

The Researcher

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Welcome to the October 2009 issue of The Researcher

Firstly I would like to introduce myself as the new co-editor along with Seamus Keating of The Researcher, replacing Paul Daly who stepped down in July of this year following four successful years. During this time, the publication has grown from a newsletter documenting the role and activities of the Refugee Documentation Centre to a journal providing a forum for the discussion of asylum and immigration issues in Ireland.

In this issue, Refugee Legal Service Managing Solicitors Grainne Brophy and Bernadette McGonigle examine the issue of Statelessness, as it affects the asylum process with particular reference to the Irish situation. James Healy B.L. discusses the impact which mental and emotional disturbances such as Post Traumatic Stress Disorder have on the Asylum Process. David Goggins of the Refugee Documentation Centre investigates the Boko Haram, an Islamic Fundamentalist Group operating in northern Nigeria sometimes known as the 'Nigerian Taliban'. Recent developments in Refugee and Immigration Law are highlighted through a selection of case summaries provided by John Stanley B.L. and to conclude, Steven O'Brien of UNHCR Dublin draws our attention to the September 2009 UNHCR Policy on Refugee Protection and Solutions in Urban Areas.

Deirdre Houlihan, RDC



Disclaimer

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

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Statelessness: An Overview of the Legal Issues



Grainne Brophy (above) and Bernadette McGonigle, *Managing Solicitors with the Refugee Legal Service*.

Introduction

Some 12 million people around the world are stateless. Among the most vulnerable groups are the Rohingya from Myanmar/ Burma, the Bidoon (or Bidun which means 'without nationality') in the Middle East, the Roma in Europe, some Palestinians and Kurds.

Based on United Nations ("UN") estimates the Council of Europe identifies the number of stateless persons in Europe to be 679,000 and this figure includes the Roma and Russian speakers in the Baltic States. The exact number of stateless people in Ireland is not known.

The importance of providing a durable solution for stateless people is crucial due to the limitation on their rights as individuals and due to the number of people affected worldwide. However many countries have no effective system for protecting stateless people.

Causes and Consequences of Statelessness

The causes of statelessness includes *inter alia*:

- Different laws applying in different countries;
- Failure to register children at birth (about 51 million births go unregistered each year according to UNICEF);
- Laws regulating marriage and birth registration;
- Nationality based solely on descent, normally of the father;
- Political change;
- Discrimination;
- Trafficking.

The consequences of being stateless can mean having no legal protection or automatic rights to health care, education, employment as well as increased risk of exploitation and harassment. Travel may also be restricted as well as access to the political process.¹

The issue of citizenship is ultimately one for governments but their determinations on citizenship must conform with international legal principles. Article 15 of the 1948 Universal Declaration of Human Rights states that: "Everyone has the right to a nationality" and that "[n]o one shall be arbitrarily deprived of his nationality, or denied the right to change his nationality". There are two UN Conventions on statelessness: the 1954 Convention relating to the Status of Stateless Persons which 63 countries are party to and the 1961 Convention on the Reduction of Statelessness to which 35 countries to date have acceded. The 1950 European Convention on Human Rights does not explicitly refer to nationality rights but citizenship matters are subject to its requirements. The 1997 European Convention on Nationality of the Council of Europe seeks to avoid statelessness by regulating the loss and acquisition of nationality. The 2006 Council of Europe Convention on the Avoidance of Statelessness dealing with state succession has not yet entered into force (three ratifications are necessary but it only has two state signatories and two ratifications to date).

How is Statelessness defined?

There is no internationally accepted definition of a "stateless" person.

A distinction must be drawn between a non-refugee stateless person and a stateless refugee. This article will look at both categories of stateless persons. In relation to non-refugee stateless persons, there is a clear absence of any specific procedures or mechanisms for the protection of this group.

The concept of statelessness includes both refugee and non-refugee stateless persons. A *de jure* stateless person is "a person who is not considered as a national by any State under the operation of its law"²; and the *de facto* stateless person who is a

¹ Nationality Rights for All: A progress Report and Global Survey on Statelessness Refugees International March 2009

² 1954 Convention relating to the Status of Stateless Persons, Article 1 (1)

“person unable to demonstrate that he/she is *de jure* stateless, yet he/she has no effective nationality and does not enjoy national protection”³

Mark Symes and Peter Jorro in ‘Asylum Law and Practice’⁴ argue that “statelessness arises where a country withdraws nationality from an individual or on the transfer of territory fails to make provisions for the incorporation of populations there resident.”⁵

Guy Goodwin-Gill, writing in ‘The Refugee in International Law’⁶, in the context of a discussion on Palestinians and statelessness, explains that:

“Statelessness is often a mixed question of law and fact. It is a matter of law in a negative sense, in that a stateless person is defined as a person who is not recognised as a citizen by any State under its law. It is also a factual issue, in that statelessness may result from historical event; and it may be perpetuated by reason of failure to acquire a new nationality. Evidence conclusively determinative of statelessness, like all evidence of negative conditions, will often be missing, however, and inferences as to the lack of protection may have to be drawn from all the circumstances, including any available documentation and historical context.”⁷

International Conventions governing Statelessness

1954 Convention relating to the Status of Stateless Persons

The preamble of the 1954 Convention reaffirms that stateless refugees are covered by the 1951 Convention relating to the Status of Refugees, and therefore are not covered by the 1954 Convention. It is preferable that stateless refugees seek protection pursuant to the 1951 Geneva Convention as their rights are more clearly defined, though as is noted in this article there are difficulties with this process, with a divergence of approach internationally as to how such cases should be assessed. Furthermore, the 1954 Convention is silent as to how such claims should be processed.

³ Nationality and Statelessness: a Handbook for Parliamentarians, UNHCR-Inter-parliamentary Union, Geneva, 2005, p.11

⁴ Symes M. and Jorro P., ‘Asylum Law and Practice’ (LexisNexis, UK, 2003)

⁵ *Ibid.* at page 231

⁶ Goodwin-Gill G., ‘The Refugee in International Law’ (OUP, 1996)

⁷ *Ibid.* at page 246

Article 1 of the 1954 Convention also defines those individuals who, despite the fact that they are stateless, are nonetheless excluded from the application of the Convention. This may be either because they do not need such protection as they already benefit from international assistance or because they are not deemed worthy of international protection on the basis of criminal acts they are deemed to have committed. These include persons:

“who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance as long as they continue to receive such assistance.”⁸

This is a reference to the United Nations Relief and Works Agency (UNRWA) for Palestinian Refugees in the Near East and the intention is to exclude Palestinians registered with UNRWA from claiming assistance.

Ireland’s obligations under the Convention relating to the Status of Stateless Persons (1954)

Ireland is a state party to the Convention relating to the Status of Stateless Persons and thus is obliged to meet the following standards *vis-à-vis* stateless persons on its territory:

Article 1 – applies to stateless persons under the protection of the UNHCR but not to those under the protection of other UN Agencies.

Article 7 – contracting States shall accord to stateless persons the same treatment as is accorded to aliens generally.

Articles 17-19 – Stateless persons are to be treated at least as favourably as aliens, generally with regard to participation in wage-earning employment.

Articles 20-23 – Stateless persons are to be treated no less favourably than nationals with respect to rationing, elementary public education, and public relief; no less favourably than aliens generally with respect to housing; no less favourably than aliens generally in relation to education other than elementary education.

Article 24 – Stateless persons to be treated no less favourably than nationals with respect to labour legislation and social security.

⁸ 1954 Convention relating to the Status of Stateless Persons Chapter I Article 1. 2(ii)

Article 27 – upon request, Contracting States shall issue travel and identity documents to stateless persons within their territory.

Convention on reduction of Statelessness (1961)

Ireland is also a state party to the Convention on the Reduction of Statelessness (1961).

This Convention does not oblige states to grant nationality to stateless persons who enter their territory, unless those persons already have strong connections with the state and do not have any right to acquire nationality elsewhere.

Procedures in Ireland for non-refugee Stateless persons

While Ireland's obligations under International Law are prescribed by the above mentioned International Conventions, Gabor Gyulai in his article 'Forgotten without reason: Protection of Non-Refugee Stateless Persons in Central Europe'⁹, notes that in order to comply with these obligations, States should:

- (1) "establish a statelessness determination mechanism which efficiently identifies stateless persons in need of protection,
- (2) guarantee a legal and social status for those identified as stateless in the spirit of the relevant provisions of the 1954 Statelessness Convention; and
- (3) ensure access to a durable solution, leading out of statelessness."¹⁰

At present, there is no prescribed procedure for a non-refugee stateless person to apply for protection in Ireland. The only avenue open to an applicant at present may be by way of a Section 3 application under the Immigration Act 1999 (pursuant to s3(6) (h) or (i), or in the case of a stateless child born in Ireland to make an application pursuant to the Citizenship Act (see below). If an application made pursuant to section 3 of the Immigration Act is successful, it is at the discretion of the Minister for Justice, Equality and Law Reform as to what rights are to be granted and for what term. While leave to remain granted by the Minister can be renewed, it is at the discretion of the Minister as to whether or not it should be renewed and on what terms. It cannot therefore be regarded as a durable solution.

⁹ Gyulai G., 'Forgotten without reason: Protection of Non-Refugee Stateless Persons in Central Europe'

¹⁰ *Ibid.* at page 16

Furthermore, in reality, the issue often crystallises at the deportation stage, when people are left in a legal limbo as there is no country in effect to deport them to; yet they have no right to reside in Ireland or to enjoy any other legal rights.

The difficulty with the lack of procedures to pursue an application for statelessness under the Convention relating to the Status of Stateless Persons is that persons may be diverted into the asylum process as a result of the absence of appropriate immigration procedures dealing with statelessness. If the refugee claim is not successful and a deportation order is proposed to be issued, the applicant should, at the very least, have a right to seek a declaration of statelessness. However, as no procedure is currently in place in Ireland for such an application to be made, it currently falls to be made as an addition to the arguments put forward under s3(6)(h) or (i) of the Immigration Act 1999. It is submitted that it is not appropriate to wait until there is a proposal to deport a stateless person before there is an opportunity to make submissions to the Minister on the matter. Legally and practically, it is also inappropriate to be proposing to deport a person who is stateless and who therefore has no country that can legally take them back.

It should also be noted that the [Immigration, Residence and Protection Bill](#) 2008 which sets out a legislative framework for the management of inward migration to Ireland effectively abolishes the regularisation mechanism provided for in the aforementioned section 3 of the Immigration Act, 1999 and does not provide an alternative regularisation mechanism.

There is the added complication that such people may be detained where a deportation order has issued against them in circumstances where there is no prospect of that deportation taking place in the foreseeable future, if ever. UNHCR have noted that stateless persons without a legal stay should be detained only after considering all possible alternatives.¹¹

There is provision under section 17(6) of the Refugee Act 1996 (as amended) for the Minister to grant permission to remain to a person who has withdrawn his/her asylum application or who has been refused a declaration of refugee status.

¹¹ *Nationality and Statelessness: A Handbook for Parliamentarians* (UNHCR, 2005) at page 21

However, it is granted at the discretion of the Minister “for such period and subject to such conditions as the Minister may specify in writing”.

It is therefore not offering a durable solution for stateless people.

S4 of the Immigration Act, 2004 provides that the Minister for Justice Equality and Law Reform or an immigration officer on his behalf has statutory discretion to give a non – Irish national permission to be in the State and to impose conditions on such permission as he deems fit in terms of duration and right to engage in employment. This discretion has been applied in limited circumstances. It is unclear if the Minister would use his discretion to regularise non-refugee stateless persons.

