but in saying no more on the matter, had given insufficient attention to considerations pursuant to that statutory provision, and (iv) that the Commissioner had failed to call the applicant back for a subsequent interview to allow her to comment on materials said to contradict her claim. In particular, the applicant claimed that the Commissioner accessed country of origin information from Canada's Immigration and Refugee Board which it used to question the applicant's credibility, but which it had not put to the applicant in circumstances where the Commissioner had stated to the applicant that it would call her back for another interview, if necessary. The applicant gave evidence that the information questioning her credibility could be contradicted by information gleaned from a perfunctory Google search.

The applicant brought the application for review four weeks outside the statutory time limit, and gave as reasons for the delay (i) that she was not aware of the possibility of judicial review until she retained her current solicitors, (ii) that she had difficulty attending to her affairs due to post-traumatic stress disorder, for which she had documentary support, and (iii) that it was difficult to find legal representation at the relevant time, which was during the Summer vacation period.

### Findings

The Court did not find the applicant's grounds for extending time convincing, noting that the applicant was represented by the RLS when the impugned decision issued, but the Court did extend the time to seek judicial review because it considered that an important legal point arose in relation to the availability of judicial review.

The Court refused leave to seek judicial review, finding that no substantial grounds had been made out. The Court held that it would be completely impossible to reach an expeditious conclusion if a decision maker was required to debate every intended conclusion on credibility with an applicant. The Court held that the question of whether or not the Commissioner should have called back the applicant was intrinsically linked to the question of whether the Commissioner breached fair procedures by failing to put relevant material to the applicant, and that it was not incumbent on the Commissioner to put each and every piece of country of origin information to an applicant. Rather, its duty is to consider the country of origin information. With regard to the credibility assessment, the Court emphasised the Court's limited role in dealing with credibility findings, and stated that the decision makers in the asylum process, having had the opportunity to observe the demeanour of an applicant, are best placed to make assessments as to credibility. With regard to the claim in relation to Section 11B, the Court held that whilst it would have been desirable for the Commissioner to explain why he thought Section 11B was particularly relevant, this was not fatal to the decision and was capable of being dealt with on appeal.

### Obiter

The Court held that it is only in very rare and limited circumstances that judicial review is available in respect of a decision of the Refugee Applications Commissioner, and that a flaw in the procedure that entitles an applicant to judicial review must be so fundamental as to deprive the Commissioner of jurisdiction. The Court stated that an applicant must demonstrate a clear and compelling case that an injustice has been done that is incapable of being remedied on appeal to the Refugee Appeals Tribunal. The Court stated that an injustice complained of in relation to the combined effect of Sections 13(5) and (6)

of the Refugee Act, 1996 as amended, which would have the effect of leaving an applicant without an oral hearing on appeal, may be incapable of being remedied on appeal and may constitute one of the rare and limited circumstances where an applicant may be entitled to judicial review of a decision of the Refugee Applications Commissioner.

### Cases Cited

- Ajoke v Refugee Applications Commissioner*, Unreported, High Court, 30<sup>th</sup> May 2008  
*Akpata v Refugee Applications Commissioner*, Unreported, Birmingham J, High Court, 9<sup>th</sup> July 2008  
*Akpomudjere v Minister for Justice, Equality and Law Reform & Ors*, Unreported, Feeney J, High Court, 1<sup>st</sup> February 2007  
*Akujobi & Anor v Minister for Justice, Equality and Law Reform* [2007] IEHC 19  
*Anochie v Refugee Applications Commissioner* [2008] IEHC 261  
*Azabugu v Refugee Appeals Tribunal & Ors* [2007] IEHC 290  
*Banzuzi v Minister for Justice, Equality and Law Reform* [2007] IEHC 2  
*Bujari v Minister for Justice, Equality and Law Reform & Ors* [2003] IEHC 18  
*Chukwuemeka v Minister for Justice, Equality and Law Reform & Anor*, Unreported, Birmingham J, High Court, 7<sup>th</sup> October 2007  
*DH v Refugee Applications Commissioner & Ors* [2004] IEHC 95  
*Idiakheua v The Minister for Justice, Equality and Law Reform* [2005] IEHC 150  
*Imafu v Minister for Justice, Equality and Law Reform* [2005] IEHC 416  
*Kayode v Refugee Applications Commissioner* [2005] IEHC 172  
*McGoldrick v An Bord Pleanala* [1997] 1 IR 497  
*Moyosola v Refugee Applications Commissioner & Ors* [2005] IEHC 218  
*O'Connor v Private Residential Tenancies Board* [2008] IEHC 205  
*Olatunji v Refugee Appeals Tribunal & Anor* [2006] IEHC 113  
*Olayinka v Minister for Justice, Equality and Law Reform*, Unreported, Birmingham J, High Court, 27<sup>th</sup> May 2008  
*PS (A Minor) v Minister for Justice, Equality and Law Reform & Anor* [2008] IEHC 235  
*Stefan v Minister for Justice, Equality and Law Reform* [2001] 4 IR 203  
*The State (Abenglen Properties Ltd) v Dublin Corporation* [1984] IR 381  
*Z v Minister for Justice, Equality and Law Reform* [2008] IEHC 36

***B.N.N. v Minister for Justice, Equality and Law Reform & Anor, Unreported, Hedigan J., 28<sup>th</sup> October 2008***

JUDICIAL REVIEW – LEAVE TO APPEAL – CERTIORARI – REFUGEE APPLICATIONS COMMISSIONER – REFUGEE STATUS DETERMINATION – EXHAUSTION OF REMEDIES – AVAILABILITY OF JUDICIAL REVIEW AS A REMEDY - FAIR PROCEDURES

**Facts**

In its decision of 9<sup>th</sup> October 2008, the Court refused to give the applicant, a national of the Democratic Republic of Congo, leave to seek judicial review against the Refugee Applications Commissioner. The Applicant applied for leave to appeal to the Supreme Court on the following points of law: (a) whether the only circumstance where decisions of the Refugee Applications Commissioner may be judicially reviewed are where the injustice caused to the individual at the Commissioner’s hearing is not capable of being remedied on appeal to the RAT, (b) if the scope for judicial review is less than that, what kind of action or inaction by the Commissioner is so fundamental as to deprive it of jurisdiction?, and (c) whether the Commissioner is obliged to put to the individual that he or she is not being believed and indicate the basis for that view.

**Findings**

The Court refused leave to appeal. The Court stated that it was clear both from the experience of the Courts dealing with asylum and from an analysis of the judgments therein on the question of the relevance of alternative remedies, that a practice of reviewing decisions from the Refugee Applications Commissioner has emerged over the past number of years and that scarcely any of the applications in that regard have been successful. The Court stated that it is for this reason that it was indicated in the judgment of 9<sup>th</sup> October 2008 that it is only in very rare and limited circumstances that judicial review of such decisions is available. In the Court’s view, while the matter of alternative remedies in this context was clearly of importance, it was not a matter of exceptional public importance. The Court accepted that a point of law also arose with regard to the matter of fair procedures, but held that it saw no basis for the contention that the point was a matter of exceptional public importance. The Court stated that there was no lack of clarity as to the state of the law on the matter.

**Cases Cited**

*Arklow Holidays Ltd v An Bord Pleanála* [2008] IEHC 2  
*F.O.S. v The Minister for Justice, Equality and Law Reform* [2008] IEHC 238, McMahon J  
*Glancre Teoranta v Mayo County Council* [2006] IEHC 250, MacMenamin J

*Harding v Cork County Council & An Bord Pleanála* [2007] IEHC 450, Clarke J

*I.O. v The Minister for Justice, Equality and Law Reform* [2007] IEHC 301, Dunne J

*Idiekheua v The Minister for Justice, Equality and Law Reform* [2005] IEHC 150, Clarke J

*K.M. v The Refugee Appeals Tribunal* [2007] IEHC 300, Edwards J

*Moyosola v The Refugee Applications Commissioner & Ors* [2005] IEHC 218, Clarke J

*Olatunji v The Refugee Appeals Tribunal* [2006] IEHC 13, Finlay Geoghegan J

*P.R.E. v The Minister for Justice, Equality and Law Reform* [2007] IEHC 339, Butler J



***A.F. v Minister for Justice, Equality and Law Reform & Anor, Unreported, Herbert J., 8<sup>th</sup> May 2008***

JUDICIAL REVIEW – LEAVE – CERTIORARI – REFUGEE APPLICATIONS COMMISSIONER – REFUGEE STATUS DETERMINATION – EXHAUSTION OF REMEDIES – AVAILABILITY OF JUDICIAL REVIEW AS A REMEDY - FAIR PROCEDURES – CREDIBILITY – SECTION 11B REFUGEE ACT 1996 - IRAN

**Facts**

The applicant, a national of Iran with a history of depression, claimed asylum in the State, and was interviewed by the Refugee Applications Commissioner. The Commissioner recommended that the applicant not be declared a refugee, finding the applicant not credible, particularly with regard to his accounts of how he travelled to the State, and in connection with whether the applicant had provided a reasonable explanation “substantiating his claim” that Ireland was the first safe country in which he arrived. The Commissioner otherwise accepted (a) that the applicant was an Iranian Kurd, (b) that the applicant was generally acquainted with the Komala Party Manifesto and was aware of significant developments within that party, and (c) that it had been furnished with certain country of origin information. The applicant also contended that the Commissioner had failed to take into account the applicant’s mental condition, and had failed to apply paragraphs 207 to 212 of the UNHCR Handbook relating to procedures for mentally or emotionally disturbed applicants.

The applicant brought the application for review six months and eight days outside the statutory time limit, explaining that he had been psychologically distressed, a claim for which he provided documentary evidence.

## Findings

The Court was satisfied that in the circumstances there was good and sufficient reason for extending the period to enable the application to be made, and made an order to that effect. The Court was satisfied that the delay arose from matters that were beyond the applicant's control, and which were a product of psychological distress, stress and depression due to illness.

The Court granted leave to seek judicial review, finding that even if it was reasonably and rationally open to the Commissioner to find, on the evidence, that the applicant was not credible, there was still material before him, which he accepted, on which there were substantial grounds for contending that the Commissioner should have concluded that the applicant was a refugee, but for the fact that he failed to take them into account. The Court held that there were also substantial grounds for contending that the Commissioner did not accord with fair procedures and paragraphs 207 to 212 of the UNHCR Handbook. The Court stated that it would be a denial of the applicant's entitlement to a primary decision in accordance with fair procedures to refuse judicial review and, no matter how the hearing might be before the Refugee Appeals Tribunal, it could not cure an unfair hearing before the Refugee Applications Commissioner, and the applicant was entitled to both.

## Cases Cited

*Akpomudjere v The Minister for Justice, Equality and Law Reform & Ors* (Unreported, High Court, Feeney J, 1<sup>st</sup> February 2007)

*Chukwuemeka v The Minister for Justice, Equality and Law Reform & Anor* (Unreported, High Court, Birmingham J, 7<sup>th</sup> October 2007)

*G.K. v The Minister for Justice, Equality and Law Reform* [2002] 1 ILRM 81, Finnegan J

*Idiakheua v The Minister for Justice, Equality and Law Reform & Anor* (Unreported, High Court, Clarke J, 10<sup>th</sup> May 2005)

*Kouaype v The Minister for Justice, Equality and Law Reform* (Unreported, High Court, 9<sup>th</sup> November 2005)

*Kayode v The Refugee Applications Commissioner* (Unreported, High Court, O'Leary J, 25<sup>th</sup> April 2005)

*McGoldrick v An Bord Pleanála* [1997] 1 IR 497, Barron J

*Nguedjido v Refugee Applications Commissioner* (Unreported, High Court, 23<sup>rd</sup> July 2003), White J  
*Re The Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360, Supreme Court

*Stefan v The Minister for Justice, Equality and Law Reform & Ors* (Unreported, Supreme Court, 13<sup>th</sup> November 2001)

## *J.F. v The Refugee Appeals Tribunal & Anor, Unreported, Birmingham J., 29<sup>th</sup> July 2008*

JUDICIAL REVIEW – CERTIORARI – TRANSFER ORDER – EC REGULATION 343/2003 (THE DUBLIN REGULATION) – S.I. 423/2003 – *ULTRA VIRES* – SEVERANCE - RIGHT OF APPEAL – HIERARCHY OF CRITERIA – REFUGEE APPEALS TRIBUNAL – MINISTERIAL DISCRETION NOT TO TRANSFER

## Facts

The applicant, a national of the Democratic Republic of Congo, applied for asylum in the State claiming that she had not applied for asylum in another country. A Eurodac "hit", confirmed by a fingerprint examination, confirmed that she had applied previously in Belgium, using another name and date of birth. The Irish authorities applied to Belgium seeking to transfer the case to that jurisdiction under EC Regulation 343/2003 (the "Dublin Regulation". The Belgian authorities accepted the request, and the Refugee Applications Commissioner notified the applicant of the transfer, and a transfer order was made. The applicant appealed the Commissioner's decision to the Refugee Appeals Tribunal. The Tribunal affirmed the Commissioner's decision. The Tribunal only had regard to whether the Member State responsible for examination of the application had been properly established in accordance with the criteria set out in Chapter 3 of the Dublin Regulation. The applicant then sought to persuade the Minister not to implement the transfer order, and furnished the Minister with a significant volume of medical evidence tending to show that the applicant had Complex Regional Pain Syndrome, and that transfer her to another state would have a detrimental effect on her condition. The Minister approached his task on the basis that his role was confined to determining whether the Member State responsible had been correctly established in accordance with Chapter 3 of the Dublin Regulation. The Minister made it clear that transfer would take place in a sympathetic and humane way, but that transfer would go ahead.