Practical steps to be taken in applying for certificate of Statelessness

Who should decide if an individual is stateless?

Qualified personnel who are specialised in the field of statelessness who can impartially and objectively examine the application and evidence supporting it should be designated to make determinations of statelessness. Consistent decision-making, increasing effectiveness in obtaining and disseminating information on countries-of-origin, and a greater level of expertise would be achieved by a central authority responsible for such determinations. These determinations require the collection and analysis of laws, regulations, and the practices of other States. Decision-makers would also benefit from collaborating with colleagues knowledgeable about the relevant issues both within the government and in other States. The decision-maker may require an Affidavit of laws. An applicant would need to set out the factual background pertaining to both parents and possibly obtain an opinion as to the statelessness of the parents from an expert witness.

How do individuals gain access to the procedure?

If there is a determination regarding statelessness, then it may be appropriate to provide temporary stay while the process is underway even though the 1954 Convention is silent on the matter. Practices among the States with dedicated procedures vary but the principle of due process requires that applicants be given certain guarantees including:

- the right to an individual examination of the claim in which the applicant may participate;
- the right to objective treatment of the claim;

- a time limit on the length of the procedure;
- access to information about the procedure in language the claimant can understand;
- access to legal advice and an interpreter;
- the right to confidentiality and data protection;
- delivery of both a decision and the reasons that underlie the decision; and
- the possibility to challenge the legality of that decision.

Establishing Statelessness

Documentary evidence from a responsible State authority certifying that the person concerned is not a national is normally a reliable form of evidence for purposes of establishing statelessness. However, such documentary evidence will not always be available, in part precisely because States will not necessarily feel accountable for indicating which persons do *not* have a legal bond of nationality. The relevant authorities of the country of origin or former habitual residence may refuse to issue certified documentation that the applicant is not a national, or may not reply to inquiries. From a practical perspective, it might be assumed that if a State refuses to indicate that a person *is* a national, then this itself is a form of evidence which could have a bearing on the claim because States normally extend diplomatic services and protection to their nationals. Nonetheless, in such cases, the State trying to determine statelessness under the Convention may need to review other types of evidence, including available documentation and reliable witnesses.¹²

In establishing proof of statelessness, States should be prepared to review the relevant legislation of States with which the individual has prior links; undertake consultations and to request evidence from these States as needed; and to request the full cooperation of the person concerned in providing all relevant facts and information. The United Nations High Commissioner for Refugees (UNHCR) can provide support in furthering consultations between States as appropriate, as

¹² Batchelor C., “The 1954 Convention relating to the Status of Stateless Persons: implementation within the European Union Member States and recommendations for harmonization”, *Refugee* (2005) at para. 36 [available online]: <http://www.unhcr.org/refworld/docid/415c3cfb4.htm>
 | Accessed 02/07/2009

well as technical information on the laws in various States globally.¹³

Gabor Gyulai in his article suggests that the “most efficient and effective way of establishing or disproving the statelessness of a person is for the alien policing authority to contact the national authorities of some selected countries (identified on the basis of a personal hearing and the documentation of eventual former procedures) and request them to confirm whether or not the person is a national of the country in question”.¹⁴

UNHCR’s mandate and role for statelessness

The UN General Assembly has given UNHCR the formal mandate to prevent and reduce statelessness around the world, as well as to protect the rights of stateless people.

The content of this responsibility is further set out by the Executive Committee governing the work of UNHCR. In ExCom’s ‘Conclusion on the Identification, Prevention and Reduction of Statelessness and the Protection of Stateless Persons’¹⁵ issued in 2006, the Executive Committee requires the agency to work with governments, other UN agencies and civil society to address the problem. The conclusion also urges States, among others, to work with UNHCR and to consider examining their nationality laws with a view to adopting and implementing legislation to prevent the occurrence of statelessness.

On the situation in Ireland, UNHCR welcomed the inclusion of stateless persons in Section 16 (g) of the Nationality and Citizenship Act 1956 as amended which gives the Minister the possibility to waive naturalization requirements otherwise in place. However, UNHCR noted that there are currently no procedures in which stateless persons can have their status considered and how the lack of identification impacts on stateless persons’ ability to get for instance stay permits, travel documents etc.¹⁶

¹³ *Ibid.* at para. 37

¹⁴ Gyulai G., ‘Forgotten without reason: Protection of Non-Refugee Stateless Persons in Central Europe’ at page ?

¹⁵ ExCom Conclusion No. 106 (LVII) 2006

[available online]:

<http://www.unhcr.org/publ/PUBL/3d4ab3ff2.pdf> Accessed 02/07/09

¹⁶ www.unhcr.org Accessed 02/07/09

Ireland’s procedures for stateless refugees

It is clear from the Refugee Act 1996 that those without a nationality (i.e. stateless persons) are encompassed within the refugee regime: they are included by reference to their place of former habitual residence. This is not only clear from section 2 of the Refugee Act 1996 (as amended) but also from section 21 which deals with the revocation of a grant of asylum. The grounds include re-availing of the protection of the country of nationality and other nationality-related matters. It also includes being able to return to the country of former habitual residence where the reasons for recognition as a refugee have ceased to exist.

This has been copper-fastened by the introduction of the Regulations on subsidiary protection (European Communities (Eligibility for Protection) Regulations 2006). The definition of a “country of origin” in the Regulations includes, for stateless people, their former habitual residence.

There is a divergence of opinion amongst leading academics in this area as to how such claims should be processed. Professor Hathaway and the New Zealand Refugee Status Determination Board have stated that if a stateless person cannot return to their country of former habitual residence, he or she cannot fear persecution there. This would appear to be an extreme view, which has very impractical results, potentially excluding a stateless person who cannot factually return to their place of former habitual residence.

This approach would also seem at odds with the 1996 Act which applies to stateless persons and is at odds with the general matters that must inform the interpretation of the 1996 Act, including the rights of persons without nationalities. It may well be that such an interpretation is itself unlawfully discriminatory of those without nationalities.

It is also a minority view. The UK Immigration Appeals Tribunal specifically rejected the approach in the case of *BA* [2004] UKIAT 00256. The Court of Appeal in the case of *Saad and Others v Home Secretary*¹⁷ was also recognised to adopt an approach inconsistent with it.

¹⁷ *Saad and others v Home Secretary*¹⁷ [2001] EWCA Civ 2008

Leading commentators other than Mr Hathaway have also rejected that approach. These include Grahl-Madsen and Goodwin-Gill. More recently Messrs Symes and Jorro recounted it as a minority view.

In the Canadian article by Edward Corrigan, the Canadian Federal Court in *Maarouf*¹⁸ is recounted as considering that the refusal by the State of former habitual residence to re-admit the resident may in itself be an act of persecution.

It should also be noted that in Professor Hathaway's book: *The Law of Refugee Status* (Butterworths 1991) at p.63, he notes that: "A state is a country of former habitual residence only if the claimant is legally able to return there." In many such cases, the applicant has no legal right to reside in that country.

Exclusion from Protection under Article 1 D of the 1951 Convention

Paragraph 101 of the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status also provides guidance on how to deal with statelessness in the context of asylum law. It states that in the case of stateless refugees, the "country of nationality" is replaced by the "country of his former habitual residence" and rather than showing that the applicant is unwilling to avail himself of the protection of that country, he must simply show that he is unwilling to return to it. Seeking the protection of the State of former habitual residence does not arise.

Applicants who have no nationality but have a country of former habitual residency include Bidoon from Kuwait, some Palestinians, Bhutanese in Nepal and Rohingya in Bangladesh.

A number of categories of applicants are excluded from the definition of 'refugee' including persons "receiving from organs or agencies of the United Nations (other than the High Commissioner) protection or assistance". Does residence in a UNHCR camp constitute protection which would exclude a person from claiming refugee status?

This question can arise in cases for example where an applicant has been residing in a refugee camp, e.g. an applicant of Bhutanese origin, who has lived in a UNHCR camp in Nepal. In a practical analysis of a claim, it may be required to examine

the nature and extent of the protection being offered to an individual by a non-State agent.

UNHCR have stated as follows:

"In UNHCR's view, refugee status should not be denied on the basis of an assumption that the threatened individual could be protected by parties or organisations, including international organisations, if that assumption can be challenged or assailed. It would, in UNHCR's view, be inappropriate to equate national protection provided by States with the exercise of certain administrative authority and control over territory by international organisations on a transitional or temporary basis. Under International law, international organisations do not have the attributes of a State. In practice, this generally has meant that their ability to enforce the rule of law is limited"¹⁹

UNHCR recently issued a statement on Article 1D of the 1951 Refugee Convention. The statement was made in the context of a preliminary ruling reference regarding the interpretation of Article 12(1) (a) of the Qualification Directive.

The reference was made by the Budapest (Hungary) Municipal Court to the Court of Justice of the European Communities (ECJ). The questions posed by the referring court concern the criteria for exclusion from refugee status under Article 12(1)(a) of the Qualification Directive, as well as the conditions under which protection or assistance of a UN organ other than UNHCR are considered to have ceased, and the consequences for the entitlements of the concerned person under the Qualification Directive.

The applicant in the case concerned is a stateless Palestinian woman from the Gaza Strip. She had submitted her asylum application in June 2007 after having stayed lawfully in Hungary with a residence permit. Due to the general instability in the Gaza Strip, she did not want to return to Gaza and applied for asylum in Hungary. She argues that under Article 1D of the 1951 Refugee Convention she is eligible to be automatically ("*ipso facto*") recognized as a refugee. The Hungarian Office of Immigration and Nationality (OIN) rejected her request. Attorney Gábor Gyozo of the Hungarian Helsinki Committee is defending the applicant.

¹⁸ : *Maarouf v. Canada* (Minister of Employment and Immigration) (T.D.), (1993), [1994] 1 F.C. 723

¹⁹ Letter from UNHCR to the Refugee Legal Service dated 20 March 2007

In the statement, the UNHCR explains that the purpose of Article 1D is to recognize and maintain the special status of Palestinian refugees as well as to ensure the continuity of their protection. A person falling under the scope of Article 1D(2) of the 1951 Refugee Convention should therefore be entitled automatically (“*ipso facto*”) to the benefits afforded to refugees by the Qualification Directive.

Cases of statelessness that may arise in practice in Ireland

Such cases may arise in relation to Bidoon from Kuwait, Rohingya from Bangladesh (a group of 78 Rohingya registered with UNHCR in Bangladesh arrived in Ireland this year as part of Ireland’s resettlement programme). However several cases relating to children who may be stateless are now arising due to the change in the legislation governing citizenship.

Non- refugee Stateless children

Article 24 of the 1966 International Covenant on Civil and Political Rights states that: “Every child has the right to acquire a nationality”. This is also covered in the 1989 Convention on the Rights of the Child.

A child born on the island of Ireland on or before 31 December 2004 is entitled to Irish citizenship. A child born on the island of Ireland on or after 1 January 2005 is governed by the citizenship of its parents. Due to the change in our citizenship laws, this may mean that some children born in Ireland are now stateless.

The following sets out which children are entitled to Irish citizenship when born in Ireland:

- a. A child is entitled to Irish citizenship where one or both of its parents is an Irish citizen
- b. A child is entitled to Irish citizenship where a parent is a British citizen
- c. A child is entitled to Irish citizenship where a parent is a national of an EU member state, an EEA agreement State or the Swiss Confederation. In this case, the parent needs to have resided in Ireland for 3 of the previous 4 years.
- d. In other cases, a child is entitled to Irish citizenship where one of his/her parents has reckonable residence during the 4 years immediately preceding the birth of the child. Reckonable residence is an aggregate of not less than 3 years lawful residence. Periods spent

during the asylum process or under a permit to study in Ireland are not included.

- e. A child born to a refugee is automatically an Irish citizen and there is no requirement that the parent must have resided in the country for at least three years.
- f. A child born prior to his/her parent being declared a refugee does not qualify for automatic citizenship. His /her parent can apply for the child to reside in Ireland under family reunification rules. After 5 years of being legally resident in the State an application for naturalisation can be made on his/her behalf.
- g. Under the Irish Nationality and Citizenship Act 1956, if a child who is not an Irish citizen is adopted by an Irish citizen or a couple where either spouse is an Irish citizen, then the adopted child shall be an Irish citizen. However, if the child is adopted from outside the State, immigration procedures must be observed.
- h. Every foundling or deserted infant first found in Ireland will, unless the contrary is proved, (that is, the parents of the child come forward and clarify that the child is not Irish) be considered to have been born in Ireland and thus entitled to Irish citizenship.

Application for citizenship for a stateless child born in Ireland

It appears that persons born in this State who would not otherwise qualify for Irish citizenship as their non-Irish parents do not satisfy the requirements pursuant to Section 6A of the Irish Nationality and Citizenship Act 1956 Act as inserted by s4 of the Irish Nationality and Citizenship Act 2004 (i.e. at least one parent has, during the period of 4 years immediately preceding the child’s birth, been resident in the island of Ireland for a period of not less than 3 years or periods the aggregate of which is not less than 3 years), are in fact entitled to Irish citizenship if they do not enjoy the citizenship of another State. The relevant statutory provision in that regard is Section 6(3) of the Irish Nationality and Citizenship Act, 1956 (as inserted by s3 of the Irish Nationality and Citizenship Act, 2001) which provides that;

- (3) “A person born in the island of Ireland is an Irish citizen from birth if he or she is not entitled to citizenship of any other country.”

Procedures for non refugee stateless children in other jurisdictions

All four countries surveyed in the report 'Forgotten without reason' have provisions in their citizenship Acts, that facilitate an application for citizenship based on statelessness, subject however to varying conditions.²⁰

Conclusion:

As can be seen from the above, non refugee stateless people are not provided a durable solution in Ireland or in many other countries. It would be helpful if a system was established for such people to access to have their status recognised and resultant rights clarified. Stateless refugees can however apply through the asylum process to have their rights recognised and this is the appropriate system for them as it provides an effective durable solution where applications are successful. The issue of statelessness is not easily resolved and while UNHCR have a role to play in the recognition of stateless people, ultimately it is the role of governments to provide solutions. However, it appears that many governments have been unwilling to acknowledge and provide solutions for stateless people leaving many of them in a legal limbo.

We also acknowledge the contributions made by:

Connor Power B.L.

Nuala Egan B.L.

Alan Desmond, UCC PhD candidate



Recent Developments in Refugee and Immigration Law

Judicial Review of Asylum Decisions and Exhaustion of Remedies

Mhlanga v Refugee Applications Commissioner and the Minister for Justice, Equality and Law Reform, Judgment of Harding Clark J, High Court, 29th July 2009.

Refugee Status Determination – Judicial Review – Exhaustion of Remedies – Refugee Applications Commissioner – Serious Deficiency in the Investigative Process – Availability of an Oral Hearing - Certiorari Granted

Facts

The applicant claimed asylum in Ireland as a Zimbabwean national. He disclosed that, although his evidence of torture had been accepted, he had been previously refused asylum in the UK because he was found to have dual citizenship with Mozambique. It was determined that he should be transferred to the UK under the Dublin II Regulation, however as he was not transferred on time Ireland became responsible for determining his application. In his ORAC questionnaire, the applicant claimed that his case was dealt with inappropriately in the UK and citing, *inter alia*, the Constitution of Mozambique and an article titled "Zimbabwe Tightens Ban on Dual Citizenship" said that dual nationality is not permitted in either Zimbabwe or Mozambique.

The applicant attended for two interviews following which a report and negative recommendation issued. As the applicant had previously claimed asylum in the UK, Section 13(6)(d) of the Refugee Act 1996 applied and the applicant's appeal was to be on the papers only. The report gave particular attention to the applicant's nationality and his account of ill treatment in Zimbabwe. The report accepted that the medico-legal report was above reproach and that he was a victim of torture in Zimbabwe, however, it found that there were a number of credibility issues in relation to certain itemized matters. The primary reason for refusal, however, was that the applicant could obtain the nationality of Mozambique and was not in need of international protection.

²⁰ Hungary, Poland, Slovakia and Slovenia

Leave was previously granted to the applicant to challenge the decision on the grounds that ORAC failed to disclose and afford the applicant an opportunity of rebutting an extract on the laws of Mozambique citizenship on which the Commissioner relied and to permit the applicant to consider and answer the proposition that he could, either in his own right or through his father, obtain or reacquire Mozambique nationality and was thereby not need of surrogate international protection.

Decision

At the substantive hearing, and following the clear line of authority on the inappropriateness of judicial review rather than appeal, the Court indicated it was considering whether this case comprised one of the exceptional cases where a “fundamental and irremediable infringement of the entitlement to a fair procedure” had occurred. ORAC made certain credibility findings, but did not determine the case on that basis. Instead, it found that there was no need to offer protection because the applicant could avail of the protection of the State of Mozambique. This was because he was either a national of Mozambique because he was born there or his father was a national or could reacquire such and the applicant could therefore apply through parentage.

The Court indicated that recent case law set out the relevant principles and required a two step assessment:

- (a) has there been a fundamental flaw or illegality such that a rehearing upon appeal before the Tribunal will be an inadequate remedy and certiorari may lie and
- (b) should the court exercise its discretion to grant certiorari.

The Court was not satisfied that the failure to put the extract from the citizenship laws of the world to the applicant comprised a breach of fair procedures as the information relied on therein was very similar to other information already lodged by the applicant. The Court, however, was concerned by the failure of the ORAC officer to engage with the applicant on the question of his ability to acquire nationality of Mozambique. In his questionnaire, he said Mozambique and Zimbabwe do not allow dual nationalities and he stressed his Zimbabwean nationality. When asked why he did not claim nationality of Mozambique, he answered

that his father was born in Mozambique but was a national of Zimbabwe. No further questions were asked of him as to why his father became a national of Zimbabwe or whether there would be any impediment or consequences to his father acquiring Mozambique nationality.

If the ORAC officer had taken the view that the acquisition of Mozambique nationality derived from his parentage could debar him from protection, the Court held that it was incumbent on the ORAC officer to tease out the issue a little further. Even though there were two interviews, there was almost a total absence of exploration of the issue. Complete reliance was placed on the extract from citizenship laws of the world, a document compiled in 2000/1 which seemed to have its own caveats. Granting the application for judicial review, the Court held that this comprised a serious deficiency in the investigative process. In considering the appropriateness of judicial review, the Court also noted that, as set out in several previous decisions, the absence of an oral hearing may be a factor to be considered.

Cases Cited

Radziuk v Minister for Justice Equality and Law Reform, High Court, 29th July 2009, *EAE and OPE v Refugee Appeals Tribunal*, Mc Mahon J, High Court, [2009] IEHC 5, 16th January 2009.



Okoh v Refugee Applications Commissioner and the Minister for Justice, Equality and Law Reform, Ex Temp. , Cooke J., High Court, 9th October 2009 (Refusing Leave)

Refugee Status Determination – Judicial Review – Exhaustion of Remedies – Refugee Applications Commissioner – European Communities (Eligibility for Protection) Regulations 2006 - Leave Refused

Facts

The applicant was a Nigerian national who arrived in the state in 2006. He claimed asylum on the basis of his membership of the minority ethnic group called the Ekoi and his fear of persecution as a member of that group based on threats to his life from another ethnic group, the Osu. He sought leave for judicial review against a negative recommendation of the Refugee Applications Commissioner.

In light of recent case law in relation to judicial review of first instance decisions, the Court invited submissions as to why relief was sought by way of judicial review rather than appeal on the basis that the decision contained “fundamental errors of law, which were incapable of or unsuitable for rectification” on appeal. Counsel for the applicant argued that the report’s assessment was vitiated by a series of errors of fact and law, the cumulative effect of which meant that applicant’s core claim was not considered. It was further argued on behalf of the applicant that the decision maker failed to comply with the mandatory requirements of Regulation 5 of the European Communities (Eligibility for Protection) Regulations 2006, meaning that no lawful protection decision had been made and that this illegality could not be remedied on appeal as the core claim would then only be considered on appeal for the first time.

Decision

Cooke J held that the central thrust of the negative decision in the Section 13 report was that the applicant was not believed in several important aspects of his claim. The Court has repeatedly held that the assessment of credibility is the task of the protection decision makers and the Court will not intervene to substitute its own assessment. Where a Section 13 report turns on credibility, only the Tribunal, and not the Court, can provide another credibility assessment.

The grounds that the decision maker acted unreasonably and in a way which flies in the face of common sense, amounted only to a contention that the decision maker was mistaken and a different conclusion should have been reached had a more balanced analysis been made or had the mistakes not occurred or had a different or better or more up to date or relevant country of origin information been consulted. These are all considerations that go to whether the decision was right or wrong, they are not fundamental errors of law incapable of remedy other than by judicial review.

Regarding the fact that the applicant asserted that the core of his claim has not been considered owing, *inter alia*, to a mistake of fact, Cooke J considered the fact that the decision maker may have been mistaken in treating a caste as a secret society. The mistake, however, was now identified and there is no reason why it should not form the subject matter of a specific ground of appeal. Cooke J held that “it is the precise legislative function of the appeal to enable that grievance to be canvassed and, if justified, to be cured.” If it was not cured, judicial review still lies.

In relation to the argument that there was an unlawful failure to allow the applicant to comment on a country of origin document, the Court referred to several previous judgments that the two stage scheme of the asylum process does not require an authorized officer to invite comments on country of origin information which is consulted after the section 11 interview in order to verify “general, political, social, ethnic, religious or other conditions in a country of origin which may have become relevant because of the account given and the claim made”.

It is only when the events or incidents in the applicant’s personal history may have some connection with those country of origin conditions or with a public event, such as arrest at a demonstration or membership of a political party, and the information discloses contradictions, that the authorized officer may have an obligation to put the matter to the applicant before the report is finalized. This was not at issue in the instant case where a Home Office document was consulted in relation to the issue of forced recruitment to secret societies (which the Court noted that the applicant said was irrelevant anyway as he was a member of a caste and not a secret society) and was capable of

being rebutted by the presentation of appropriate information on appeal.

The authorized officer is obliged to present a report that complies with the requirements of standards laid down by the Regulations. If, however, a mistake is made in considering or failing to consider relevant facts or personal circumstances, it does not mean that the resulting report is so fundamentally unlawful, for want of compliance with the regulation, as to require that it be quashed. There is “nothing in the 2006 Regulation or in Council directive 2004/83/EC precludes a protection decision being arrived at by means of a two stage process of investigation and appeal”.

Regulation 3 designates both the authorized officer and the Tribunal Member as protection decision makers. The obligation to attain minimum standards is fully satisfied by an asylum process in which mistakes by an authorized officer, at the first stage “whether they be of fact or law, of understanding or analysis, of assessment or conclusion, are capable of being remedied by the protection decision of the RAT on appeal”. It is the final definitive decision that counts as the definitive protection decision for that purpose.