Article 20(e) of the Dublin Regulation states, *inter alia*, that a decision concerning an applicant's being taken back "may be subject to an appeal or a review", and that "appeal or review concerning this decision shall not suspend the implementation of the transfer order except where the courts or competent bodies so decide in a case by case basis, if the national legislation allows for this...". Section 8(8) of S.I. 423 of 2003, which allows for an appeal to the Tribunal against a determination by the Commissioner to transfer an applicant under the Dublin Regulation, states "In considering an appeal an appeal under this article, the Tribunal shall have regard only to whether or not the Member State responsible for examination of the application has been properly established in accordance with the criteria set out in Chapter 3 of the Council Regulation."



The Applicant claimed (a) that, properly interpreted, S.I. 423 of 2003 does not preclude a Tribunal Member from having regard to all relevant facts to identify the country responsible and the country having obligation, and that if the statutory instrument cannot be so interpreted then it is *ultra vires* the Refugee Act 1996, and (b) that the Minister had discretion re whether to transfer the applicant, and ought to have considered not doing so.

### Findings

The Court quashed the Minister's decision, but rejected the challenge to the Tribunal's decision. Regarding the Tribunal's decision, the Court stated that it saw no scope for ambiguity in the wording of Section 8(8) of S.I. 423 of 2003, and was satisfied that the Tribunal Member was correct in his belief that his role was confined to considering whether the correct country had been identified as the responsible country in accordance with the hierarchy of criteria. Regarding the Minister's decision, the Court noted that the Minister acknowledged the need to deal with the matter in a sympathetic and humane way, but found that the Minister had not appreciated the range of options open to him, and that if the Minister had realised that he had a discretion, then it was quite possible that there would have been a different outcome.

### Obiter

The Court stated that if it severed Section 8(8) of S.I. 423 of 2003, this would involve rewriting the subordinate legislation with the effect that Ireland would have an appeal system whose parameters would have been set by the courts rather than by the Oireachtas or the Executive

While the Minister has discretion to suspend the implementation of a transfer order, and not to implement a transfer order, there is no corollary entitlement to seek non-implementation, or obligation on the Minister's part to consider every such request.

### Cases Cited

*B.O.B. v The Minister for Justice, Equality and Law Reform* [2007] IEHC 430, Birmingham J

*L.K. & F.N. v The Minister for Justice, Equality and Law Reform* [2008] IEHC 308

*Makumbi v The Minister for Justice, Equality and Law Reform* [2005] IEHC 203

*John Stanley BL*



## Judgments of the Superior Courts and the Immigration, Residence and Protection Bill 2008

The Superior Courts have clarified important aspects of Irish immigration and refugee law in a series of key decisions over the past few years. These key decisions deal with, *inter alia*, the right of asylum applicants to previous refugee status decisions; the powers of the Chairman of the Tribunal; the right of asylum applicant children to make their own asylum applications; rights and obligations in cases of removal and transfer, including the Minister's obligation to consider private and family rights when making or enforcing a deportation order; and the law relating to judicial review of immigration and asylum decisions. The Immigration, Residence and Protection Bill 2008 contains provisions dealing with each of these points. It is instructive to compare the Courts' judgments with these proposed provisions.

### Access to Previous Decisions

Until the decision in *PAA v The Refugee Appeals Tribunal* [2007] 4 IR 94, the Refugee Appeals Tribunal refused to furnish asylum applicants with any of its previous decisions on the basis, *inter alia*, that there was no such requirement for it to do so under Section 19(4A) of the Refugee Act 1996. That statutory provision states that the chairperson of the Tribunal may, at his or her discretion, decide not to publish a decision of the Tribunal which in his or her opinion is not of legal importance. The applicants in *PAA* claimed they had a constitutional right to access previous decisions. The Supreme Court held that the Tribunal was under a duty as a matter of constitutional fair procedures to allow appellants reasonable access to relevant previous decisions. As a consequence the Tribunal currently allows appellants' legal representatives limited access to a database of previous decisions.

The proposed legislative scheme does not provide access to a database of previous decisions. Instead, under Section 95(2)(b) & (c) the Tribunal Chairperson would grant access only where the s/he considers the request reasonable, and that there exists a legally relevant decision. Where there is more than one legally-relevant decision, and the chairperson is of the opinion that a representative sample of the decisions would serve the requirements of fairness, the making available of such a sample would comply be sufficient (Section 95(3)). The Chairperson could also refuse an application for legally relevant decisions where s/he is satisfied that the request is frivolous or vexatious. Also, an applicant's legal representative would be required to bring to the Tribunal's attention any decisions of which the representative is aware that may tend not to support the appeal (Section 95(7)). There is also an obligation on the legal representative to use the decision given only in support of the applicant's appeal (Section 95(8)(b)(i)). Any other use of a decision would constitute an offence.<sup>3</sup>

<sup>3</sup> Section 95(9). A legal representative guilty of an offence is liable, on summary conviction, to pay a fine not exceeding €5,000 or to imprisonment for a term not exceeding twelve months, or both or, on conviction on indictment, to a fine not exceeding €500,000 or to

### *Powers of the Tribunal Chairman*

In *GE & Ors v The Refugee Appeals Tribunal & Ors* [2006] 2 IR 11, the Supreme Court clarified the extent of the Refugee Appeal Tribunal Chairman's power in reassigning cases, and held that where circumstances warrant the reassigning of an appeal, the Chairman may reassign the appeal, so long as he acts fairly and respects the principles of natural and Constitutional justice. Under Section 93 of the proposed legislative scheme, the Chairperson of the Tribunal would have the power to assign and reassign the business of the Tribunal from one member to another, and also to request a Tribunal member to review his or her draft decision where it appears to the Chairperson that the decision might contain an error of law or fact. Moreover, under Section 93(9) of the Bill, the Chairperson would have the power to refer, on notice to an applicant, any final decision of the Tribunal to the High Court for that Court's direction. Section 93(18) proposes that the chairperson would be responsible for the conduct of the Tribunal's functions in relation to any proceedings relating to the transaction of the business of the Tribunal.

### *Minors' Right to Individual Asylum Assessment*

In *AN & Ors v The Minister for Justice & Anor*, Unreported, 18th October 2007, the Supreme Court held that Section 3(2)(f) of the Immigration Act 1999 could not apply to children where there is no asylum application on their behalf, and that where an application by a parent of a minor is unsuccessful, the child is entitled to apply for asylum based on his own circumstances, while where a child's parents are successful in an application for asylum, the child should benefit by virtue of the principle of family unity.

Section 73(13) of the Immigration, Residence and Protection Bill 2008 proposes that a protection application would be deemed to be made on behalf of all the dependents of a foreign national under eighteen years of age, whether they are present in the State at the time of the application or are born or arrive in the State subsequently.

### *Age Assessment*

In her judgment in *AM v The Refugee Applications Commissioner* [2006] 2 IR 476, Finlay-Geoghegan J held that the minimum procedural requirements for age assessment of minors in the asylum process: must include (a) that an applicant is told in simple terms the purpose of the interview, (b) that an applicant is told in simple terms why the interviewer considers his or her claim is false, and is given an opportunity to deal with the matter; (c) that an applicant is told of any reservations held by the interviewer re identity documents and is given an opportunity to deal with the

matter; (d) that an applicant is clearly and promptly informed of any adverse decision and its reasons; and (e) that the possibility and procedure of reassessment is communicated both orally and in writing.

Section 24(7) of the Immigration, Residence and Protection Bill 2008 states only that if and for so long as it appears to an immigration officer that a foreign national is eighteen years of age or over, the relevant provisions of the Bill shall apply to the foreign national as if he or she were eighteen years of age or over. Section 73(6) of the Bill provides that where it appears to an immigration officer that an applicant for protection is under the age of eighteen years, the officer shall notify the Health Service Executive of this, and relevant legal provisions relating to the care and welfare of persons under the age of eighteen years of age will apply in relation to the foreign national.

### *Deportation & Transfer*

Judgments of the Superior Courts have clarified important rights and obligations that arise in the deportation of illegal immigrants and failed asylum seekers, and the transfer of asylum applicants to other "Dublin Regulation" States:

- (a) In *Adebayo and Ors v Commissioner of An Garda Siochana* [2006] 2 IR 298, a case involving applicants for judicial review who challenged the Minister's decisions to deport them during the fourteen days subsequent to the issue of the deportation orders, notwithstanding that they had sought judicial review of their deportation orders, the Supreme Court held, *inter alia*, that deportation may not be implemented during the fourteen day period pursuant to Section 5 of the Illegal Immigrants (Trafficking) Act 2000.
- (b) In *EM v The Minister for Justice, Equality and Law Reform*, Unreported, 15th November 2005, Finlay-Geoghegan J held that the Minister for Justice, Equality and Law Reform has discretion not to implement a transfer order made under regulation 7(1) of the Refugee Act 1996 (Section 22) Order 2003. The Court held that the Minister is obliged, as a matter of fair procedures, to determine an applicant's request not to implement a transfer order, and is obliged to uphold an applicant's right to life as guaranteed by the Constitution. Accordingly, the Court held that the Minister has an implicit power not to implement a transfer order where the protection of the life of an applicant is at issue
- (c) In *PL&B v Minister for Justice, Equality and Law Reform* [2001] 9 ICLMD, the Supreme Court held, *inter alia*, that failed asylum seekers are entitled to reasons for deportation upon being refused refugee status.

(d) *In Dimbo v Minister for Justice, Equality and Law Reform* and *Oguekwe v Minister for Justice, Equality and Law Reform*, both unreported, 1st May 2008, the Supreme Court held that in making decisions whether to deport a parent of an Irish child, the Minister for Justice, Equality and Law Reform must consider the facts relevant to the personal rights of the citizen child protected by the Constitution, if necessary by due enquiry in a fair and proper manner, identify a substantial reason which requires the deportation of a foreign national parent of an Irish born child, and make a reasonable and proportionate decision.

Section 4 of the Immigration, Residence and Protection Bill 2008 allows for a foreign national, including failed asylum seekers, to be summarily deported without notice. Section 118(9) of the Immigration, Residence and Protection Bill 2008 proposes that an application by a foreign national for leave to apply for judicial review of a transfer or removal shall not of itself suspend or prevent his or her transfer or removal from the State. It is unclear how the Courts' principles in *EM*, *Adebayo*, *PL&B*, *Dimbo*, and *Oguekwe* will apply in light of these significant legislative departures.

#### *Extending Time for Judicial Review*

Section 5 of the Illegal Immigrants (Trafficking) Act 2000 stipulates that judicial review of certain decisions in the immigration and asylum processes must be made within fourteen days of the date of the notification of the impugned decision, and that such time is extendable by the High Court only where it is satisfied that there is good and sufficient reason to extend time. Several judgments of the Superior Courts deal with this issue:

In *B v Governor of the Training Unit Glengarriff Parade*, Unreported, 5<sup>th</sup> March 2002, the Supreme Court held that a refusal by the High Court of an extension of time can be appealed to the Supreme Court without leave of the High Court.

In *GK v Minister for Justice, Equality and Law Reform* [2002] 1 ILRM 401, the Supreme Court held that the time limits for the institution of judicial review proceedings can only be extended where the High Court considers that there is good and sufficient reason for extending the period, and where the substantive claim is arguable.

In *Saalim v Minister for Justice, Equality and Law Reform* [2002] 6 ICLMD106, the Supreme Court held that factors relevant to extending time for leave to apply for judicial review include (i) whether the applicant had an arguable case, (ii) the extent of the delay, (iii) whether there is a transition in the law, (iv) whether the legal advisors are largely culpable, and (v) whether the State is prejudiced by the delay.

*In C.S. (A Minor) v Minister for Justice, Equality and Law Reform* [2005] 1 IR 343, [2004] IESC 44, the Supreme Court held that when considering whether there is good and sufficient reason to extend time limits for judicial review the Court should consider the merits of the substantive case, and not simply the merits of the application to extend time.