The Court rejected the basic submission that the core of the claim has not been the subject of a lawful protection decision, provided that on appeal to the Tribunal no legal obstacle prevents the Tribunal Member arriving at a decision that cures or avoids those mistakes.

Cases Cited

Radziuk v Minister for Justice Equality and Law Reform, High Court, 29th July 2009, *EAE and OPE v Refugee Appeals Tribunal*, Mc Mahon J, High Court, [2009] IEHC 5, 16th January 2009.



T.T.A. v The Minister for Justice, Equality and Law Reform & Anor, High Court, Cooke J., 29th April 2009 ([2009] IEHC 215)

JUDICIAL REVIEW – CERTIORARI – REFUGEE STATUS DETERMINATION – REFUGEE APPLICATIONS COMMISSIONER – ALTERNATIVE REMEDY – ROLE OF REFUGEE APPLICATIONS COMMISSIONER

Facts

The Refugee Applications Commissioner refused the applicant’s claim and the applicant The applicant sought to quash the Commissioner recommendation against granting him refugee status on four grounds: (1) that the Commissioner found that State protection might reasonably have been available to the applicant without sufficient evidence, (2) that the Commissioner’s finding that the applicant was fleeing prosecution rather than persecution was based on hearsay and speculation, (3) that the Commissioner’s failure to disclose country information to the applicant was in breach of fair procedures, and (4) that the Commissioner’s adverse credibility findings were made without the Commissioner’s concerns being put to the applicant and in breach of fair procedures. The applicant also took an appeal to the Tribunal, which was left in abeyance pending the determination of the judicial review proceedings.

The Court invited counsel to make submissions on the issue as to whether this was a case in which the Court should exercise its discretion to issue Certiorari against the Commissioner when an appeal was available and had been commenced, particularly in light of the Supreme Court’s decision in *A.K. v The Refugee Applications Commissioner*.

Held

The Court refused the relief sought, finding that the application was based on a mistaken view of the nature of the statutory process, and that all the matters on which leave was granted were well capable of being dealt with on appeal. The Court elaborated as follows (para.20):

20. The full scope of that appeal and the latitude for the substitution of an appraisal which is the full opposite to that reached by the Commissioner in the report, is not in any sense restricted or impaired by the fact that the appeal’s starting point and the procedural framework for the appeal is the Commissioner’s report to which the Appeal Tribunal is required

to have regard. Nor is it diminished or circumscribed by the change from an investigative forum to quasi adversarial procedure in which the Commissioner is represented before the Tribunal in order, as it were, to stand over the report. The Commissioner acts as a type of legitimus contradictor who provides the adversarial element which permits the Tribunal to test and tease out the issues, but this in no way inhibits the Tribunal in reaching a conclusion that the Commissioner has made mistakes; that he has relied on wrong or inadequate evidence; that he has misunderstood the applicant, or in deciding in the light of entirely new evidence submitted by the applicant that conclusions which might have been tenable before the Commissioner should, on balance, no longer be allowed, and that a new view of the case should be taken.

The Court said that it was clear that certiorari could in principle quash the report and recommendation of the Commissioner, but that the Court should only intervene in exceptional and clear cases where it is necessary to do so. The Court said it should be slow to trespass upon the function of the Tribunal, and should confine itself to the necessary correction of significant illegalities in the first stage investigation by the Commissioner when it is indispensable to do so in order to preserve the effectiveness, fairness, and integrity of the appeal that is otherwise available to the Tribunal. (*J.M. distinguished*)

Case Cited

A.K. v The Minister for Justice, Equality and Law Reform, Unreported, High Court, Cooke J., 27th January 2009

Akintunde v The Minister for Justice, Equality and Law Reform & Anor, Unreported, High Court, Cooke J., 30th April 2009

Diallo v The Minister for Justice, Equality and Law Reform, Unreported, High Court, Cooke J., 27th January 2009

J.M. v The Refugee Applications Commissioner & Anor, Unreported, Cooke J., 27th January 2009

N v The Refugee Applications Commissioner, Unreported, High Court, Hedigan J., 9th October 2008

Stefan v The Minister for Justice [2001] 4 IR 203

The State v Dublin Corporation [1984] IR 381



***R.L.A. v The Minister for Justice, Equality and Law Reform*, High Court, Cooke J., 30th April 2009 ([2009] IEHC 216)**

JUDICIAL REVIEW – CERTIORARI – REFUGEE STATUS DETERMINATION – REFUGEE APPLICATIONS COMMISSIONER – ALTERNATIVE REMEDY – SECTION 11(6) REFUGEE ACT 1996 AS AMENDED – SECTION 11B REFUGEE ACT 1996 AS AMENDED SECTION 13 REFUGEE ACT 1996 AS AMENDED

Facts

The applicant claimed asylum on the basis of a fear of persecution relating to student cults in Nigeria. The Commissioner did not believe the personal history recounted by the applicant. The Commissioner's decision quoted from country information in relation to student cults, but this information had not been put to the applicant. The applicant sought to quash the Refugee Applications Commissioner's recommendation against refugee status on two grounds: (1) that the Commissioner had failed to take into account the matters set out in Section 11B of the Refugee Act 1996, a mere statement that it had done so being insufficient, and (2) that the Commissioner erred in fact and in law by reaching a conclusion that the applicant's claim should be refused based on country information that was not put to the applicant.

During the hearing the Court invited submissions regarding whether the case fell into the category of exceptional cases for the exercise of the Court's discretion to issue Certiorari against a report of the Commissioner, rather than to require the applicant to pursue the statutory appeal, in view of the Supreme Court's judgment in *A.K.* The applicant contended that the fact that country information relating to the cults was not put to the applicant was a fundamental breach of fair procedures.

Held

The Court refused the relief sought, finding that an appeal to the Refugee Appeals Tribunal was the more appropriate remedy. The Court stated that Section 10 of the 2003 Act deleted Section 11(6) of the 1996 Act as originally enacted, thereby removing an applicant's entitlement to see all documents on which the Commissioner relies before finalisation of the report, and that since that change there is no statutory obligation on the Commissioner to notify an applicant in advance of general country information to which recourse may be had in verifying the credibility of the personal history given by an applicant, and that this is the rationale that underlines Section 13(10) of the Refugee Act 1996. The Court stated that the only issue concerning fair procedures

was whether the information at issue must be put to an applicant before the report is finalised or whether it is of a kind which is sufficient to provide with the report in accordance with Section 13(10). The Court found that the country information at issue did not have to be put to the applicant because its only purpose was to verify the general picture relating to student cults. The Court elaborated as follows (paras. 11 & 12):

11. When a first interview takes place, the interviewer has only the contents of the asylum application and the questionnaire to go on. He or she cannot foresee what claims, facts or events will be presented in evidence during the interview to corroborate the assertion of refugee status. An applicant may, as it were, out of the blue, elaborate a claim by reference to a particular event such as a prison break, a political demonstration, a tribal conflict, and so on. Of necessity, therefore, it may only be after the interview that it is possible to check the veracity of such claims by recourse to country of origin information. Clearly, (and counsel for the Minister expressly accepted this proposition,) if such a verification produces contradictory information on specific factual matters peculiar to the applicant's situation, then there may well be an obligation, in application of the principle of fair procedures, to reconvene the interview or to put that information to the applicant by inviting written comments before the report is adopted and the recommendation is made.

12. But when the information is of a general nature relating to the conditions prevailing in the country of origin, there is, in the Court's judgment, no necessary breach of fair procedures in an investigative process of this kind by reason only of the fact that country of origin information is furnished with the report in accordance with section 13(10). The reason for that is that when the narrative report with the accompanying documents is furnished, the applicant is placed in the position to decide whether to accept or reject the basis upon which credibility has been assessed. If the applicant considers that the disbelief is unfair and unfounded and that any general country of origin information is out of date or inaccurate or incomplete, he or she is then in the position to challenge it before the Tribunal on appeal and to do so by adducing new country of origin information and giving testimony again. In so appealing, the applicant is, in effect, saying, "It was wrong not to believe me,

and the Tribunal Member should now form a different view of my story and substitute a new appraisal." That is the purpose of such an appeal, and it is clearly capable of remedying such an alleged unfairness in the assessment and it is manifestly the more appropriate forum in which to do so.

The Court noted that having received the report and the impugned document, the applicant now knew the precise basis for the negative finding of credibility and was in a position to rebut it on appeal and to argue why it was mistaken or unbalanced or unfair.

The Court did not accept the proposition that the Commissioner only complies properly with the provisions of Section 11B of the 1996 Act if the headings in subparagraphs (a) to (m) are treated as a mandatory checklist which must be gone through seriatim. Rather, the Court held, Section 11B depends on the actual content of the report and the particular circumstances of the case. The Court noted that if a case does not turn on credibility at all, then Section 11B is wholly irrelevant. The Court stated that if a RAC report contains no negative conclusion on any particular heading of Section 11B, then the applicant is entitled to proceed to appeal on the basis that those indices of credibility are not relevant or not in issue and cannot play any role in any reappraisal of credibility on appeal.

The Court rejected the proposition that if an applicant has cooperated fully in the investigation he is entitled to a positive finding to that effect under subheading (i) of Section 11B. The Court stated that if a challenge is to be made to the assessment of credibility in a RAC report, it is necessary for the applicant to give at least some minimal indication of what the basis of that challenge is going to be, and do so in specific terms.

Case Cited

A.K. v The Minister for Justice, Equality and Law Reform, Unreported, High Court, Cooke J., 27th January 2009

Akintunde v The Minister for Justice, Equality and Law Reform & Anor, Unreported, High Court, Cooke J., 30th April 2009

Diallo v The Minister for Justice, Equality and Law Reform, Unreported, High Court, Cooke J., 27th January 2009

Stefan v The Minister for Justice [2001] 4 IR 203



JUDICIAL REVIEW, REFUGEE STATUS DETERMINATION & CREDIBILITY

Deportation and Medical Issues

L. & Anor (R.O.I and L.S.) v. Minister for Justice Equality and Law Reform and the Attorney General, McCarthy J, High Court, 5th March 2009

Deportation – Section 3(11) Immigration Act 1999 – Application to Revoke the Deportation Order – Medical Issues – Article 8 ECHR - Leave refused

Outcome: Application refused

Facts

This application for judicial review comprised a challenge to a deportation order. The applicants were Nigerian citizens who married in the State in 2002. The second applicant arrived in Ireland in 1997 at age 17 and was legally resident here since 2000. The first applicant arrived in Ireland in 2001 and applied for asylum.

Judicial review proceedings against a deportation order issued against him in February 2005 were previously settled. Further representations were lodged with the Minister in December 2005 and these included representations regarding the fact that his wife was undergoing fertility treatment. The Minister subsequently reaffirmed the deportation.

Very shortly thereafter, further representations were made to the Minister requesting that he revoke or amend the deportation order and referred again to the fact that the second applicant was attending for fertility treatment and evidenced an appointment for this scheduled for later that month. The Minister replied noting that the medical condition was already considered when the deportation order was reaffirmed. Hanna J. granted leave in March 2007 to challenge the Minister's decision to affirm the deportation order.

Decision

The Court considered the appropriate test to be applied by the Court in judicial review of administrative action and followed its own previous decisions in the cases of *B.J.N. v. The Minister for Justice and Others* (Unrep., High Court, 2008), and *Kamil v. Refugee Appeals Tribunal and Others* (Unrep., High Court, 28th August 2008) in which McCarthy J endorses *O'Keefe* and rejects the anxious scrutiny test. It

was argued by Counsel for the applicants that the decision of the Supreme court in *Clinton v. An Bord Pleanala* (Unrep. Supreme Court, 2nd May 2007) comprised evidence of a departure from *O'Keefe*. The Court held that this case did not either depart from or overrule the test applied by the Supreme Court in cases pertaining to asylum seekers or refugees.

The Court held that medical treatment for infertility would not engage Article 8 save for the circumstances of *Dickson v. United Kingdom* (wherein the ECHR held that the threshold set by the United Kingdom for the right of a prisoner to have his wife artificially inseminated was so high that it did not allow a balancing of the competing interests and a proportionality test as required by the Convention) and the entitlement of a prisoner is quite different from that of a couple who are childless. There is no restriction on the couple obtaining this treatment in Nigeria if it is available. The fact that such treatment may not be available in Nigeria is neither here nor there. In any balancing of rights, a rational decision maker would be entitled to ignore this factor completely since it does not engage any rights.

The Court acknowledged that Counsel for the applicant did not assert that persons might be entitled to remain in the State indefinitely to avail of this treatment but instead that some short term ad hoc permission be afforded to them. The Court held that *da Silva v. Netherlands* comprehensively summarises the State's entitlement to deport in the context of Article 8. It was held in *da Silva* that the State must strike a fair balance between the competing interests of the individual and the community as a whole and the State enjoys a margin of appreciation. Article 8 does not entail a general obligation for a State to respect immigrants' choice of country of residence and to authorize family reunion. The State's obligations to admit to its territory relatives of person residing there vary according to the particular circumstances of the persons involved and the general interest. Factors to be considered, are the extent to which family life is effectively ruptured, the extent of the ties in the State, whether there are insurmountable obstacles to the family living in the country of origin of one or more of them, whether there are factors of immigration control or consideration of public order weighing in favour of exclusion and whether family life was created at a

time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be precarious. Where this is the case, it is only in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8.

The Court also considered the question of whether or not the conduct of the State in refusing to revoke the deportation order is such as to interfere with the right to respect for family life and looked to the decision of Dunne J in *BIS and Others v. Minister for Justice*, citing Lord Philips in *Mahmood v Secretary of State for the Home Department* [2001] 1 W. L. R. 840 in which he summarized the basic principles applicable to decisions pertaining to family life. In the Court's view what is asserted in the instant case is a choice by the applicants as to where they should reside. There is no right to such a choice. In *BIS*, Dunne J cited Lord Bingham in *Razgar* (and this passage was previously approved by Feeney J in *Agbonlahor v Minister for Justice Equality and Law Reform* [2007] I.E.H.C. 166) wherein he stated that "decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases, identifiable only on a case by case basis". There is nothing to indicate that the facts and circumstances in the instant case amount to one of the minority of exceptional cases.

The sequence of events shows that the second named applicant was aware of the precariousness of his position at the time of his marriage. A sensible person would have postponed his marriage (his civil marriage took place when he was awaiting a decision from the Refugee Appeals Tribunal) until after the completion of the process as if he was found to be unlawfully in the State marriage could not be enjoyed in this jurisdiction notwithstanding his wife's connection with it, save in very limited circumstances. The Minister exercised his discretion in a rational way. Per Keane J in *Baby O. Minister for Justice* [2002] 2 I.R. 169, the Minister was not obliged to enter into correspondence setting out detailed reasons as to why refusal did not arise. Relief was refused.

Cases Cited

A.O. and D.L. v. Minister for Justice [2003] 1 I.R. 124, *Agbonlahor v Minister for Justice Equality and Law Reform* [2007] I.E.H.C. 166, *Baby O. v. Minister for Justice* [2002] 2 I.R. 169, *B.J.N. v. The Minister for Justice and Others* (Unrep., High Court, 2008), *Bucumi v. Refugee Appeals Tribunal and Others* (Unrep, High Court, 29th October 2008), *Clinton v. An Bord Pleanala da Silva v. Netherlands*, E.C.H.R. (31st January 2006), *Slivenko v. Latvia* E.C.H.R. (9th October, 2003), *Fr. N and Others v. Minister for Justice Equality and Law Reform* (Unrep., High Court, Charleton J., 24th April 2008), *Huang v. Secretary of State for the Home Department* [2007] 4 All. E.R. 15; *Kamil v. Refugee Appeals Tribunal and Others* (Unrep., High Court, 28th August 2008), *Kongue v. Refugee Appeals Tribunal and Others* (Unrep, High Court 29th October 2008), *Laurentiu v. Minister for Justice* [1999] 4 I.R. 26, *Mahmood v. Secretary of State for the Home Department* [2001] 1 W.L.R. 840, *Mwiza v. Refugee Appeals Tribunal and Another* (Unrep., High Court 22nd August 2008), *Odemema v. The Minister for Justice, Equality and Law Reform* (Unrep., 28th November 2008), *O'Keeffe v. An Bord Pleanala* [1993] 1 I.R. 39, *R (Razgar) v. Secretary of State for the Home Department* [2004] 1 A.C. 368; *Z. v. Minister for Justice* [2002] 2 I.L.R.M. 215



DEPORTATION OF PARENTS OF IRISH CHILDREN

G.A. (A Minor Acting by his father and next friend, K.A.) and K.A. v Minister for Justice Equality and Law Reform, Mc Mahon J, High Court, 22nd May 2009

Deportation – Irish Citizen Child – Parent of Irish Child – Insurmountable Obstacles – Section 3 Immigration Act 1999 – Article 8 ECHR – Leave Granted

Outcome: Leave granted

Facts

This application for leave comprised a challenge to a deportation order against the father of an Irish citizen child. The first named applicant was an Irish citizen born in Ireland in 2004 (who had a twin brother in the State also). His father, the second named applicant, was a Nigerian citizen who previously lived in the Ivory Coast where he married M.A, the mother of the first named applicant and a citizen of that state, in 2003.

M.A travelled to Ireland and was subsequently granted residency here under the IBC05 scheme. In November 2007, the second named applicant sought to reunite with his family in Ireland. Since then, he asserted that he had been assisting in the education and social activities of the children while his wife was running her business. A deportation order was made against him on January 27th 2009.

Decision.

The Court asked what is the proper criterion to be applied by the State when deciding whether to issue a deportation order (in circumstances where other members of the family are lawfully resident). The Court noted that the examination conducted by an executive officer of the Minister relied on *R(Mahmood) v. Home Secretary for the Home Department* [2001] WLR 840, where the Court of Appeal in the UK found that “the removal or exclusion of one family member from a State where other members of the family are lawfully resident will not necessarily infringe Article 8 [of the Convention on Human Rights] provided that there are no insurmountable obstacles to the family living together in the country of origin of the family member excluded, even where this involves a degree of hardship for some or all members of the family”. The executive officer preparing the report in the instant case found that there were no insurmountable obstacles to the family being able to establish a life in their country of origin and that the deportation order should stand.

The Court noted, however, that in *Huang v Secretary of State for the Home Department*, the Mahmood approach was greatly modified. On the issue of whether the deported person can pursue a challenge to his deportation from abroad, the Court looked to the decision in *Chikwamba v Secretary of State for the Home Department* [2008] IESC 25 where the House of Lords held that “only comparatively rarely, certainly in family cases involving children, should an Article 8 appeal be dismissed on the basis that it would be proportionate and more appropriate for the appellant to apply for leave from abroad”. The Court was of the view that the Supreme Court decision in *Oguekwe v Minister for Justice, Equality and Law Reform* [2008] IESC 25 is more relevant regarding the level of consideration in which the Minister should engage. Per Denham J in that case, the consideration of the Minister should be fact specific to the individual child.

The Court held that the executive officer’s report did not reflect the *Oguekwe* principles. It did not consider sufficiently the facts relevant to the personal rights of the citizen child and identify a substantial reason which required the deportation of the second named applicant with sufficient clarity. There was also a failure to sufficiently consider the family unit as a whole. The Court held that this was due to “an over reliance on the Mahmood approach” which “has clearly fallen out of favor, not only in England, but in this jurisdiction as well”. In taking this approach, the Court noted it was similar to that taken in another recent case by Charlton J in *HLY, NJ and PY v Minister for Justice, Equality and Law Reform* [2009] IEHC 96. For this reason, the Court granted leave.

Cases Cited

Chikwamba v Secretary of State for the Home Department [2008] 1 WLR 1420, at 1432; *HLY, NJ and PY v Minister for Justice, Equality and Law Reform and the Attorney General* [2009] IEHC 96; *Huang v Secretary of State for the Home Department* (Kasmiri v Same_ [2007] 2 WLR 581; *McNamara v An Bord Pleanala* (Unrep., High Court, Barr J, 10th May 1996); *Oguekwe v Minister for Justice, Equality and Law Reform* [2008] IESC 25; *R (Mahmood) v. Home Secretary for the Home Department* [2001] WLR 840.

John Stanley B.L.
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How Mental and Emotional Disturbances Impact on the Asylum Process



James Healy B.L.

Very frequently medical reports in respect of examinations carried out on asylum seekers report that they are suffering from Post Traumatic Stress Disorder or are suffering from depression. Indeed the UNHCR Handbook devotes a special section on cases giving rise to such special problems in establishing the facts, under the heading “Mentally Disturbed Persons” and it recognises that “it frequently happens that an examiner is confronted with an Applicant having mental and emotional disturbances that impede a normal examination of his case” and further states that “it will call for different techniques of examination”. Paragraph 208 of the Handbook goes on to state that “the examiner, should in such cases, whenever possible, obtain expert medical advice. The medical report should provide information on the nature and degree of the mental illness and should assess the applicant’s ability to fulfil the requirements normally expected of an applicant in presenting his case. The conclusions of the medical report will determine the examiner’s further approach”. This article will attempt to explore how the mental and emotional disturbances suffered by asylum seekers impacts on the presentation of their cases with particular reference to their recall of past traumatic events, an area which often gives rise to issues about credibility.

It has been known since at least as far back as the First World War that battle experiences can cause episodes of memory loss. Disturbances of memory and concentration had been found in studies of prisoners of war from World War Two and the Korean War, with one study by Torrie in 1944 finding that immediately after a major campaign a significant percentage of soldiers had no memory at all of events. However, Post Traumatic Stress Disorder was not defined until after the Vietnam War but essentially describes the symptoms that may develop in any person who has been a victim or witness of violent and terrifying traumatic experience, which are usually characterised by

sleep disorder, flashbacks, nightmares, social withdrawal, distressing recall hyper-arousal and irritability among other characteristics.

The Istanbul Protocol – a Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment - issued by the Office of the United Nations High Commissioner for Human Rights in New York and Geneva in 2004, states that the diagnosis most commonly associated with the psychological consequences of torture is Post Traumatic Stress Disorder (PTSD) and that such association between torture and this diagnosis has become very strong in the minds of health providers, Immigration Courts and the informed lay public.

It has been proved that even in relatively normal situations our memories are by no means as reliable as previously assumed and may fail us for several reasons, leading to the kind of inconsistencies that courts and tribunals may construe as deliberate deception or inauthenticity, or possibly, particularly in the case of abused and traumatized children, as an inability to discriminate between fact and fantasy. In addition to these “normal” kinds of errors in memory, people who have experienced extreme stress are frequently subject to rather severe disturbance of memory which Bessel van der Kolk and other researchers in the field have termed “trauma-specific”. Indeed, inability to recall an important aspect of the trauma is one of the criteria required by the DSM-IV method for diagnosing Post Traumatic Stress Disorder. Anecdotal evidence has found that the difference between normal memory and “trauma specific” memory, make it difficult, if not impossible, for traumatised victims of torture and persecution to testify in a manner likely to gain them recognition.