Under Section 118(5), the Immigration, Residence and Protection Bill 2008 would require the leave of the High Court to appeal a refusal to extend time in which to bring judicial review. Section 118(3) of the Bill stipulates that the High Court may not extend the period in which an applicant can bring judicial review unless satisfied that:

(a) each of the following conditions is fulfilled:

(i) the applicant—

(I) did not become aware until after that period's expiration of the material facts on which the grounds for his or her application are based, or

(II) became aware of those facts before that period's expiration but only after such number of days of that period had elapsed as would have made it not reasonably practicable for the applicant to have made his or her application for leave before that period's expiration;

(ii) the applicant, with reasonable diligence, could not have become aware of those facts until after the expiration of that period, or, as the case may be, that number of days had elapsed;

(iii) his or her application for leave was made as soon as was reasonably practicable after the applicant became aware of those facts; or

(b) that there are other exceptional circumstances relating to the applicant and under which, through no fault of the applicant, his or her application could not have been made within that period.

These provisions would seem to set at nought much if not all of the principles in *B*, *GK*, *Saalim*, and *CS*.

#### *Conclusion*

In a series of key decisions in recent years, the Superior Courts have clarified important aspects of Irish immigration and refugee law. The Immigration Residence and Protection Bill 2008 sets out a single legislative framework for the management of immigration and protection in the State. Rather than codify the current law, the proposed legislation appears to propose provisions that will circumvent key jurisprudence.

*John Stanley BL*

## “If there is a hell on Earth, the Danakil Depression in the Horn of Africa is a strong contender”: Temperature, life, peril & geology in one of the world’s hottest places<sup>4</sup>



### Introduction

The Danakil Depression in northern Ethiopia is considered “...one of the most desolate places on earth - a superheated expanse of desert, black basalt mountains, a turquoise lake ringed with blinding-white salt and, on the skyline, the silhouette of an active volcano”.<sup>5</sup> It is a region

“...known as one of the hottest and most inhospitable places on earth: there’s little to see, nothing to do, and no great destination awaiting you at the other end. The journey is hot, tiring and demanding; very few travellers come here”.<sup>6</sup> This article focuses on those who visit the Danakil Depression, its inhabitants, and the future of the area.

### Danakil

“There’s nowhere else quite like it on Earth. More like hell, say the very few who’ve made it there... The heat is intolerable and there is no shade. It’s a place where rivers die, boiling water spurts out of rocks and smoke curls up from holes in the ground. The landscape is dotted with bright yellow sulphur fields, green crystal pools and sparkling salt beds. This is the Danakil Depression, a basin about the size of Wales or New Jersey in north-eastern Ethiopia, close to the Red Sea. Danakil is renowned for being the place with the highest average temperature on Earth. It tops 34 °C every day of the year and soars to 55 °C in the summer”.<sup>7</sup> The Danakil Depression “...descends to

<sup>4</sup> Title derives from an article by Paul Simmons, (11 November 2006), “Hell on Earth in the Horn of Africa”, *The Times* [http://www.lexisnexis.com/uk/nexis/results/docview/docview.do?docLinkInd=true&risb=21\\_T4574423258&format=GNBFI&sort=BOLEAN&startDocNo=176&resultsUrlKey=29\\_T4574423261&cisb=22\\_T4574423260&treeMax=true&treeWidth=0&csi=10939&docNo=191](http://www.lexisnexis.com/uk/nexis/results/docview/docview.do?docLinkInd=true&risb=21_T4574423258&format=GNBFI&sort=BOLEAN&startDocNo=176&resultsUrlKey=29_T4574423261&cisb=22_T4574423260&treeMax=true&treeWidth=0&csi=10939&docNo=191)

<sup>5</sup> *The Guardian*, (30 June 2006), “Pick of the day” <http://www.guardian.co.uk/media/2006/jun/30/tvandradio.radio>

<sup>6</sup> Lonely Planet, (2000), *Ethiopia, Eritrea & Djibouti*, Lonely Planet, Victoria Australia, p.407

<sup>7</sup> New Scientist, (10 September 2005), *Danakil* [http://www.lexisnexis.com/uk/nexis/results/docview/docview.do?docLinkInd=true&risb=21\\_T4574423258&format=GNBFI&sort=BOLEAN&startDocNo=226&resultsUrlKey=29\\_T4574423261&cisb=22\\_T4574423260&treeMax=true&treeWidth=0&csi=158275&docNo=234](http://www.lexisnexis.com/uk/nexis/results/docview/docview.do?docLinkInd=true&risb=21_T4574423258&format=GNBFI&sort=BOLEAN&startDocNo=226&resultsUrlKey=29_T4574423261&cisb=22_T4574423260&treeMax=true&treeWidth=0&csi=158275&docNo=234)

By way of comparison the highest ever temperature recorded in Ireland “...was + 33.3°C at Kilkenny Castle 26th June 1887”

more than 130 m below sea-level and experiences some of the highest temperatures recorded on earth, frequently exceeding 50°C”.<sup>8</sup> Residing in “...the lowest part of Africa. The Danakil sits on a fragile part of the Earth’s crust, a junction of three tectonic plates pulling apart from each other, which has created a landscape of volcanoes, old lava flows, desert and salt lakes”.<sup>9</sup> The Danakil is “...is a kind of inferno”.<sup>10</sup> “Why is Danakil so hot all the time? Largely because of its depth and thermal activity. Geothermal springs pump steam into the depression, and at 150 metres below sea level, the air is denser and so better able to retain heat, just as thin air at high altitude is poor at retaining heat”.<sup>11</sup> It has “...acquired a reputation as one of the hottest, most inhospitable places on earth...”.<sup>12</sup> In the Danakil “...people have perished within a matter of hours...”.<sup>13</sup> Most of the region is “...unsuitable for cultivation”.<sup>14</sup> Yet life persists. “Surprisingly, many animals and plants make Danakil their home. Thermophilic (heat loving) bacteria populate the hot springs. Hyenas and other canids, and even baboons are often seen. But long-term survival is inconceivable for humans, although the nomadic Afar people have perfected the art of staying alive as they pass through this hostile environment”.<sup>15</sup> And the Danakil Depression is also a receptacle of the past, where the remains “...of Australopithecus Afarensis, an early hominid dating as far back as four million years, have been found in an almost complete state in the Danakil Depression, which was not always the arid desert it is today. When the early hominids roamed the Afar region, it was a well-watered and wooded savanna country”.<sup>16</sup> In the present the Danakil is “...regarded with awe even by Ethiopians, who regard it as a dangerous place few

Met Eireann, (Undated), *Temperature in Ireland*

<http://www.met.ie/climate/temperature.asp>

<sup>8</sup> Europa World, (25 October 2007), *Physical and Social Geography, Eritrea, Africa South of the Sahara*, Regional Surveys of the World, Routledge, London

<http://www.europaworld.com/entry/er.ge?ssid=1105493528&hit=1>

<sup>9</sup> Paul Simmons, *op.cit*

<sup>10</sup> Matthew Paris, (3 March 2007), “Life is cheap in this parched and bare valley of the shadow of death Ethiopia kidnapping”, *The Times*

[http://www.lexisnexis.com/uk/nexis/results/docview/docview.do?docLinkInd=true&risb=21\\_T4574423258&format=GNBFI&sort=BOLEAN&startDocNo=151&resultsUrlKey=29\\_T4574423261&cisb=22\\_T4574423260&treeMax=true&treeWidth=0&csi=10939&docNo=166](http://www.lexisnexis.com/uk/nexis/results/docview/docview.do?docLinkInd=true&risb=21_T4574423258&format=GNBFI&sort=BOLEAN&startDocNo=151&resultsUrlKey=29_T4574423261&cisb=22_T4574423260&treeMax=true&treeWidth=0&csi=10939&docNo=166)

<sup>11</sup> New Scientist, *op.cit*

<sup>12</sup> Lonely Planet, *op.cit*

<sup>13</sup> *Ibid*

<sup>14</sup> Tadesse Berhe and Yonas Adaye, (Undated), *Afar, The impact of local conflict on regional stability*, Institute for Security Studies, Africa, [http://www.issafrica.org/dynamic/administration/file\\_manager/file\\_links/CPRDPAPERAFAR.PDF?link\\_id=22&slink\\_id=4452&link\\_type=12&slink\\_type=13&tmpl\\_id=3](http://www.issafrica.org/dynamic/administration/file_manager/file_links/CPRDPAPERAFAR.PDF?link_id=22&slink_id=4452&link_type=12&slink_type=13&tmpl_id=3)

<sup>15</sup> New Scientist, *op.cit*

<sup>16</sup> *The Reporter*, (6 October 2007), “Rearview Mirror - Older Than Egypt is Ethiopia”

[http://www.lexisnexis.com/uk/nexis/results/docview/docview.do?docLinkInd=true&risb=21\\_T4574423258&format=GNBFI&sort=BOLEAN&startDocNo=1&resultsUrlKey=29\\_T4574423261&cisb=22\\_T4574423260&treeMax=true&treeWidth=0&csi=8320&docNo=25](http://www.lexisnexis.com/uk/nexis/results/docview/docview.do?docLinkInd=true&risb=21_T4574423258&format=GNBFI&sort=BOLEAN&startDocNo=1&resultsUrlKey=29_T4574423261&cisb=22_T4574423260&treeMax=true&treeWidth=0&csi=8320&docNo=25)



would want to visit. The Afar, who live there, are seen as hostile and the Eritrean border, which runs through it, is one of Africa's most potent flashpoints. The only visitors are soldiers, salt-miners and a growing number of tourists, drawn to the extremes of the desert and its beauty. The road down from the prosperous Tigrean mountain capital Mekele is rough, and used by camel convoys which take the week-long return trip to fetch salt cut from the desert floor, a medieval scene."<sup>17</sup> One Tigrayan camel-driver notes that the Afar are the only inhabitants of this desolate area, and an article in *The Times* goes on to précis travellers' reaction to the Danakil. "“Nobody can live in the Danakil during the summer," a Tigrayan camel-driver had told us, "Only the Afar can stand the summer." When after sunrise we walked with the camels and men to their destination - the salt-encrusted edge of the lake, and turning-point of this journey -we saw what he meant".<sup>18</sup>

### Afar

Most of the Afar "...are nomadic herders. Some also trade in the salt that can be mined from the Danakil Depression...".<sup>19</sup> Water is collected intricately such as by "...condensing the steam from fissures by passing it through rocks, and survive by building shelters from sticks and digging up the salt from the desert to trade for fish, grains and vegetables".<sup>20</sup> They are solitary pastoralists who tend "...herds of goats, sheep, cattle in the harsh desert. They move from one waterhole to the next, eking a subsistence living from the barren soil. As the dry season advances, most Afar head for the banks of the river Awash, where they make camps. Because this is the only important river in the region, they compete for the best places and carefully guard the positions they take along the banks. The river Awash rises in the mountains and carries a great deal of water, but the heat is so great that it never meets the sea, ending instead in Kake Abbe".<sup>21</sup> The unforgiving environment of the Danakil has forced the Afar to adapt. "Ecological crisis and shrinking pastures in recent decades have forced the Afar to adopt cultivation, migrant labor, and trade to survive".<sup>22</sup> And the Afar are assiduously protective of their trade. "The Afar make sure that no one robs them of their salt by studiously overseeing the mines and caravans. Every

merchant must stop at the salt-tax collector's hut in the dusty enclave of Hamed Ela on the edge of the salt flats and pay a fee for each camel, mule, and donkey in his caravan. At the mines, every job—from levering the salt from the earth to running the outdoor tea kitchens—is assigned and managed by an Afar. Theirs is a strict monopoly, and it has made them proud and dictatorial. They do not hesitate for a minute to let you know that once you set foot in their salt kingdom, you are subject to their commands".<sup>23</sup> For centuries salt mined from the Danakil Depression has been "...taken up into Ethiopia's highlands by camel caravan. The Afars' hostility to outsiders is sharpened by their determination to defend their salt monopoly".<sup>24</sup> Information is scant as to the genetics of the Afar. "Little is known about the origins of the Afar people, but linguists classify their language as Cushitic, deriving from an ancient tongue of the Ethiopian Highlands. Their wandering way of life has left no obvious archaeological record, yet scholars know from 2,000-year-old stone inscriptions in the highlands that nomads travelled with (and taxed and harassed) camel caravans in the Danakil Desert even then.