In the case of a torture victim presenting his or her story of subjection to state violence as persecution as grounds for asylum, we are mainly concerned with the encoding of what has taken place in the original extremely stressful torture situation or situations that he or she has experienced, or with the encoding that occurs later during diagnostic interviews and the asylum hearing conducted by the recognised authority.

In the original traumatic situation or situations, perceptions, that is what we take into our brains through our senses – eyes, ears and so on – will

typically be narrowed, that is a kind of “tunnelling” will take place. One is fixated on a few central details which cause the greatest fear and pain or unpleasant sensations. Other details fade into the background and the sense of time often becomes disrupted, particularly when events of a similar kind occur repeatedly, for example beatings and interrogations. There may be a sense of timelessness. It is not unusual for prisoners to be blindfolded while they are tortured – this leads to spatial disorientation and an inability to locate the source of sensations. Sounds and smells may take on greater significance than usual. Extreme emotions and painful sensations experienced. Emotions may also be experienced more physical than usual.

The Istanbul Protocol recognises the fact, that it is not uncommon among trauma and torture survivors, for more than one mental disorder to be present, as there is considerable co-morbidity among trauma-related mental disorders, as various manifestations of anxiety and depression are most common symptoms resulting from torture. It distinguishes between the two prominent classification systems viz. the International Classification of Disease (ICD-10) classification of mental and behavioural disorders and the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders (DSM-IV). It states that the DSM-IV definition of PTSD relies heavily on the presence of memory disturbances in relation to trauma, such as intrusive memories, nightmares and the inability to recall important aspects of the trauma. The individual may be unable to recall with precision, specific details of the torture events but will be able to recall the major themes of the torture experience. For example, the victim may be able to recall being raped on several occasions but not be able to give exact dates, locations and details of the setting or the perpetrators. Under such circumstances, an inability to recall precise details, supports rather than discounts the credibility of a survivor’s story. Major themes of the story will be consistent upon re-interviewing. The ICD-10 diagnosis of PTSD is very similar to that of DSM-IV.

The Protocol goes on to state that according to DSM-IV, PTSD can be acute, chronic or delayed. The symptoms must be present for more than one month and the disturbance must cause significant distress or impairment in functioning. In order to

diagnose PTSD, the individual must have been exposed to a traumatic event that involved life threatening experience for the victim or others and produced intense fear, helplessness or horror. The event must be re-experienced persistently in one or more of the following ways:-

- Intrusive distressing recollections of the event
- Recurrent distressing dreams of the event, acting or feeling as if the event were happening again including hallucinations.
- Flashbacks and illusions
- Intense psychological distress at exposure to reminders of the event and
- Psychological reactivity when exposed to cues that resemble or symbolic aspects of the event.

The individual must persistently demonstrate avoidance of stimuli associated with the traumatic event or show general numbing of responsiveness as indicated by at least three of the following:-

- Efforts to avoid thoughts, feelings or conversations associated with the trauma.
- Efforts to avoid activities, places or people that remind the victim of the trauma
- Inability to recall an important aspect of the event
- Diminished interest in significant activities.
- Detachment or estrangement from others
- Restricted affect and
- Foreshortened sense of future

Another reason to make a DSM-IV diagnosis of PTSD, is the persistence of symptoms of increased arousal that were not present before the trauma, as indicated by at least two of the following:-

- Difficulty falling or staying asleep
- Irritability or angry outbursts
- Difficulty in concentrating
- Hypervigilance and exaggerated startle response.

Symptoms of PTSD can be chronic or fluctuate over extended periods of time and the Protocol recognises the fact that not meeting diagnostic criteria of PTSD does not mean that torture was not inflicted. According to the ICD-10 method, a certain proportion of cases of PTSD may follow a chronic course over many years with eventual transition to an enduring personality change. To make the ICD-10 diagnosis of enduring personality change after catastrophic experience, the changes in personality must be present for at least two years following exposure to catastrophic stress, with the

ICD-10 method specifying that the stress must be so extreme that “it is not necessary to consider personal vulnerability in order to explain its profound effect on the personality”. This personality change is characterized by a hostile or distrustful attitude towards the world, social withdrawal, feelings of emptiness or hopelessness, a chronic feeling of “being on edge”, as if constantly threatened and estrangement.

Depression and Depressive Disorders.

Depression may be part of the Post Traumatic Stress Disorder spectrum or a separate diagnosis in its own right. In the words of DE Dietrich (2000), “one of the most frequent and neuro-psychologically well investigated symptoms in depression is reduced memory capacity. This can be further confirmed as outlined in the thesis of Pelosi (2000) who demonstrated that depressed patients had poor recall compared to controls and that this became worse as the memory load increased. He firmly concluded that “major depression significantly affects working memory”

The Istanbul Protocol states that depressive disorders are almost ubiquitous among survivors of torture. In the context of evaluating the consequence of torture, it is problematic to assume that PTSD and major depressive disorder are two separate disease entities with clearly distinguishable aetiologies. Depressive disorders include major disorder, single episode or major depressive disorder and recurrent (more than one episode). Depressive disorder can be present with or without psychotic, catatonic, melancholic or atypical features. According to DSM-IV method, in order to make a diagnosis of major depressive episode, five or more of the following symptoms must be present during the same two week period and represent a change from previous functioning (at least one of the symptoms must be depressed mood or loss of interest or pleasure) :-

- Depressed mood
- Markedly diminished interest or pleasure in all or almost all activities
- Weight loss or change of appetite
- Insomnia or hypersomnia
- Psychomotor agitation or retardation
- Fatigue or loss of energy
- Feeling of worthlessness or excessive or inappropriate guilt.
- Diminished ability to think or concentrate and
- Recurrent thoughts of death or suicide.

To make this diagnosis the symptoms must cause significant distress or impaired social or occupational functioning, not due to a physiological disorder and unaccounted for by another DSM-IV diagnosis.

The Istanbul Protocol concludes that quite apart from PTSD and major depressive disorders, that in relation to the catalogue of symptoms there are other possible diagnoses that include but are not limited to:-

- Generalized anxiety disorder features excessive anxiety and worry about a variety of different events or activities, motor tension and increased autonomic activity;
- Panic disorder manifested by recurrent and unexpected attacks of intense fear or discomfort, including symptoms such as sweating, choking, trembling, rapid heart rate, dizziness, nausea, chills or hot flushes;
- Acute stress disorder which has essentially the same symptoms as PTSD but is diagnosed within one month of exposure to the traumatic event;
- Somatoform disorders featuring physical symptoms that cannot be accounted for by a medical condition;
- Bipolar disorder featuring manic or hypomanic episodes with elevated, expansive or irritable mood, grandiosity, decreased need for sleep, flight of ideas, psychomotor agitation and associated psychotic phenomena;
- Disorders due to a general medical condition often in the form of a brain impairment with resultant fluctuations or deficits in level of consciousness, orientation, attention, concentration, memory and executive functioning;
- Phobias such as social phobia and agoraphobia.

A number of UK studies have been carried out to highlight the effects that PTSD has on the memory. Yehuda (1995) found that veterans with PTSD had quite circumscribed cognitive deficit affecting memory retention and Jenkins (1998) carried out a study of rape victims with PTSD and found that they had significant recall deficits. A study by Harvey (1988) found that depression played a significant role in memory deficits of acute stress disorder patients, but when this was controlled for, some effects of acute stress disorder alone was still evident.

In 2007 Somnath Chatterji led a study on behalf of the World Health Organisation, which was the largest population-based study ever to explore the effect of depression, in comparison to the four other chronic diseases, being angina, arthritis, asthma and diabetes. The results of this study, which had used World Health Organisation data collected from 60 countries and more than 240,000 people was published in "The Lancet". It found that on average between 9% and 23% of persons suffered from depression, plus one or more of the four chronic diseases. It also found that depression is more damaging to everyday health than any of the other four chronic diseases and that if a person is ill with any condition, depression makes it worse. The researchers calculated the impact of different conditions, by asking the people surveyed questions about their capacities to function in everyday situations – such as moving around, seeing things and remembering information. Having assigned a number between zero and 100, reflecting a person's relative health score, their main finding showed "that depression impairs health state to a substantially greater degree than any other disease". In 2000, scientists rated depression as the disease which had the fourth greatest public health impact globally and that by 2020, it is predicted that depression will have jumped to second place. At some point in their life it is estimated that around one in every five women and one in every ten men will suffer from depression.

Irish case law on what effect psychiatric and emotional problems have on the memory appears to be thin on the ground, but a number of international cases prove this to be so.

Roger Haines delivering the opinion of the New Zealand Refugee Status Appeals Authority in Re SA Refugee Appeal 1/92 (30 April 1992) stated that "It is widely accepted that a refugee claimant who has changed his or her story from time to time is not necessarily indicative of deliberate untruthfulness. In many cases there is a clear and convincing reason for inconsistencies and changes. Examples which come to mind are memory failures, an inability or reluctance to relive traumatic events or recount painful facts. One should not be over zealous in attacking the credibility of such applicants"

Professor Hathaway in his book "The Law of Refugee Status" states that it is critical that a

reasonable margin of appreciation be applied to any perceived flaws in a claimant's testimony. A claimant's credibility should not be impugned simply because of vagueness or inconsistencies in recounting peripheral details, since memory failures are experienced by many persons who have been the objects of persecution. These words of Professor Hathaway were approved as "sound and sensible advice" by Merkel J in the Federal Court of Australia in the case of Kopalapilla –v- Minister for Immigration and Multi Cultural Affairs (1997) 1510 FCA (24 December, 1997)

In the case of Alan –v- Switzerland (UNCAT) UN Committee Against Torture 1997 INLR 29, it was held that "The State party has pointed to contradictions and inconsistencies in the author's story but the Committee considers that complete accuracy is seldom to be expected by victims of torture and that inconsistencies as exist in the author's presentation of the facts do not raise doubts about the general veracity of his claims, especially since it has been demonstrated that the author suffers from Post Traumatic Stress Disorder".

In the Federal Court of Canada in the case of Appiah –v- Canada IMM 3009 96 (19 August 1997) Teitalbaum J. stated that "Once the Board had made a first step of accepting the sexual assault because of the weight of medical and psychological evidence, it had to follow through on all the ripples and repercussions of this finding. In other words, not only did the hearing have to be conducted in a 'delicate manner', but the Board also had to weigh the possible consequences of the PTSD on its assessment of Mr Appiah's credibility".

Also in the Federal Court of Canada in Singh –v- Canada FCTD IMM 75-95 (4 July 1995) it was held that "The fact that a person is suffering from Post Traumatic Stress Disorder is evidence that the individual has been subject to stressful conditions and is consistent with the fact that the person has been persecuted and fears its repetition, or simply fears that she will be persecuted".

In another Canadian case, Vijayarajah –v- Canada IMM 4538 – 98 (12 May 1999), Tremblay-Lamer J. held that appropriate weight should have given to the documentary evidence in the case, particularly a document by Doctor Donald Payne entitled "Psychological Problems of Torture Victims in Refugee Interviews and Hearings",

published for the Canadian Centre for the Victims of Torture. He recognised that torture victims would have considerable problems at refugee hearings, stating that “It is my opinion that, because of psychological disturbances as a result of torture, it is unrealistic to expect all refugee claimants will be able to make a full statement on their situation on arriving in Canada. Torture victims will tend to minimise their experiences due to distress caused by recalling and talking about them and may say contradictory things as a result of their confusion”. Here, the Court held that the Board’s conclusion was based on unsound reasoning given that it found that the applicant was not credible due to inconsistencies in his testimony and then relied on this negative credibility finding to dismiss medical and documentary evidence, which explained that torture victims may contradict themselves as a result of the confusion caused by their experiences.

The Tribunal in the case of a Aga (IAT) 14632 (10 March 1997) stated that “as far as the representatives’ request to us that we should give some guidance to special adjudicators in matters such as this, we comment that as far as we are aware, other than what we respectfully describe as the general guidance given by Lord Bridge in the case of Huseyin Bugdaycay and Others –v– Secretary of State for the Home Department (1987) AC page 514, and the guidance given by the UNHCR Handbook at paragraphs 206 to 212, there are no decisions of the higher courts that contain specific guidance to the Immigration Appellate Authority when hearing appeals from mentally ill appellants. We comment that, to the best of our knowledge, it is often the case that where an appellant is mentally ill and is considered unfit to give evidence, then he or she does not give oral evidence before a special adjudicator and the special adjudicator then relies on submissions and other documentary evidence that is put before him or her. Furthermore, we firmly believe that each individual appeal must be dealt with and decided having regard to particular circumstances and facts relative to that appeal. However, it is our view that the overall guidance in paragraphs 206 to 212 of the UNHCR Handbook is extremely helpful. In addition, when it is brought to the attention of a special adjudicator that an appellant has a history of mental illness, he or she should, where possible, require a medical report be produced dealing with the mental history of the appellant and whether, in

the opinion of the person giving the report, the appellant is fit to give oral evidence at an appeal hearing and if oral evidence is given whether such evidence is likely to be influenced (or impeded) by reason of mental illness. In assessing the oral evidence given by such a person, full weight should be given to any mental disorder, in particular the effect that such disorder may have on the appellant’s recollection and its relevance to the normal stress the given of evidence creates. It is as wrong to dismiss the evidence as unreliable simply because of the disorder as it is to give undue weight to it. It must be assessed in the light of the evidence as a whole and it may be that the objective evidence will play an even greater role than in the usual case”.

In conclusion, it can be gleaned that in the case of asylum seekers, great caution needs to be exercised in denying credibility, in respect of persons having mental or emotional problems. The normal variability of memory is likely to be exacerbated by the medical factors reviewed in this article and a general impairment of recall in such persons is to be expected as a result of their traumatic experiences and physical and mental state. There are strong reasons for holding that lack of consistency *per se* cannot be used to give any negative weight to the assessment of credibility in such cases. A more thorough and searching investigation is envisaged at paragraph 212 of the UNHCR Handbook in stating that in view of the above considerations, investigation into refugee status of a mentally disturbed person will, as a rule, have to be more searching than in a “normal” case and will call for a close examination of the applicant’s past history and background, using whatever outside sources of information may be available. However, despite many decision makers at all levels of the asylum process having the best medical evidence and opinions before them, of persons suffering from in many cases severe emotional and mental disturbances as a result of persecution, no such allowances is made for their psychiatric or emotional state and their lack of consistency from an impaired memory is very often used against them to make credibility issues, a scenario in what Judge Denning in another contest and another jurisdiction once called “an appalling vista”. There is an old legal maxim: “*fiat justitita, ruat caelum*”, let justice be done though the heavens fall. It is a proud maxim that every age must learn again.

Who are the Boko Haram?



RDC Researcher David Goggins investigates recent events in northern Nigeria

In May 1999 democracy was restored to Nigeria after sixteen years of authoritarian military rule. Since then there have been numerous outbreaks of serious sectarian violence, resulting in over ten thousand deaths. Most of these deaths were the result of religious tension between Nigeria's Muslim and Christian communities. The particularly brutal outbreak of violence that erupted in several states in northern Nigeria in July 2009 was unique in that it was no less than an uprising by an Islamic fundamentalist group seeking to overthrow the democratic Nigerian state. The group believed to be responsible for this uprising was a sect known as the Boko Haram, a Hausa-language phrase usually translated as either "Western education is forbidden"²¹ or "Western education is a sin".²²

Origin of the Boko Haram

The Boko Haram was founded in 2002 by a self-styled Islamic preacher named Muhammed Yusuf. Yusuf was born in Yobe State on 29 January 1970. He had four wives and twelve children and claimed to have three thousand students.²³ He was said to be well-educated and extremely wealthy.²⁴ Yusuf constantly preached against what he saw as the harmful influence of western culture, denouncing western education and science. His principal objective was the replacement of the existing Nigerian government with an Islamic regime based on a strict interpretation of sharia law similar to that practised by the Taliban of Afghanistan. A description of the Boko Harm published by *Radio Free Europe/Radio Liberty* states:

"The sect is sometimes called the 'Nigerian Taliban' because it is loosely modeled after Afghanistan's Taliban – using militant tactics to try

to impose its own interpretation of Shari'a law across the country. Most of Nigeria's Muslim leaders and believers dismiss Boko Haram's militant ideology as a perversion of Islam's peaceful teachings. No conclusive evidence has been made public that links Boko Haram to Al-Qaeda or the Taliban in Afghanistan."²⁵

Philosophy of Muhammed Yusuf

Muhammed Yusuf's idiosyncratic interpretation of Islam led him to reject Western ideas such as evolution and the belief that the Earth is a sphere. In an interview with *BBC News* Yusuf expounded his views as follows:

"There are prominent Islamic preachers who have seen and understood that the present western-style education is mixed with issues that run contrary to our beliefs in Islam. Like rain. We believe it is a creation of God rather than an evaporation caused by the sun that condenses and becomes rain. Like saying the world is a sphere. If it runs contrary to the teachings of Allah, we reject it. We also reject the theory of Darwinism."²⁶

Membership of the Boko Haram

Muhammed Yusuf's followers were said to include both university lecturers and students as well as illiterate, jobless youths. They wore long beards, red or black headscarves and refused to use western-made goods. All those who did not subscribe to the sect's strict interpretation of Islam were regarded as an infidel. This included not only Christians but also the majority of Nigerian Muslims, who follow the moderate Maliki school of Sunni Islam.²⁷ A *Reuters AlertNet* report commented on the lack of support for Boko Haram among mainstream Muslims, stating:

"Boko Haram's views are not espoused by the majority of Nigeria's Muslim population, the largest in sub-Saharan Africa. The Muslim umbrella group Jama'atu Nasril Islam has condemned the uprising and voiced support for the security forces."²⁸

²¹ Al Jazeera (29 July 2009) *Profile: Boko Haram*

²² According to numerous sources including: Radio Free Europe/Radio Liberty (31 July 2009) *Leader of 'Nigerian Taliban' Killed in Police Custody*, and: This Day (2 August 2009) *Nigeria: Profile of a Troublemaker*

²³ This Day (2 August 2009) *Nigeria: Profile of a Troublemaker*

²⁴ BBC News (31 July 2009) *Nigeria's 'Taliban' enigma*

²⁵ Radio Free Europe/Radio Liberty (31 July 2009) *Leader of 'Nigerian Taliban' Killed in Police Custody*

²⁶ BBC News (31 July 2009) *Nigeria's 'Taliban' enigma*

²⁷ Reuters (30 July 2009) *Q+A – Who are the Islamic sect in Northern Nigeria?*

²⁸ Reuters AlertNet (2 August 2009) *More than 700 killed in Nigeria clashes*

Lack of hope due to unemployment

Professor Sadiq Abubakar of Ahmadu Bello University, Zaria explained the social conditions that attracted recruits to the Boko Haram, saying:

“Unemployment is very high. Go into any city and see the number of graduates from secondary schools and universities roaming around, literally doing nothing and no job is forthcoming. And secondly, there is too much concentration of wealth in few hands in this country. And they actually show it by the type of cars they drive, the houses they build, and the ostentation in the midst of poverty. There’s no leadership, especially in those areas where the violence occurred.”²⁹

Commenting on the underlying reasons behind the Boko Haram revolt Professor Murtalal Muhibbuddin, head of the department of religion at Lagos State University, (LASU) stated:

"The people are frustrated and they are just looking for any means to confront the government of the day for not providing them the basic necessities of life. The teeming unemployed youths can be easily mobilised. What they said they were fighting against, such as Western education and Western values, are just smokescreens to vent their anger on the government. That is why they are attacking police stations, which they see as government establishments.”³⁰

Writing in *Foreign Policy* magazine Jean Herskovits, research professor of history at the state university of New York, states:

“Ten years of supposed democracy have yielded mounting poverty and deprivation of every kind in Nigeria. Young people, under-educated by a collapsed educational system, may ‘graduate,’ but only into joblessness. Lives decline, frustration grows and angry young men are too easily persuaded to pick up readily accessible guns in protest when something sparks their rage.”³¹

Previous incidents

Prior to the events of July 2009 the Boko Haram had allegedly attacked the authorities on a number of previous occasions, including incidents in Yobe in 2003 and in Kano in 2004. In April 2007 ten policemen and a divisional commander’s wife were

²⁹ Voice of America (29 July 2009) *Troops Rush to Quell Violence in Northern Nigeria*

³⁰ Inter Press Service News Agency (2 August 2009) *Religion-Nigeria: Poverty, Frustration Fuel Sectarian violence*

³¹ Herskovits, Jean (7 August 2009) *Nigeria: Violence in North is Not What it Seems*

killed in an attack on the police headquarters in Kano.³²

On 13 November 2008 Muhammed Yusuf was arrested following an attack on a police station in Maiduguri in which seventeen of his followers were killed. On 20th January 2009 he was granted bail by a High Court judge in Abuja.³³

The uprising

The uprising began in Bauchi State on 26 July 2009 when several hundred Boko Haram adherents launched an attack on the Dutsen Tanshi police station³⁴. This attack failed, with reports of at least fifty people being killed³⁵. During the course of the next four days the group carried out further attacks, with gun battles between members of the sect and the police being reported throughout Bauchi, Kano, Yobe and Borno States. The worst of the violence occurred in the city of Maiduguri in Borno State, where the Boko Haram had its headquarters.