Today the Afar regard themselves as one ethnic group, but geopolitically their population of about three million is divided among three countries: Ethiopia, Eritrea, and Djibouti. It is a territorial reality that has split clans and families...Regardless of which country they live in, the Afar share a general lifestyle, travelling across the desert with their livestock. "We are the people who move," one woman said. "From the beginning that has been our way" "...<sup>25</sup> For those Afar who reside in the Danakil, there remains wonder. "How the Afar people manage to live in this place, and why they choose to, puzzles the rest of Ethiopia as much as it does visitors. Any highwaymen will not be local Afar villagers, who depend upon the traffic of camels and men and look after them. They will almost certainly be wandering bands of bandits-cum-guerrillas and will seize adventitiously rather than in any premeditated way, for tourists are very few. On the Ethiopian side of the depression there is a strong military presence. Anyone trying to cross the desert and pan would be easy to spot and apprehend, for the only way over is exposed for a day in the white glare and baking sun. Only the Afar know this weirdly beautiful, desolate

<sup>17</sup> Xan Rice, Laura Smith & Ian Cobain, (3 March 2007), "Troops scour Ethiopian border after holidaying British diplomats are abducted at gunpoint", *The Guardian*

<sup>18</sup> Matthew Parris, (27 June 2006), "Descent into hell", *The Times*  
<http://www.lexisnexis.com/uk/nexis/auth/checkbrowser.do?t=1221576457628&bhcp=1>

<sup>19</sup> BBC, (5 March 2007), *Q&A: Ethiopia's Afar community*  
<http://news.bbc.co.uk/2/hi/africa/6419791.stm>

<sup>20</sup> New Scientist, op.cit

<sup>21</sup> The Diagram Group, (2000), *Encyclopaedia of African Peoples*, The Diagram Group, 2000, London, pp.21-22

<sup>22</sup> Carl Skutsch editor, (2005), *Encyclopaedia of the World's Minorities*, Volume 1, A – F, Routledge, London, p.11

<sup>23</sup> Virginia Morell, (October 2005), *Crueliest place on earth, Africa's Danakil desert*, *National Geographic*  
<http://ngm.nationalgeographic.com/ngm/0510/feature2/index.html?fs=travel.nationalgeographic.com>

<sup>24</sup> *The Economist*, (10 March 2007), "Depressed among the Danakil; Ethiopia"  
[http://www.lexisnexis.com/uk/nexis/results/docview/docview.do?docLinkInd=true&risb=21\\_T4574423258&format=GNBFI&sort=BOOLEAN&startDocNo=76&resultsUrlKey=29\\_T4574423261&cisb=22\\_T4574423260&treeMax=true&treeWidth=0&csi=7955&docNo=89](http://www.lexisnexis.com/uk/nexis/results/docview/docview.do?docLinkInd=true&risb=21_T4574423258&format=GNBFI&sort=BOOLEAN&startDocNo=76&resultsUrlKey=29_T4574423261&cisb=22_T4574423260&treeMax=true&treeWidth=0&csi=7955&docNo=89)

<sup>25</sup> Virginia Morell, op.cit

place, or move in it with ease”.<sup>26</sup> And it is an environment whose fierceness has been replicated by the Afar where “...the very harsh environment and difficult conditions in which the nomads live – in which survivors must compete fiercely for very limited resources – have given rise to a culture in which physical courage and individual initiative are exalted, pain is despised, suffering ignored, and death accepted with serenity”.<sup>27</sup> Weaponry for the Afar is both utilitarian and symbolic. “Possession of arms in Afar society is viewed as important in terms of security (self-defence) and as powerful heritage symbols”.<sup>28</sup> The history of the Afar has long been “...been a violent one marked by fighting with invading armies and, later, imperial and national governments”.<sup>29</sup> The Italian occupation of Ethiopia for example remained incomplete. “Many areas still remained out of the reach of the Italian government. In the Afar areas, it was the practice of the Danakil to kill any stranger on sight. They did so because “the natives understand perfectly that it is better no one should know their country – that this is the only safeguard to their independence” “.<sup>30</sup> The self-sufficiency of the Afar was also local and has invited an enduring reputation. “There is a long history of hostility between the Afar and the surrounding groups, and, as a result, the Afar are often considered fierce and warlike”.<sup>31</sup> The independence of the Afar has not left them immune from the vagaries of nature. “In the early 1970s these nomads suffered greatly from famine. In this arid semi-wilderness they had to use pasture over a wide area in order to support their herds”.<sup>32</sup> The Danakil is a harsh and unrelenting region and a peripheral area that has “...not attracted economic investment, and the Afar suffer from recurrent droughts, animal diseases, locust plagues, and a lack of investment in infrastructure, education, and economic development. Since the 1970s, traditional Afar pasture areas have been appropriated by the state for irrigation agriculture practiced by outsiders...”.<sup>33</sup> Elaborating on this issue helps to explain the belligerence of the Afar. “Development policies in the Afar region have historically reflected the governments’ political and

strategic priorities, as well as foreign commercial interests. As a result, the Afar often lost access to their resource bases. For instance, in the early 1960s, large commercial cotton irrigation farms were established by displacing large pastoral groups from their communal land. Furthermore, the imperial government established the Awash Valley Authority (AVA), which was entrusted with full authority to administer and supervise the agricultural development activities of the fertile Awash River basin. The AVA denied the communal land rights of the pastoral Afar in the area. Under the AVA development scheme, a large part of the Afar’s dry-season grazing land was lost to commercial irrigation programmes run by foreign concessions, members of the royal family, and Ethiopian entrepreneurs (Ali, 1998; Markakis, 2002:447). This loss of resources meant that the Afar began to resent the involvement of ‘outsiders’, which eventually evolved into full ethnic conflict (Ibid)”.<sup>34</sup> The Ethiopian government has traditionally been slow responding with assistance to the Afar.<sup>35</sup> Indeed the Afar has been marginalised in not only in Ethiopia but in all three countries in which they reside, considered a “...distinct minority due to their peripheral geographical, political, and cultural status”.<sup>36</sup> The Afar, though dispersed, do “...maintain close physical contact, strong sentiments of kinship, and an inclusive Afar identity”.<sup>37</sup> And rebel groups have emerged “...calling for a separate state on territory straddling Ethiopia, Djibouti and Eritrea”.<sup>38</sup> Despite this however the Afar remain separated. “They are very territorial, even between clans, and inward-looking, not outward. Although they’re well known as determined fighters... who don’t think twice about killing their enemies, they don’t have a history of strong leaders, men capable of holding their clans together in some common cause, largely because of fierce rivalries among their clans”.<sup>39</sup>

The ongoing humanitarian crisis facing the Afar is highlighted by UN OCHA. “The UN’s Office for the Coordination of Humanitarian Affairs warned that repeated droughts were decimating the livelihood of Afar pastoralists. With poor infrastructure, few schools and little access to health care, the Afar remain one of the most marginalized peoples of Ethiopia”.<sup>40</sup> Nevertheless the Danakil remains tempting for tourists and this in turn can be alluring for the Afar as “...more

<sup>26</sup>Matthew Parris, (3 March 2007), “Life is cheap in this parched and bare valley of the shadow of death Ethiopia kidnapping”, *The Times* [http://www.lexisnexis.com/uk/nexis/results/docview/docview.do?docLinkInd=true&risb=21\\_T4574423258&format=GNBFI&sort=BOOLEAN&startDocNo=151&resultsUrlKey=29\\_T4574423261&cisb=22\\_T4574423260&treeMax=true&treeWidth=0&csi=10939&docNo=166](http://www.lexisnexis.com/uk/nexis/results/docview/docview.do?docLinkInd=true&risb=21_T4574423258&format=GNBFI&sort=BOOLEAN&startDocNo=151&resultsUrlKey=29_T4574423261&cisb=22_T4574423260&treeMax=true&treeWidth=0&csi=10939&docNo=166)

<sup>27</sup> Lonely Planet, *op.cit*

<sup>28</sup> Tadesse Berhe and Yonas Adaye, *op.cit*

<sup>29</sup> The Diagram Group, *op.cit*

<sup>30</sup> Roy Pateman, (1998), *Eritrea, Even the stones are burning*, The Red Sea Press, New Jersey, p.55

<sup>31</sup> John Middleton and Amal Rassam, Volume Editors, (1994), *Encyclopaedia of World Cultures, Volume IX, Africa and the Middle East*, G.K. Hall & Company, New York, p.7

<sup>32</sup> Minority Rights Group International, (Undated), *Afar, Eritrea, Africa, World Directory of Minorities and Indigenous Peoples* <http://www.minorityrights.org/?lid=3945>

<sup>33</sup> Carl Skutsch editor, *op.cit*

<sup>34</sup> Tadesse Berhe and Yonas Adaye, *op.cit*

<sup>35</sup> Minority Rights Group International, (Undated), *Afar, Ethiopia, Africa, World Directory of Minorities and Indigenous Peoples* <http://www.minorityrights.org/?lid=3929>

<sup>36</sup> Carl Skutsch editor, *op.cit*

<sup>37</sup> Tadesse Berhe and Yonas Adaye, *op.cit*

<sup>38</sup> International Relations and Security Network, (16 March 2007), *Ethiopia: Abductions, dangerous games* <http://www.isn.ethz.ch/isn/Current-Affairs/Security-Watch/Detail/?id=53036&lng=en>

<sup>39</sup> Virginia Morell, *op.cit*

<sup>40</sup> Minority Rights Group International, *op.cit*

tourists are likely to venture into the Danakil depression, lured by the desert, volcanoes and geysers, by the Afar themselves, and by the lustre of danger. The worry is that kidnapping may become a new business, further destabilising a borderland already on a war footing".<sup>41</sup> Those who do wish to brave the Danakil must "...must seek special permission from the Ethiopian government if they wish to visit the region; they must also travel with armed police guards. As strangers to the region, these guards may be as much a hindrance as a help, and their weapons offer little protection in a region where guns are common and there is little central authority".<sup>42</sup>

### Tourists

The area is "...known for frequent non-political banditry...".<sup>43</sup> These armed groups engage in kidnapping and looting.<sup>44</sup> Travelling into the Afar region and into the Danakil Depression is testing.<sup>45</sup> But the Danakil Depression remains a lure. "The terrain and the temperatures in the "Land of Death" are lethal and few people travel there without serious intent. Perhaps that is why it is on a must-do list for adventurous travellers".<sup>46</sup> One traveller describes a journey. "These lawless and trackless valleys of the shadow of death are an endlessly confusing, crumpled terrain and you must stick to the one atrocious track, where travellers would be a sitting duck for ambush. In only one place there did we find water, and, near it, a Tigrayan camel-driver with no camels. He and his train had been ambushed the previous year, kidnapped, and marched across the depression to the low mountains of Eritrea. Without their camels and almost dead from heat and thirst, they eventually wandered back, lucky to be alive. Now is the season when tens of thousands of camels and their Tigrayan drivers will be making their way down for, and back up with, blocks of salt, often travelling at night, and fearful themselves of attack. The camels drink only twice on their journey, walking often at night. There is no fodder down in the Danakil. None at all. They set out with mountains of straw piled high on their backs, which they deposit at the small villages they pass on the way down. Villagers keep them safe on their roofs for the camels' return journey. Their drivers bring only dry bread, sugar and tea. The journey is, by

<sup>41</sup> *The Economist*, *op.cit*

<sup>42</sup> Xan Rice, Laura Smith & Ian Cobain, *op.cit*

<sup>43</sup> BBC, (5 March 2007), *op.cit*

<sup>44</sup> Tadesse Berhe and Yonas Adaye, *op.cit*

<sup>45</sup> *The Guardian*, (5 March 2007), "Vehicles found at 'distressing' Ethiopia kidnap site"

<http://www.guardian.co.uk/world/2007/mar/05/ethiopia>

<sup>46</sup> "Torcuil Crichton, (4 March 2007), "Bandits, rebels and two hostile regimes: they call it Land of Death; Between Ethiopia and Eritrea is a hard place to be, and not only the temperatures are lethal", *Sunday Herald*

[http://www.lexisnexis.com/uk/nexis/results/docview/docview.do?docLinkInd=true&risb=21\\_T4574423258&format=GNBFI&sort=BOOLEAN&startDocNo=126&resultsUrlKey=29\\_T4574423261&cisb=22\\_T4574423260&treeMax=true&treeWidth=0&csi=172807&docNo=148](http://www.lexisnexis.com/uk/nexis/results/docview/docview.do?docLinkInd=true&risb=21_T4574423258&format=GNBFI&sort=BOOLEAN&startDocNo=126&resultsUrlKey=29_T4574423261&cisb=22_T4574423260&treeMax=true&treeWidth=0&csi=172807&docNo=148)

common consent in Ethiopia, one of the toughest trials a man can face".<sup>47</sup> It is a region not only of interest to tourists but also to geologists. "The region is of huge geological and archaeological significance since three-million-year-old fossils of human ancestors were found in the area, is one of the most hostile environments on the planet".<sup>48</sup> And indeed the danger to tourists from banditry and climate respectively, is mirrored by that to the region itself, from, in this case, its composition.

### Geology

UN OCHA reports in August 2007 of a volcanic eruption in the Danakil Depression which "...led to the displacement of more than 2,000 people".<sup>49</sup> The region "...stands at the junction of three tectonic plates, which form the outer shell of the Earth and meet at unstable fault lines. The Nubian and Somali plates run along the Great Rift Valley, which spreads south from Afar. Branching out like a funnel to the north is the Arabian plate. Tectonic plates across the globe are constantly shifting - though slowly, usually by a few centimetres a year - with the magma beneath the crust. The plates can collide, forcing the crust upwards and creating mountain ranges - as happened with the Himalayas. They can also slide past one another, as occurs along the San Andreas Fault, in California, a notorious earthquake zone. The plates can also pull apart causing continents to break up and oceans to form. Early in this process, at the plate margins, the Earth's crust stretches and thins in the manner of toffee. Magma rises up, eventually cracking the crust and helping the plates drift apart. Between the fault lines the crust, now heavy with cooled magma, sinks to form a valley and then allows water from a nearby sea to rush in. This is how the Atlantic was formed, separating Africa and Eurasia from the Americas. And this is what scientists believe is happening in Afar as the Arabian and Nubian plates pull apart. Parts of the region have already sunk to more than 100 metres below sea level, and only the highlands around the Danakil depression stop the Red Sea from rushing in".<sup>50</sup> The Afar have not known what to make

<sup>47</sup> Matthew Parris, *op.cit*

<sup>48</sup> Cahal Milmo, (3 March 2007), "Five Britons kidnapped in Ethiopia's 'land of death' ", *The Independent*

[http://www.lexisnexis.com/uk/nexis/results/docview/docview.do?docLinkInd=true&risb=21\\_T4574423258&format=GNBFI&sort=BOOLEAN&startDocNo=151&resultsUrlKey=29\\_T4574423261&cisb=22\\_T4574423260&treeMax=true&treeWidth=0&csi=8200&docNo=161](http://www.lexisnexis.com/uk/nexis/results/docview/docview.do?docLinkInd=true&risb=21_T4574423258&format=GNBFI&sort=BOOLEAN&startDocNo=151&resultsUrlKey=29_T4574423261&cisb=22_T4574423260&treeMax=true&treeWidth=0&csi=8200&docNo=161)

<sup>49</sup> UN OCHA, (August 2007), *OCHA Regional Office for Central and East Africa, Regional Humanitarian Update, Volume 1, Issue 6, Reporting period: 1-31 August 2007*

<http://ochaonline.un.org/Searchresults/tabid/1447/language/en-US/Default.aspx?Search=danakil>

<sup>50</sup> Xan Rice, (2 November 2006), "Seismic shift: In the land of death, scientists gather to witness the birth of a new landscape: In Ethiopia's arid Afar region eruptions and earthquakes have created an open-air laboratory *The Guardian*

[http://www.lexisnexis.com/uk/nexis/results/docview/docview.do?docLinkInd=true&risb=21\\_T4574423258&format=GNBFI&sort=BOOLEAN&startDocNo=176&resultsUrlKey=29\\_T4574423261&cisb=22\\_T4574423260&treeMax=true&treeWidth=0&csi=138620&docNo=193](http://www.lexisnexis.com/uk/nexis/results/docview/docview.do?docLinkInd=true&risb=21_T4574423258&format=GNBFI&sort=BOOLEAN&startDocNo=176&resultsUrlKey=29_T4574423261&cisb=22_T4574423260&treeMax=true&treeWidth=0&csi=138620&docNo=193)

of recent geological changes. "The nomads were terrified. For a week the ground had shuddered violently. Cracks opened up in the soil swallowing goats and camels. Sulphur-laced smoke rose out of the dark slits. After retreating to the hills, the nomads saw chunks of obsidian rock burst through the Earth's crust "like huge black birds" and fly 30 metres into the air. A mushroom cloud of ash dimmed the sun for three days. At night the new crater breathed flashes of fire. "They had experienced earthquakes before but never anything like this," said Atalay Ayele, a seismologist at Addis Ababa University, who interviewed the Afar tribes people soon after the volcanic eruption 13 months ago in this remote corner of north-eastern Ethiopia. "They said that Allah must have been angry with them".<sup>51</sup> But Dr Ayele, 37, and his colleagues wanted a scientific explanation. They knew the area was geologically unstable, but the number of earthquakes - 162 measuring more than four on the Richter scale in just two weeks - made them suspect that something extraordinary had happened deep underground. They asked a team of British-based scientists with access to satellite technology for help. When the results came back it seemed as unlikely as birds flying out of the ground. Here in the Afar desert, one of the hottest and driest places on earth, the tribe had witnessed the birth of a new ocean. Images from the European Space Agency's Envisat satellite showed that a huge rift, 37 miles long and up to eight metres (26ft) wide, had opened deep in the Earth's crust. The tear, the largest observed since the advent of satellite monitoring, was created by a violent lateral rush of molten rock, or magma, along the fault line separating the Nubian and Arabian tectonic plates. Tim Wright, a geologist at the University of Leeds who interpreted the satellite results, was astonished by the images and what they pointed to. "The process happening here is identical to that which created the Atlantic Ocean," said Dr Wright during a recent research expedition in Afar. "If this continues we believe parts of Eritrea, Ethiopia and Djibouti will sink low enough to allow water to flow in from the Red Sea." The findings caused a stir in the scientific community".<sup>52</sup> Study of what is happening in the Danakil provides "...an insight into the role of magma

injection in cracking the Earth's crust and the pace at which continental break-up occurs. The last big "ocean spreading" occurred in Krafla, Iceland, in the mid 1970s, along the boundary of the North American and Eurasian plates that forms the Atlantic's mid-ocean ridge. But it took nine years to achieve what has occurred in Afar in a few weeks. "We are looking at a huge open-air laboratory here," said Gezahegn Yirgu, a geologist from Addis Ababa University, as he peered out of a military helicopter swooping low over the Afar region. In recent months there has been more instability in Afar. After a series of earthquakes in June the rift widened by a further two metres. Hundreds of Afar nomads are still seeking refuge in a town 25 miles from the main fault zone, too afraid to go home. They may be wise; the scientists say there could be more violent earthquakes and eruptions. The new sea is predicted to be formed within about a million years. The separation of the Nubian and Somali plates along the Great Rift Valley could take 10 times as long. But that will be even more dramatic - for then Africa will eventually lose its horn. "Some people think that extreme natural phenomena happened only in historical times," said Cindy Ebinger, an American geologist leading the research in Afar. "But here we can see them happening right now".<sup>53</sup>

### Conclusion

And so the Danakil barren and dangerous, is also contradictorily vibrant and domed. It is "...a creative, hyperactive geologic wonder, its volcanoes, fissures, faults, hot springs, and steaming geysers all part of the birthing process of a new ocean. The Earth's crust is separating here, tearing apart along three deep rifts geologists call the Afar Triple Junction. One day in the very distant future (some scientists have calculated about a hundred million years), when the rifting is complete, the salty waters of the Red Sea will spill across Cafar-barro, erasing forever the camel trails of the Afar".<sup>54</sup>



<sup>51</sup> Xan Rice, (2 November 2006), *ibid*

The Afar are Muslim as recorded in a paper by Tadesse Berhe and Yonas Adaye, (Undated), *Afar, The impact of local conflict on regional stability*, Institute for Security Studies, Africa,

[http://www.issafrica.org/dynamic/administration/file\\_manager/file\\_links/CPRDPAPERAFAR.PDF?link\\_id=22&slink\\_id=4452&link\\_type=12&slink\\_type=13&tmpl\\_id=3](http://www.issafrica.org/dynamic/administration/file_manager/file_links/CPRDPAPERAFAR.PDF?link_id=22&slink_id=4452&link_type=12&slink_type=13&tmpl_id=3)

<sup>52</sup>Xan Rice, (2 November 2006), "Seismic shift: In the land of death, scientists gather to witness the birth of a new landscape: In Ethiopia's arid Afar region eruptions and earthquakes have created an open-air laboratory", *The Guardian*

[http://www.lexisnexis.com/uk/nexis/results/docview/docview.do?docLinkInd=true&risb=21\\_T4574423258&format=GNBFI&sort=BOOLEAN&startDocNo=176&resultsUrlKey=29\\_T4574423261&cisb=22\\_T4574423260&treeMax=true&treeWidth=0&csi=138620&docNo=193](http://www.lexisnexis.com/uk/nexis/results/docview/docview.do?docLinkInd=true&risb=21_T4574423258&format=GNBFI&sort=BOOLEAN&startDocNo=176&resultsUrlKey=29_T4574423261&cisb=22_T4574423260&treeMax=true&treeWidth=0&csi=138620&docNo=193)

<sup>53</sup> Xan Rice, *ibid*

<sup>54</sup> Virginia Morell, *op.cit*

## Coverage of issues related to children in UK Home Office COI reports



by Paul Daly, RDC

Given that UK Home Office Country of Origin reports are used as core sources in the refugee status determination of other jurisdictions, it is always noteworthy when these reports are reviewed. APCI is the UK statutory body whose remit is to review COI reports produced by the UK Home Office. In April of this year APCI published its commissioned report, 'An analysis of the coverage of issues related to children in COI reports produced by the Home Office'<sup>55</sup>. The Summary of Key Findings in this report states:

“Children’s perspectives and positions within the COI reports are strongly presented in some reports and weakly in others.”

The APCI report goes on to state that when the UK COI reports are strong they contain clear contemporary facts, relevant material grounded in analysis and “an explicit reference to the UN Convention on the Rights of the Child and the optional protocols”. Pointing out where the COI reports are strong obviously calls for no action by those who use them but is a positive signal for the authors to continue in the direction they are going. However, becoming aware of the weak points of the COI reports calls for some action on the part of researchers, legal representatives and decision makers. In this article it is the weak points of the UK COI reports that I will focus on without in any way implying that their weaknesses predominate over their strengths. Becoming more aware of the reports’ weak points challenges the widely held assumption that UK COI reports are always impeccable sources. This awareness in turn raises the bar for more accurate and balanced COI research as well as underlining the need for greater corroboration of sources which results in fairer decision making.

The APCI report summarises the weak points of the UK COI reports as follows:

“When they are weak or poor, the reports ... carry unsubstantiated assertions. They also omit:

- the civil rights and freedoms of children (despite authors’ citations of evidence that constitutes an infringement of them)
- the administration of juvenile justice (despite clear evidence that this is an issue within the country that is the subject of the COI report)
- the family environment as whole, and, specifically, on the quality of provision of alternative child care
- the sale, trafficking and abduction of children (despite references to this occurring in relation to marriage, military recruitment and adoption).
- Any direct report of children’s views”

What is interesting about the APCI report is that UK Home Office responses to the APCI comments have been annotated in blue throughout the report resulting in a more balanced and complete picture and in some cases an immediate acknowledgment of an area in which a COI report needs to improve.

The brief of the authors, Ravi KS Kohli and Fiona Mitchell, was to provide an assessment of information on issues affecting children in the most recent COI reports in the following 20 countries:

- |                |               |
|----------------|---------------|
| 1. Afghanistan | 11. Iraq      |
| 2. Algeria     | 12. Jamaica   |
| 3. Bangladesh  | 13. Nigeria   |
| 4. Cameroon    | 14. Pakistan  |
| 5. China       | 15. Somalia   |
| 6. DRC         | 16. Sri Lanka |
| 7. Eritrea     | 17. Sudan     |
| 8. Ethiopia    | 18. Syria     |
| 9. India       | 19. Turkey    |
| 10. Iran       | 20. Zimbabwe  |

Detailed critiques of each of the 20 COI reports as well as UK Home Office comments are included in the APCI report and should be consulted by everyone involved in refugee status determination. The authors’ brief was to comment on how complete, how accurate and how balanced the information in each COI report is. The authors believe that the UN Convention on the Rights of the Child is central to the question of how children should be regarded in COI reports “as it provides the basic internationally agreed humanitarian rights based framework within which children’s lives and circumstances are understood.” Therefore, to review the COI reports they produced a systematic template of analysis based on the Convention on the Rights of the Child. The authors summarised their review of the COI reports under a number of key themes.

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[http://www.apci.org.uk/PDF/tenth\\_meeting/APCI%2010%204%20Children's%20issues.pdf](http://www.apci.org.uk/PDF/tenth_meeting/APCI%2010%204%20Children's%20issues.pdf)

### 1. Approaches to integrating source material

Each UK Home Office COI report states in point iii of the Preface:

“The Report aims to *provide a brief summary* of the source material identified, focusing on the main issues raised in asylum and human rights applications.” [emphasis added].

However, the authors of the APCI report state:

“We have observed that the authors of the reports *seldom summarise material* but present a series or selection of extracts from varying numbers and types of reports. This has its limitations...” [emphasis added].

The UK Home Office response to this comment is as follows:

“We acknowledge this point – the use of summary/synthesis of material, also greater use of statistical data – and will aim to encourage this approach across the country reports.”