Describing the situation in Maiduguri the *Daily Trust* stated:

“In Maiduguri, the sect members appeared to have grouped themselves in batches and simultaneously attacked targets around the city at about 12.30am. They ambushed at the state police headquarters in Maiduguri, sparking off a shootout that lasted over three hours. Fifty of the sect followers were killed there and the others retreated. In the various battles, at least eight police officers, two soldiers and three prison officers were killed, the new prison in the city was broken and prisoners freed, while homes of policemen and police stations were also set ablaze, in an apparent fulfilment of the promises of retaliatory attacks made by the sect’s leader Ustaz Muhammad Yusuf.”³⁶

A *This Day* article also reported the fighting in Maiduguri, stating:

“It was gathered that the assault started around noon on Sunday when the fundamentalists in military camouflage stormed the police headquarters and other structures within the area in Maiduguri with petrol bombs, bows, arrows and other weapons with the aim of levelling the entire

³² Guardian UK (3 May 2007) *Christians live in dread as new, local Taliban rises in the north*

³³ Vanguard (30 July 2009) *Boko Haram leader, Yusuf, killed.*

³⁴ Daily Independent (Lagos) (27 July 2009) *Nigeria: Dozens Killed in Bauchi Religious Crisis*

³⁵ Daily Trust (28 July 2009) *Nigeria, Sect Violence Spreads in North – Deaths – Borno 100, Kano Three, Yobe Two*

³⁶ Daily Trust (28 July 2009) *Nigeria, Sect Violence Spreads in North – Deaths – Borno 100, Kano Three, Yobe Two*

place. The fundamentalists also gained access into the Police Mobile College, Maiduguri, beside the Police headquarters, after killing the Sergeant on guard. They immediately moved into the quarters, burning down nine houses and slaughtering some policemen in the process before they were forced out of the area by riot policemen who shot sporadically at them. They also attacked other parts of the town during which two police stations, Lamisula and Gamboru, were razed even as some churches and mosques were burnt with scores of civilian casualties recorded.³⁷

The mayhem finally came to an end on 30 July, when the Boko Haram headquarters in Maiduguri were shelled and then stormed by the Nigerian army. It is not known exactly how many people were killed in the fighting. A senior defence official stated that over 700 dead bodies were given a mass burial in Maiduguri, while according to the Nigerian Red Cross 780 bodies had already been found in the town and they were still searching for more.³⁸ The Inspector General of Police later confirmed that 28 policemen had been among those killed.³⁹

Targeting of Christians

Despite their claim to be in dispute only with the government and its security forces, there were credible claims that the Boko Haram also targeted Maiduguri's Christian minority. Eleven churches were said to have been extensively damaged, including the Catholic church of St. Michael Railway which had only recently been rebuilt after its destruction in the religious riots of February 2006.⁴⁰

Even more disturbing were claims that Boko Haram followers had killed a number of Christian pastors in Maiduguri. These included Rev Sabo Yakubu of the Church of Christ in Nigeria, of whom there were photographs indicating that his heart may have been ripped out,⁴¹ Pastor George Orji, who was said to have been beheaded while being held hostage in the Boko Haram compound

³⁷ This Day (28 July 2009) *Nigeria: Religious Riots Spread to Kano, Yobe, Borno*

³⁸ Reuters AlertNet (2 August 2009) *More than 700 killed in Nigeria clashes*

³⁹ Daily Trust (25 August 2009) *Families of killed policemen to get insurance benefits*

⁴⁰ Catholic Information Service for Africa (4 August 2009) *Nigeria: Eleven Churches Ruined in 'Boko Haram' Chaos*

⁴¹ Christian Solidarity Worldwide (5 August 2009) *Nigeria: Thirteen-year-old forced to watch Pastor hacked to death in Boko Haram deadly violence*

and Pastor Elijah, whose charred remains were found in the ruins of Jajere National Evangelical Mission.⁴²

Speaking of the attitude of the Boko Haram towards Christians, Samuel Salifu, national secretary of the Christian Association of Nigeria, stated:

“We have no doubt in our minds that they would have perceived Christianity as a Western religion, which to them is also haraam [sin] which must also be eradicated.”⁴³

A failure of intelligence

The authorities were widely criticised for allowing Boko Haram activities to be unchallenged to such an extent that they became a threat to the Nigerian state. A Vanguard report on the life of Muhammed Yusuf states:

“Despite the secrecy surrounding the group, many in Nigeria say the attacks were far from surprising. Mannir Dan Ali, a journalist in Abuja, says there was a minor incident in early June which appeared to spark a series of statements from the group threatening reprisals.”⁴⁴

The *Weekly Trust* comments on these accusations, stating:

“Many commentators have blamed ‘failure of intelligence’ for the Maiduguri Tragedy. Countering this argument, the Director General of the State Security Service (SSS) Afakriya Gadzama, blamed politicians and action agencies for failing to pre-empt the Boko Haram uprising. He dismissed allegations of intelligence failure in the country, saying his agency had provided adequate security intelligence, but that the people who should have acted on it failed to do so.”⁴⁵

Death of Muhammed Yusuf

The uprising effectively ended on 30 July 2009 when the police captured Muhammed Yusuf, who was found hiding among the cattle in his father-in-law's home. Several hours later the police announced that Yusuf had been killed in a shootout with security men.⁴⁶ This version of events was

⁴² Christian Solidarity Worldwide (6 August 2009) *Nigeria: Christians lament a lack of international concern over Boko Haram bloodshed*

⁴³ Compass Direct News (7 August 2009) *Death Toll Climbs in Attack by Islamic Sect*

⁴⁴ Vanguard (31 July 2009) *Nigeria: Mohammed Yusuf - Life And Times of New 'Maitatsine' Leader*

⁴⁵ Weekly Trust (August 2009) *Now That Boko Is 'Halal'...*

⁴⁶ Daily Trust (31 July 2009) *Nigeria: Boko Haram Leader Killed*

challenged by groups such as Human Rights Watch, who alleged that Yusuf had been extra judicially executed while in police custody.⁴⁷ The Nigerian Bar Association and the Afenifere Renewal Group also condemned the killing of Yusuf, with a spokesman for the latter speculating that he had been killed to prevent his backers from being exposed. Among others who died in police custody were Alhaji Buji Foi, who was believed to be the groups sponsor⁴⁸ and Mohammed Yusuf's father-in-law Alhaji Baa Fugu Mohammed.⁴⁹

Commenting on the death of Muhammed Yusuf, Professor Zacarys Anger Gundu of Ahmadu Bello University stated:

“Some things might have come out if he had gone to trial. There are a lot of things we don't know about the group, and killing the leader removes the issue from public scrutiny.”⁵⁰

An indication of the attitude of the police to Yusuf's death comes from an unnamed police officer quoted by *This Day*, as saying “It's good riddance because our judiciary system has many loopholes.”⁵¹

Extra Judicial Killings?

Amnesty International condemned the killing of alleged members of Boko Haram, stating:

“Nigeria's security forces have a history of carrying out extra-judicial executions, torture and other ill-treatment. Although the government claims to have a zero-tolerance policy on extrajudicial executions and torture by the police, there are consistent reports that the Nigeria Police Force executes detainees in custody, suspected armed robbers under arrest, people who refuse to pay bribes or people stopped during road checks.”⁵²

There were widespread accusations by Nigerian human rights groups that the security forces in Maiduguri had indiscriminately killed members of the Boko Haram and innocent civilians alike.

⁴⁷ Human Rights Watch (undated) *Violence Between Security Forces and Islamist Group in Northern Nigeria*

⁴⁸ *This Day* (2 August 2009) *Nigeria: Boko Haram – Death Toll Now 700, Says Security Commander*

⁴⁹ *Daily Trust* (6 August 2009) *Nigeria: Boko Haram Leader's in-Law Killed*

⁵⁰ *Wall Street Journal* (4 August 2009) *Nigeria Violence Sparks New Concerns*

⁵¹ *This Day* (2 August 2009) *Nigeria: Profile of a troublemaker*

⁵² *Amnesty International* (31 July 2009) *Nigeria: Killings by security forces in Northern Nigeria*

Referring to these deaths *Human Rights Watch* researcher Eric Guttschuss asked:

“Were the casualties members of Boko Haram? Were they just individuals found in these neighbourhoods? What are the circumstances of their deaths?”⁵³

A fear of being summarily executed led to hundreds of adherents of Islamic groups, such as Ahalil-Sunnah Waljama'a and Izala, shaving off their beards as the security forces were said to be detaining all bearded men and even killing some of them.⁵⁴ It was also reported that women married to Boko Haram members were divorcing their husbands for fear of being arrested.⁵⁵

Aftermath

Hundreds of Boko Haram members were said to have evaded capture after the failure of the revolt, leading to fears that they would seek to continue their struggle. Speaking of this possibility Borno State Deputy Governor Alhaji Adamu Dibal said:

“The entire story was Mohammed Yusuf, Mohammed Yusuf, Mohammed Yusuf. Without this kingpin it will be difficult for them to regroup.”⁵⁶

Although the Boko Haram threat appears to have been defeated there are fears that the social problems which continue to exist in northern Nigeria may lead to similar actions by other groups. This view is expressed by Small World correspondent Rotimi Olawale who says:

“The northern region is the least educated region in the entire country, the poverty level is also higher and combined with the high unemployment rate in Nigeria, you have a region that has a pool of poor, uneducated and unemployed youth roaming the streets on a daily basis. How would these kids not be susceptible to brain-washing and incitements, especially when the person delivering the message can meet their basic human needs – food, clothing, shelter and cash”⁵⁷

⁵³ *IRIN News* (31 July 2009) *Nigeria: Innocents*

“indiscriminately shot and killed”, rights groups say

⁵⁴ *Daily Trust* (5 August 2009) *Nigeria: Muslims Shaved Beards to Stay Alive*

⁵⁵ *Daily Independent* (5 September 2009) *Nigeria: Boko Haram Women divorce Husbands*

⁵⁶ *Reuters* (4 August 2009) *Interview: Nigerian sect planned bomb attack during Ramadan*

⁵⁷ *Small World News* (9 August 2009) *Boko Haram, Alive in Nigeria*



UNHCR's New Policy on Urban Refugees

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In September 2009, UNHCR released a new policy on Refugee Protection and Solutions in Urban Areas. The significance of this policy paper may not be apparent at first, but it is hugely significant for UNHCR's operations in many countries where we work and marks a different emphasis in this area compared with the previous policy on urban refugees outlined in 1997.

In a world undergoing a process of rapid urbanization with over 50 per cent (some 3.3 billion) of the world's population living in cities, and set to rise, it is no surprise to find that a growing number and proportion of the world's refugees are also to be found in urban areas. According to UNHCR's most recent statistics, almost half of the world's 10.5 million refugees now reside in cities and towns, compared to one third who live in camps.

As well as increasing in size, the world's urban refugee population is also changing in composition. In the past, a significant proportion of the urban refugees registered with UNHCR in developing and middle-income countries were young men.

A growing number and proportion of the world's refugees, including large numbers of refugee women, children and older people, are now to be found in urban areas particularly in those countries where there are no camps. They are often confronted with a range of protection risks: the threat of arrest and detention, refoulement, harassment, exploitation, discrimination, inadequate and overcrowded shelter, as well as vulnerability to sexual and gender-based violence (SGBV), HIV-AIDS, human smuggling and trafficking.

Until recently, UNHCR continued to give primary attention to those refugees who are accommodated in camps. This approach was encouraged by the organization's 1997 policy statement on refugees in urban areas, a document that was based on the assumption that such refugees were more the exception and less the norm, as is now increasingly the case.

Experience with the 1997 policy statement revealed a number of other difficulties. It was preoccupied with the growing cost of providing assistance to refugees in urban areas, which limited its scope of application. So too did its focus on the issue of refugees who take up residence in an urban area after moving in an irregular manner from their country of first asylum. In addition, the 1997 paper did not establish a sufficient balance between UNHCR's security concerns in urban settings and the need to deal with the underlying causes of the refugees' frustration.

The September policy paper replaces the 1997 statement on urban refugees and recognizes the need to address the issue of urban refugees in a more comprehensive manner. The document itself is relatively concise and sets out the broad contours and underlying principles of UNHCR's engagement with urban refugees.

It has a number of significant features. In particular, it fully recognizes the need for the policy to be adapted to the specific circumstances of different countries and cities. It relates primarily to the situation of urban refugees in developing and middle-income countries where UNHCR has a presence and an operational role. Thus the paper does not examine the challenge of refugee integration or the issue of subsidiary protection standards in the industrialized states, issues more relevant in the Irish context.

It is intended that the implementation and impact of the new UNHCR policy will be reviewed and revised in close collaboration with other actors who have a substantive role to play in expanding the protection space available to refugees in urban areas.

A full copy of the new policy can be found on Refworld at

<http://www.unhcr.org/refworld/docid/4ab8e7f2.html>

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