The authors give an example of weak or poor practice in relation to this heading in the case of the report on Sudan:

“The section on children opens with material that covers a number of topics - Without any use of subheadings, the information that is initially presented appears disparate and to some extent lacks cohesion. It currently appears to draw out information as it is cited by number of sources/organisations rather than collating information together in a way that highlights issues for children. It would be more useful for the section to be focused and structured in relation to topics rather than sources.”

### 2. The place of sources

Each COI report also states in point iii of the Preface:

“It is not intended to be a detailed or comprehensive survey. For a more detailed account, the relevant source documents should be examined directly.”

In relation to this heading the authors state:

“Without providing a summary of the content of the sources, it is not always possible to tell how relevant it may be to children’s rights as a whole within a specific country context. For example, on the basis of the information extracted from the UNICEF Situation Analysis on Excluded Children in Jamaica the users of the report may be unaware that it also contains further relevant and comprehensive details on violence against children –including rates of child homicides- on disabled children that contradicts/mediates the positive developments that authors draw from other sources and cite in paragraphs 24.06 – 24.08. Given the need for quick electronic access, the COI reports should provide some indication of which sources contain more detail

than is reflected in the summaries contained within the section on children.”

The authors also state in relation to this heading:

“Secondly, it raises a question as to ‘comprehensiveness’ of the source documents used. These are described as “recognised external sources”. While it is true that some sources provide a considerable amount of detail and can act as a point for more information, there are many that do not provide much more depth than is represented by the extracts in the COI reports...In order to establish a baseline of information in each of the reports and to ensure that they do incorporate a children’s perspective, the authors of the COI reports should all make use of the evidence produced as part of the reporting process on the UN Convention on the Rights of the Child.”

The UK Home Office’s response is:

“Agree with this and will adopt. The UNCR Committee reports and those provided by

Governments and various NGOs are a useful resource and good starting point in considering issues affecting children in the various countries we produce reports on.”

### 3. The utility of the reports’ structure and format

Point iv of the Preface of the COI reports states:

“The structure and format of the COI Report reflects the way it is used by UKBA decision makers and appeals presenting officers, who require quick electronic access to information on specific issues and use the contents page to go directly to the subject required. Key issues are usually covered in some depth within a dedicated section, but may also be referred to briefly in several other sections. Some repetition is therefore inherent in the structure of the Report.”

The authors of the APCI report state:

“In our appraisal of the COI reports, we considered how far all information relevant to children is easily accessible to a reader/user of the report. Naturally, the section on children is an obvious starting point for readers of the report. For that reason, we think that the section on children should contain a record of all relevant information on children that is contained with the report as a whole and that the information within the children’s section is linked to broader contextual material in the remainder of the report. The inclusion of signposts (ideally, hyperlinks) between sections and subsections of the report would increase ease of access for the users of the reports. In general, we would argue that the reports make insufficient use of signposts and/or the repetition of relevant material cited elsewhere in the reports. A common theme to emerge from our review of the reports is that the women’s

section often contains information significant to the treatment of girls. For example, the practice of female circumcision often happens during infancy, early childhood or adolescence and should therefore be considered in the section on children. Other examples are the inclusion of material on early and/or forced marriage, and of violence (sexual and physical) against girls within the sections on women but not the sections on children. This material should either be repeated or re-located to the sections on children.”

The UK Home Office’s response is as follows:

“...it may be impractical to bring every bit of data on children into the section because of the loss of context in the process and the danger of lengthening already long reports through excessive repetition. We will introduce clearer and more frequent cross-references between inter (and intra)-related sections.”

The authors give an example of weak or poor practice in the COI report on the DRC in relation to this heading:

“In that report, the women’s section records the past and ongoing rape and torture of girls (and women). The references to girls are not incidental. Paragraph 25.20 notes “tens of thousands of women and girls have been the victims of systematic rape committed by combatant forces” and 25.31 notes records of “numerous acts of sexual violence... This phenomenon principally affects young girls and women, and the majority are under 18 years old; young boys and men are equally subjected to sexual abuse. The perpetrators of these acts are generally military personnel, police officers, prison guards, care staff, teachers, parents, pastors, neighbours, and even young delinquents living on the streets”. Other paragraphs that make specific mention of children are listed in the individual report on the Democratic Republic of Congo. Few of these are repeated in the section on children.”

### **The significance of the information presented**

Point v of the Preface in COI reports states:

“The information included in this COI Report is limited to that which can be identified from source documents. While every effort is made to cover all relevant aspects of a particular topic, it is not always possible to obtain the information concerned. For this reason, it is important to note that information included in the Report should not be taken to imply anything beyond what is actually stated. For example, if it is stated that a particular law has been passed, this should not be taken to imply that it has been effectively implemented unless stated.”

The authors of the APCI report propose that

“the reports could be more explicit about what has been determined as relevant to the countries concerned and

what has been determined as irrelevant, and how these judgements have been made. We also think that it would be helpful to know where authors have not been able to find information.”

However, the UK Home Office do not propose to adopt this suggestion as they do not see it as practical. The Home Office do state that they are looking at the “feasibility of providing comment in the specific circumstances where legislation has been proposed or passed but no information could be found regarding implementation.”

Interestingly, the UK Home Office reiterate in this response that the COI reports are not comprehensive and add a qualification about the coverage of human rights:

“the reports are not designed to be comprehensive documents, in neither content nor sourcing. Their composition reflects a need to cover issues in a balanced fashion that are relevant to asylum and human rights claims primarily relating to issues of protection, not necessarily all human rights issues in a country.”

The authors of the APCI report make a further important point in relation to this heading:

“An additional point here is one that is relevant to a number of reports. The above quote states that ‘information included in the report should not be taken to imply anything beyond what is actually stated’. If what is actually stated is intended to be reliable and informative, then we would argue against the inclusion of statements that rule out the occurrence of children’s rights violations but are unsupported by evidence or that make general, overarching statements about the commitment of a government to children’s rights and welfare but are again unsubstantiated in the COI reports.”

The UK Home Office state in relation to this:

“We agree with this, and will remove and avoid such statements in future reports.”

The example the authors give is in relation to the COI report on Eritrea:

“Here it is noted in 26.05 that “there are no laws against child abuse, and child abuse was not common”. Leaving such a statement to stand alone is potentially misleading and should not be taken to mean that child abuse is not common. It is unlikely that documented evidence of child abuse exists if there are no regulations or laws through which to monitor or challenge it. Additionally, there are considerable discrepancies between this statement and other evidence cited on the sexual exploitation of children (e.g. 26.04) and the need for stronger child protection mechanisms within the country (e.g. 26.33).”

### Dealing with discrepancies in information

Point vi in the Preface in COI reports notes:

“In compiling the Report, no attempt has been made to resolve discrepancies between information provided in different source documents.”

The authors of the report state:

“While we think that it would be more appropriate for the authors to attempt to resolve or appraise conflicting information, we also recognise that this may represent a significant undertaking. Therefore, in the absence of an analytical approach to the extraction and presentation of source material, we think it is essential that conflicting information is presented together and its source clearly labelled. This would aid the reader in gaining an understanding of a particular issue. We have indicated in the individual reports where we think it is necessary for this to be done.”

The Home Office state in reply:

“We agree that conflicting material should be brought together in reports.”

The APCI’s most important recommendation has been accepted by the Home Office:

“In order for the COI reports to incorporate an adequate and appropriate perspective on children’s issues, it has to be grounded by the UN Convention on the Rights of the Child....

Therefore, we would argue that the reports should give consideration to:

- Basic demographic information about children
- The country position in relation to the CRC and the optional protocols
- Children’s civil rights and freedoms and how these are visible within the civil structures and legal frameworks of the country
- Family environment and alternative care
- Education, leisure and cultural activities
- Health and welfare of children
- Special protection measures, as relevant to each individual country.”

The example the authors give of weak or poor practice under this heading is the COI report on Syria:

“The COI report on Syria offers a section on children that is a brief and poor section in a comparatively short report. It is about 850 words in length, roughly 3% of the whole report, excluding Annexes and Preface. The report as a whole carries a sense of children being on the periphery of its considerations, and the section on children confirms this. There is no note of the CRC, the Optional Protocols, or access to Syria’s contributions to the periodic scrutiny by the Committee on the Rights of the Child.”

### The sources used

The authors made a number of observations on how well the different authors use sources. Some COI reports have “relied on older sources and therefore present an incomplete and potentially inaccurate picture of what is occurring within the country.”

Examples of weak or poor practice, according to the authors include both Somalia and Iran:

“Somalia. The COI report includes reference to figures that are 22 years old, in stating ‘In 1985 the enrolment at secondary schools included 3% of children (boys 4%; girls 2%) in the relevant age-group. Current expenditure on education in the Government’s 1988 budget was 478.1m’. (paragraph 24.05)”

“Iran. The COI report draws on UN documents for 1997 to complete the subsection on child care. However, Iran submitted a 2nd Periodic Report to the Committee on the Rights of the Child that was considered by the Committee in January 2005. The whole of the Child Care sub-section is therefore based on an outdated source.”

### Implications of the APCI report

The APCI report has a number of implications for COI researchers, legal representatives and decision makers.

1. In terms of material in UK COI reports which is not integrated, researchers provide a real service to clients when they extract the relevant material and present it in a structured way.

2. Users of COI should ensure that, as the UK COI reports suggest, “relevant source documents” are “examined directly”. One of the UK Home Office responses quoted in the report states that “the [COI] reports are not designed to be comprehensive documents, in neither content nor sourcing. Their composition reflects a need to cover issues in a balanced fashion that are relevant to asylum and human rights claims primarily relating to issues of protection, not necessarily all human rights issues in a country.” A different picture of the country situation may result from consulting original sources directly.

3. In relation to the COI reports’ structure and format, it is useful to be reminded that material on, for example, the situation for children, is sometimes to be found in different parts of the report and that these are not necessarily collated together in one section or cross-referenced.

4. At present the COI reports do *not* report the fact that no information is forthcoming on certain matters. The Preface in each COI report cautions that ‘information included in the report should not be taken to imply anything beyond what is actually stated’. However, it is easy to see that in such circumstances people may sometimes incorrectly draw conclusions that are not in



the COI report such as the implementation or non-implementation of a certain law in a country. It is useful to be reminded of the fact that certain information cannot be sourced in the COI reports.

5. While waiting for changes to be made by the Home Office, it would be useful if the material in the APCI report on the 20 current COI reports reviewed were consulted by COI researchers, legal representatives and decision makers in relations to children's issues.

6. At present conflicting information is not necessarily presented together in COI reports though it is the intention of the Home Office to do so in future reports. It is worth flagging conflicting information as it can otherwise be missed.

7. The APCI template is that COI reports should give consideration to:

- Basic demographic information about children
- The country position in relation to the CRC and the optional protocols
- Children's civil rights and freedoms and how these are visible within the civil structures and legal frameworks of the country
- Family environment and alternative care
- Education, leisure and cultural activities
- Health and welfare of children
- Special protection measures, as relevant to each individual country.

Information on these aspects should be sourced elsewhere where they are not found in the UK COI reports.

8. The APCI report states that some COI reports have "relied on older sources and therefore present an incomplete and potentially inaccurate picture of what is occurring within the country." Given that a core standard of COI is that it should be current, information should be sourced elsewhere when the older sources quoted are outdated.



## Access to Protection at Airports in Europe

### Report on the monitoring experience at airports in Amsterdam, Budapest, Madrid, Prague, Vienna and Warsaw

*By Hungarian Helsinki Committee*

In most Member States of the EU, the number of persons crossing the state border at airports far exceeds those at land or sea borders. Yet access of asylum seekers to the territory and the asylum procedure is often unregulated or ad hoc at such entry points. Although international and European laws contain rules and guidelines to ensure that refugees can have access to Europe, practices often do not reflect the protection envisaged in law.

The project "Monitoring asylum seekers' access to territory and procedure at European airports -- exchange of experience and best practices" sought to monitor how refugees' access to Europe through 6 airports (Amsterdam, Budapest, Madrid, Prague, Vienna and Warsaw) is ensured in law and in practice.

6 NGOs working to assist refugees took part in the project: the Hungarian Helsinki Committee, Asylkoordination Austria, the Dutch Council for Refugees (Netherlands), the Organisation for Aid to Refugees (OPU, Czech Republic), Association for Legal Intervention (Poland) and the Spanish Commission for Refugees (CEAR, Spain).

The project was supported by the European Refugee Fund, Community Actions 2005. The views expressed in this report and information provided by the project and the partners involved do not necessarily reflect the point of view of the European Commission.

The Recommendations of the Report are as follows:

#### **7.1 Regular Monitoring Arrangements and Strengthened Cooperation between Authorities, NGOs and UNHCR**

It is recommended that all Member States establish cooperation agreements with refugee-assisting organizations and UNHCR to monitor the access of asylum seekers to the territory of the country, allowing access to all persons and airport facilities as well as to the files of returned persons. This will contribute to making airport procedures more transparent, improve compliance with legal standards and develop mutual trust among organizations working with migrants and refugees.

#### **7.2 Access to Persons in Detention Facilities and Legal Assistance**

All Member States should ensure the proper implementation of the Asylum Procedures Directive, which stipulates access of legal advisers to asylum applicants held in detention areas, including transit

zones at airports. In order to ensure that persons who may be in need of international protection have access to legal advice, lawyers provided by either the state as part of a legal aid scheme or NGO legal counselors should be notified of intercepted foreigners and allowed to participate in the first interview with the foreigner.

### **7.3 Interview with All Persons in the Procedure to Refuse Entry into the Country**

Member States should prescribe that a detailed interview is held with all persons subjected to refusal of entry to ensure protection against refoulement and the identification of refugees. The interview would serve to find out the individual circumstances of the particular foreigner and his/her reasons for leaving the country of origin and would also provide a real opportunity for persons to seek asylum.

### **7.4 Information Provision on the Right to Seek Asylum and Assistance**

Members States should provide written information on the procedure and the rights and responsibilities of foreigners subject to airport procedures in multiple languages that reflect the variety of languages spoken by asylum seekers arriving in the country.

It is critical that all foreigners intercepted and refused entry at the airport receive appropriate and detailed information on the possibility of appealing the decision. Although reference to the availability of judicial review appears in the Schengen form, it is practically useless and hard to notice, not to mention the fact that foreigners often do not understand the form despite their signature on the bottom. Written information on the possibility to seek asylum and the asylum procedure should be displayed on the walls of airport premises, including passport control areas.

The contact information of lawyers or NGOs who can provide free legal assistance should be displayed in all premises where foreigners may be held and border guards should assist foreigners with contacting such service providers.

### **7.5 Interpretation Services**

To resolve immediate communication barriers, it is strongly recommended that border guard officers who meet foreigners and deal with return or asylum procedures at airports participate in language courses at least in English or in another commonly spoken language. However, border guard officials speaking the language of the foreigner or a language that he/she understands at less than full proficiency level should refrain from conducting detailed interviews in order to avoid misunderstandings at the crucial initial stage of establishing the facts and personal circumstances. Misinterpretation may have grave effects and could play a role in refoulement. All Member States should secure professional interpreters speaking a wide range

of languages who are available within a short period of time to assist at the airport. Border guards should ideally select professionals who have undergone specialized training as interpreters to avoid situations where the interpreter would not impartially and fully translate the foreigner's statements. In any case, all interpreters used by the border guards should be made aware of the basic professional requirements associated with dealing with foreigners involved in the return procedure.

### **7.6 Automatic Suspensive Effect for Judicial Review Against the Return Decision**

In order for remedies against the decision to refuse entry and the return order to be effective and meaningful, the request for judicial review must have automatic suspensive effect. Once a foreigner is returned from the country, it is practically impossible to pursue legal remedies, which results in risking the life and security of potential asylum seekers.

### **7.7 Conditions of Detention/Accommodation**

All Member States should ensure that facilities for foreigners confined at the airport or in airport transit zones for more than 24 hours provide adequate living standards with as few restrictions as possible. Authorities must keep in mind that these foreigners have only committed a minor offence by entering the country without valid travel documents – in case of refugees for a legitimate reason – therefore keeping them in prison-like conditions exceeds the purpose of the measure and is not proportionate to the offence they have committed. It is recommended that Member States follow the practice of the Amsterdam Schiphol airport where foreigners move freely in the transit zone following an individual risk assessment. Basic conditions of reception should be provided, such as separating men and women (unless it is a family), allowing the use of bathrooms at any time and daily access to open air. Meals that take into account foreigner's dietary and religious customs should be provided by the authorities.

### **7.8 Training of Border Guard Staff**

It is recommended that all border guards working directly with foreigners at airports participate in regular intercultural, communication and basic legal trainings in order to better recognize if a person is in need of international protection. Authorities should consult with NGOs and UNHCR on this issue and engage in joint training activities.

The full report can be accessed at <http://www.helsinki.hu/docs/Airport-Monitoring-Report-final-complete-1.pdf>



## Xenophobic Violence in South Africa



*David Goggins Investigates*

### Introduction

In May of this year South Africa was shocked by widespread rioting and violence which broke out in many of its major cities. This violence was directed at South Africa's immigrant population and resulted in the deaths of at least 62 people, serious injury to hundreds more and the displacement of an estimated 100,000 non South African nationals from the urban townships where they had been living and working. The apparent cause of this violence was xenophobia, fear or hatred of foreigners.

### Background

Following the transition to democracy in 1994 the black majority population of South Africa gained many rights which had been denied to them under the apartheid regime. It was widely expected that this would result in a major rise in the standard of living for the millions of people who were living in the townships in conditions of abject poverty. When the ANC dominated government failed to meet these expectations many people laid the blame for this on the large number of immigrants newly arriving in South Africa. As the vast majority of these new arrivals are in the country illegally there is no official estimate of their numbers, although unofficial estimates suggest that there are at least five million of them, including three million Zimbabweans fleeing from economic hardship and political persecution in their own country. Typical of these estimates is an *IRIN News* report which states:

“The number of foreign nationals, both legal and illegal, residing in South Africa is estimated at anywhere between one million and 10 million, but around three million are thought to have fled Zimbabwe's imploding economy, where unofficial estimates now put inflation at 1,000,000 percent, with no limit in sight.”<sup>56</sup>

South Africa has also received immigrants from Somalia, Mozambique, Malawi, Kenya, Nigeria, the Democratic Republic of Congo and other African countries. *BBC News* commented on this influx as follows:

“Since the end of apartheid, millions of African immigrants have poured into South Africa seeking jobs and sanctuary. But they have become scapegoats for many of the country's social problems – its high rate of unemployment, a shortage of housing and one of the worst levels of crime in the world.”<sup>57</sup>

During the past 14 years certain people in South Africa developed a deep resentment of these newcomers, whom they called “Kwerekwere”, or foreigners.<sup>58</sup> Even from the early days of black majority rule fears were expressed that immigrants might take jobs and houses away from native South Africans. These fears were articulated by Mangosutho Buthelezi, Leader of the Zulu dominated Inkatha Freedom Party, who in a speech made to the South African parliament in 1994 stated:

“If we as South Africans are going to compete for scarce resources with millions of aliens who are pouring into South Africa, then we can bid goodbye to our Reconstruction and Development Programme.”<sup>59</sup>

### Xenophobic incidents prior to 2008

Numerous incidents were reported where foreigners were the victims of attacks which appeared to be motivated by racial prejudice. For instance, in 1997 immigrant street traders in Johannesburg were attacked by local merchants, in 1998 three non South African nationals were killed by a mob on a train travelling between Pretoria and Johannesburg and in 2000 a Sudanese man was thrown from a train and a Kenyan man and his room mate were shot in their home.<sup>60</sup> In 2000 a *BBC News* report on the rise in hostility towards immigrants from other African countries stated:

“It is the history of black South Africans' struggle for freedom that has moulded their views. Under apartheid, blacks were almost non-people. Democracy gave them a stake in society for the very first time. Now, many are fiercely protective of these hard-won rights and unwilling to share them with foreigners.”<sup>61</sup>

Those who have suffered most from xenophobic violence have been refugees from Somalia, with dozens of them allegedly killed in 2006 alone. An *IRIN News* report on these attacks stated:

“What is striking about the attacks against Somalis is that they are apparently targeted above all others. Somalis often live in impoverished neighbourhoods among migrants from other nations – Zimbabwe, Malawi, Mozambique, Democratic Republic of Congo – but say they face the brunt of local hostilities.”<sup>62</sup>

Somalis allege that it is their success as informal traders in the squatter camps which has led to attacks against them by local businessmen seeking to eliminate the competition.

### May 2008 attacks

Far more serious than the sporadic incidents of previous years was the countrywide outbreak of xenophobic violence which occurred in May 2008. Immigrants living

<sup>58</sup> The Times (26 July 2008) *Residents ready to hunt down foreigners* Khupiso, Victor

<sup>59</sup> *IRIN News* (19 May 2008) *South Africa: Burning the welcome mat*

<sup>60</sup> *IRIN News* (19 May 2008) *Burning the welcome mat*

<sup>61</sup> *BBC News* (28 August 2000) *South Africa's new racism*

<sup>62</sup> *IRIN News* (10 October 2006) *South Africa: Fleeing war, Somalis are targets of violence in adopted home*

<sup>56</sup> *IRIN News* (21 May 2008) *South Africa: The army is called in*

<sup>57</sup> *BBC News* (18 May 2008) *Violence spreads in Johannesburg*

in the township of Alexandra in northern Johannesburg were the first to be attacked, with the violence then spreading to Diepsloot township northwest of the city. A Zimbabwean eyewitness to these attacks states:

“On Sunday night (11 May) people were screaming and singing in the streets; some were holding guns. They started beating people and telling them to get out of their houses.”<sup>63</sup>

The following week the violence spread to other working class communities in the Johannesburg area, with reports of angry mobs roaming the townships beating up and even killing foreigners, looting their shops and burning their homes. Non South African nationals were forced to abandon all their belongings and seek shelter at local police stations, churches or government buildings. South African citizens also fell victim to mob violence, with one businessman accused of employing Zimbabweans reportedly being killed after his house was set on fire.<sup>64</sup> The police responded with rubber bullets and tear gas, but were unable to control the mobs. Within two weeks the violence had spread to many other parts of South Africa, including Cape Town where once again Somali traders were the main targets of attacks.

A *Human Rights Watch* report describes these events as follows:

“The attacks followed a May 11 Meeting headed by Jacob Ntuli, leader of Umphakathi, a local community group, to discuss crime in Alexandra. During the meeting, local residents began blaming foreign nationals for the high crime rate and for “stealing” jobs and houses from South Africans. Residents at the meeting decided to forcefully evict foreigners from their neighbourhoods and converged at 10 p.m. with guns, whips and knob-kierries (traditional weapons). With cries of “Khipha ikwerekwere” (kick out the foreigners), mobs attacked certain enclaves of shacks known to be inhabited by foreign nationals. The South African police intervened to stop the attacks and arrested 50 people that night on charges of criminal activities relating to public violence. They are among those currently in detention, awaiting trial. Victims of xenophobic violence told Human Rights Watch the attacks continued in Alexandra for four days. “The mobs started in Beirut informal settlement and then went on a rampage across Alex,” Frank Rasodi, an Alexandra resident, told Human Rights Watch. “They were attacking the foreigners day and night – they wanted to get them all out.”

<sup>63</sup> IRIN News (16 May 2008) *South Africa: Townships in turmoil raise fears that xenophobia will spread*

<sup>64</sup> SW Radio Africa (20 May 2008) *Businessman Murdered for Employing Zimbabweans* Karimakwenda, Tererai

By May 15, violence had spread to Diepsloot Township. On May 16, groups of South African residents of Olifantsfontein, Thokozo, Tembisa and Cleveland townships began attacking foreign nationals in their areas. By May 19, violent mobs had targeted foreigners in central Johannesburg, Hillbrow, Boksburg and Germiston. Violence spread to Mpumalanga and Kwazulu Natal provinces on May 20 and North-West and Western Cape provinces on May 22.”<sup>65</sup>

According to a government spokesman among those killed in the riots were 21 South Africans, 11 Mozambicans, 5 Zimbabweans, 3 Somalis and 22 persons of unknown nationality. South Africans were particularly shocked by the publication of photographs showing a Mozambican man named Ernesto Alfabeto Nhamuave being set alight by a rampaging mob in Reiger Park, Johannesburg, on 18 May 2008. Mr Nhamuave later died from his injuries.<sup>66</sup>

A report from the *Mail & Guardian* newspaper revealed that mobs were employing a language test to identify foreigners, using a list of words from the isiZulu language, such as the words for elbow or toe, which would not generally be known to non-South Africans. This test was applied to anyone with a dark complexion, who spoke a different language to their neighbours, or who was otherwise suspected of being an outsider, and failure to pass was likely to result in a beating and robbery. There is a possibility that this test led to attacks on non-isiZulu speaking South African citizens.<sup>67</sup>

A number of people arrested during the disturbances were later released due to lack of evidence, as victims were reluctant to bring themselves to the attention of the police due to a well-founded fear that they would be deported as illegal immigrants. Speaking to *Human Rights Watch* Zimbabwean national Joseph Nlovu said:

“These attackers, they know that we are afraid to report crimes to the police because instead of investigating the police will just arrest us. So they think they can attack us and they won’t be punished because we will not go to the police. But they must be punished. They are murderers and criminals. I know some people who attacked my neighbour. I will report them to the police if they promise not to arrest me and send me back to Zimbabwe. It is even worse there.”<sup>68</sup>

<sup>65</sup> Human Rights Watch (23 May 2008) *South Africa: Punish Attackers in Xenophobic Violence*

<sup>66</sup> A particularly harrowing photograph of this incident can be found at: [http://www.boston.com/bigpicture/2008/06/xenophobia\\_in\\_south\\_africa.html](http://www.boston.com/bigpicture/2008/06/xenophobia_in_south_africa.html)

<sup>67</sup> South Africa has 11 official languages.

<sup>68</sup> Human Rights Watch (23 May 2008) *South Africa: Punish Attackers in Xenophobic Violence*

### Sources of xenophobia

One of the reasons postulated as being the source of the xenophobic violence is the South African unemployment rate, which some sources suggest is as high as 40%. This has led to resentment among the unemployed masses in the townships at the perceived success of the better skilled and more entrepreneurial immigrants from Somalia and Zimbabwe.

A *UNHCR* report comments on this resentment as follows: “In many cases of xenophobia in South Africa, the foreigners appear to be victims of jealousy – women and men engaged in small-scale trade who are perceived to be more successful than their local competitors. Often violence has followed mass protests against inadequate government services. But it was unclear what triggered these attacks, which began with a march by mobs that police estimated to be several thousand people.”<sup>69</sup>

Another source of discontent among township dwellers is their deep resentment at what they claim is the favourable treatment of foreigners in the allocation of subsidised housing. Although the government’s Reconstruction and Development Programme builds over 180,000 units a year this has not been sufficient to meet the needs of millions of South Africans still living in shacks in the township slums. It is widely believed that many of the local councillors responsible for allocation are corrupt and have taken bribes from “wealthy” foreigners seeking to jump the housing queue. These accusations have been acknowledged by the authorities, with the Secretary General of the South African Communist Party stating:

“Some of our own councillors illegally take bribes and allocate RDP houses to undeserving people who are South African and non-South African citizens. These corrupt practices create fertile ground for intra-community conflict and xenophobia.”<sup>70</sup>

Critics of the government have accused the authorities of ignoring the factors which allowed xenophobia to develop among the poor of South Africa. One such critic is William Gumede, former deputy editor of *The Sowetan*, who in an article published by *The Independent* says:

“Long-standing official denial of xenophobia is at the heart of the terrible violence against foreign African refugees spreading through Johannesburg. For years, warnings by local rights groups that the regular attacks in townships, rural towns and inner-city slums on foreign Africans will soon escalate have been ignored by the South African government. Yet in spite of the bloody attacks, the South African government and Thabo Mbeki’s response has been staggeringly unconvincing.

Astonishingly, the police are blaming a ‘third force’ of shadowy individuals supposedly behind orchestrating the attacks. To do so is to ignore spectacularly not only the

<sup>69</sup> United Nations High Commissioner for Refugees (28 March 2008) *Xenophobic attacks drive hundreds from homes in South African suburb*

<sup>70</sup> BBC News (4 June 2006) *South Africa: Behind the violence*

deep-seated prejudice against refugees from poorer neighbours but also the resentment generally against African immigrants.”<sup>71</sup>

The accusation that the violence had been organised by a subversive “third force” was later withdrawn by the Minister of Intelligence who said: “I accept that we have had a spontaneous outburst of xenophobia here”.<sup>72</sup> The police have claimed that much of the mayhem was organised by criminals who used the violence as an opportunity to steal and loot. After the violence in Johannesburg police spokesman Govindsamy Mariemuthoo said:

“When one looks at the victims as well, there are South African citizens, so this is purely criminal.”<sup>73</sup>

Police superintendent Sibongile Nkosi also referred to the involvement of unemployed young criminals in the violence, stating:

“Almost all of them were found with property they stole from the foreigners.”<sup>74</sup>

### Continuing violence

Xenophobic attacks have continued to be reported. In June 2008 a Mozambican man was burned alive by a mob in the Atteridge township near Pretoria.<sup>75</sup> In October 2008 a Somali woman named Sahra Omar Farah and her three children were brutally murdered in a shop run by Somalis in a village in the Eastern Cape Province. Ms Farah was reported to have been stabbed over 100 times. Three suspects have been arrested. UN High Commissioner for Human Rights Navanethem Pillay condemned these murders, noting that another three Somali shopkeepers had since been murdered in Johannesburg and Port Elizabeth.<sup>76</sup>



South Africa/ Xenophobic attacks against foreigners/Two makeshift refugee camps have been set up near Rosslyin, north of Pretoria. Somali, Ethiopian, Eritrean, Congolese and Angolan nationals are seeking refuge there. 29 May 2008. By kind permission of UNHCR/J. Oatway. David Goggins’s article has no connection with UNHCR.

<sup>71</sup> Independent, The (21 May 2008) Gumede, William *Mbeki must face up to South Africa’s xenophobia*

<sup>72</sup> BBC News (4 June 2006) *South Africa: Behind the violence*

<sup>73</sup> Voice of America (19 May 2008) *South Africa Police Say 22 Killed in Anti-foreigner Attacks* Bobb, Scott

<sup>74</sup> News 24 (22 May 2008) *1,000s flee xenophobic attacks* Khoza, thabisile

<sup>75</sup> BBC News (14 June 2008) *S Africa mob burns Mozambican man*

<sup>76</sup> Office of the United Nations High Commissioner for Human Rights (OHCHR) (7 October 2008) *Pillay highlights pattern of xenophobic attacks after brutal killing of Somali family in South Africa*

*IRIN News* recently reported that 200 Somali businessmen in the Western Cape Province had received threats of violence from a group calling itself the Zankhanyo Retailers Association. An insight into the mindset of the members of this group was revealed by a spokesman who told a local newspaper:

“While we're talking to them, we want them to stop operating. Our problem is simple: We are hungry. We are angry. And the Somalis are undercutting us. These people come into the country with nothing, and the next minute they have stocked shops and fridges. We've done our research and we know that the Muslim Judicial Council [MJC] is helping them because they're Muslim. We also want help from our government because we gave them power. We are the ones who fought for freedom and democracy, and now these Somalis are here eating our democracy.”<sup>77</sup>

In an examination of the reasons for the rise in xenophobia in South Africa a document published by *Open Democracy* says:

“The first place to look for an explanation is in the South African government's own policy record: especially its inability to address the problems of poverty and unemployment, and its lack of leadership on the issue of immigration and refugee policy.”<sup>78</sup>

All reports and documents referred to in this article are available on request from the Refugee Documentation Centre.



## RDC Library Journals



Zoe Melling Librarian, RDC

One of the library's collections, the RDC's 50-plus journal subscriptions are a useful resource for keeping up-to-date on developments in a range of areas relevant to asylum researchers and practitioners. Details of journal holdings can be viewed on the E-Library, and contents pages for individual issues are also available; these can be accessed either by clicking on the link in the library catalogue or browsing through the serial contents collection in the Digital Library, which is currently being updated. Articles can be photocopied and supplied on request.

Key journals held in the library include:

### Refugee & Immigration Law

European Journal of Migration & Law  
Immigration Asylum & Nationality Law  
International Journal of Refugee Law  
Journal of Refugee Studies  
Refugee Survey Quarterly

### Human Rights

European Human Rights Law Review  
International Journal of Children's Rights  
International Journal of Human Rights  
International Journal of Refugee Law  
International Journal on Minority and Group Rights  
Netherlands Quarterly of Human Rights

### General Law

The Bar Review  
Irish Law Times  
Law Society Gazette

### Current Affairs

The Economist  
Guardian Weekly  
Keesing's Record of World Events  
Newsweek  
Time

Many journals are also available online, and the RDC subscribes to a wide range of electronic resources, which can be searched on request. In some cases, subscriptions may be extended to provide direct access to end users. In response to demand, we are currently looking at this possibility for the *International Journal of Refugee Law*, *Journal of Refugee Studies* and *Refugee Survey Quarterly*, published by Oxford University Press.

As always, feedback is most welcome and we strongly encourage users to contact us with any requests, comments or suggestions.

### Contact details

Refugee Documentation Centre  
1st Floor, Montague Court,  
7-11 Montague St,  
Dublin 2  
DX 149  
Telephone: 00 353 (0)1 4776250  
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Email:  
Refugee\_Documentation\_Centre@legalaidboard.ie

Queries can also be submitted through the E-Library or on [www.legalaidboard.ie](http://www.legalaidboard.ie).

<sup>77</sup> IRIN News (17 October 2008) *Somalia-South Africa: Foreign competitors not welcome*

<sup>78</sup> Open Democracy (2 June 2008) *South Africa's tipping-point* Aggad, Faten & Sidiropoulos, Elizabeth



## Refugee & Immigration Practitioners' Network

The *Refugee & Immigration Practitioners' Network* held its first meeting in the Law Society's Blue Room on Thursday, October 16<sup>th</sup> last. Saul Woolfson BL delivered a most informative and well-received talk to a full house on *Preparing Applications for Subsidiary Protection in the Context of Recent Caselaw*. A lively discussion followed (with apologies to all those who didn't get to add their views and comments due to lack of time) and copies of recent European cases of interest to practitioners were distributed.

The Network has been established to foster the sharing of legal knowledge between refugee and immigration practitioners in Ireland in order to promote excellence in the representation of our clients. The Network's composition is intended to reflect the diverse range of experienced practitioners involved in the area, including solicitors, barristers, those working in NGOs and caseworkers. The format of the network meetings is also intended to recognise the expertise and experience of the audience as well as the invited speakers and to facilitate conversation on important issues of relevance. Therefore we hope that each month, following a talk by an invited speaker or speakers on a topic of particular interest to practitioners, there is an opportunity for discussion and questions.

Caoimhe Sheridan and I, Coordinators of the ELENA Network in Ireland, organised the first meeting on a topic of particular interest to refugee lawyers. Hereafter, it is intended that we will alternate on a monthly basis between refugee and immigration law. Caoimhe and Hilka Becker of the Immigrant Council of Ireland will coordinate those meetings relating to Immigration Law while Caoimhe and I will continue to arrange those meetings relating to refugee law. Although we are dividing the meetings between refugee and immigration law, we recognise that urgent matters will arise and there will be some crossover. While the monthly meetings will be a central aspect of the network, we hope to encourage communication by email also in order to keep practitioners updated on matters of legal importance which come to our attention.

There is no charge for attendance at the meetings. The next meeting will take place in the Distillery Building at 6.30pm on Wednesday, November 19<sup>th</sup> next when we are pleased to confirm that Michael Lynn BL will give a talk titled *Metock-and Beyond* focusing on the immigration law implications of the European Court of Justice decision in *Metock* as well as current and possible future challenges to other aspects of Ireland's implementation of the free movement directive. On Wednesday December 10th, we will hold our third meeting, when Jonathan Tomkin, Solicitor, who has recently returned from Luxembourg where he worked as a Referendaire (Legal Advisor) at the European Court of Justice, will give practical guidelines to asylum and refugee practitioners on taking a case before the European Court of Justice.

December's meeting will be followed by a panel discussion and reception.

Caoimhe would be happy to receive your comments, queries and any suggestions you might have for future meetings by email to [caoimhe@irishrefugeecouncil.ie](mailto:caoimhe@irishrefugeecouncil.ie)

Jacki Kelly, Solicitor.



## Short Courses in the Refugee Studies Centre

The RSC is pleased to announce a new three-day course on statelessness, to be held at St Catherine's College, Oxford (9–11 January 2009). Devised by Jean-François Durieux, Departmental Lecturer in International Human Rights and Refugee Law, the course, intended for experienced practitioners and graduate researchers, will be interdisciplinary and participative, drawing on the expertise of RSC staff and associates, as well as members of outside institutions, including UNHCR. The RSC anticipates this course to be the first in a series that will continue in coming years.

The issue of statelessness is steadily gaining prominence on the agendas of international and regional institutions, governments and civil society throughout the world. It is also at the heart of a growing body of theoretical and empirical research looking at citizenship and lack thereof from various perspectives.

The RSC's short courses offer the opportunity to receive additional professional training and develop expertise in particular refugee-related areas. Other short courses on offer over this academic year include *Palestinian Refugees and International Law (date yet to be decided)* and *Psychosocial Responses to Conflict and Forced Migration (7–8 February 2009)*. The former, led by RSC deputy director Dr Dawn Chatty and Lena El-Malak, places the Palestinian refugee case study within the broader context of the international human rights regime. It examines, within a human rights framework, the policies and practices of Middle Eastern states as they impinge upon Palestinian refugees. The key themes, which have taken centre stage in the debate on the Palestinian refugee crisis, are statelessness, right of return, repatriation, self-determination, restitution compensation and protection. The latter examines mental health and psychosocial support in emergency and protracted refugee settings. Convened by Dr Maryanne Loughry and Dr Mike Wessels, it invites practitioners and theorists to struggle with complex intercultural issues associated with psychosocial programming.

For further details, please contact the RSC Outreach Programme Manager Katherine Salahi ([katherine.salahi@qeh.ox.ac.uk](mailto:katherine.salahi@qeh.ox.ac.uk) / +44 1865 270723).

