



The RESEARCHER

Published by The Refugee Documentation Centre | RDC@legalaidboard.ie

Welcome to the April 2015 issue of The Researcher

In this issue we publish an article by Caroline Stephens of UNHCR Ireland which provides an overview of the potential impacts of the Dublin III Regulation.

Patrick Dowling, researcher at the Refugee Documentation Centre writes on the killing of people with Albinism in Tanzania.

Catherine Fahy, solicitor with the Refugee Legal Service discusses the important subject of disability and asylum law.

Refugee Documentation Centre researcher David Goggins investigates the current situation in Libya and the possible outcomes for the future.

Triona Jacob, legal intern at the Office of the Refugee Applications Commissioner discusses the implications of *Tarakhel v Switzerland*.

Many thanks to all our contributors, if you are interested in contributing to future issues please contact us at the email address below.

Elisabeth Ahmed
Refugee Documentation Centre (Ireland)

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The Researcher is published bi-annually by:

The Refugee Documentation Centre, Montague Court,
7-11 Montague Street, Dublin 2, Ireland
Phone: + 353 (0) 1 4776250
Fax: + 353 (0) 1 6613113
RDC@legalaidboard.ie

The Researcher is available on www.legalaidboard.ie,
www.ecoi.net and www.Refworld.org/

Editors:

Elisabeth Ahmed: EA Ahmed@legalaidboard.ie

David Goggins: DAGoggins@legalaidboard.ie

Dublin III Regulation: an overview and its potential impacts



Caroline Stephens, UNHCR Ireland

The Dublin III Regulation,¹ like its predecessors,² aims to: ensure at least one Member State takes responsibility in examining an individual application (therefore avoiding the situation of ‘asylum-seekers in orbit’, where no Member State is willing to accept responsibility for examining an application³); and prevent international protection applicants from lodging claims in several Member States (thereby limiting secondary movement of applicants⁴). However, it has been argued that what has actually transpired under the Dublin system is that families have been separated and applicants have been transferred to Member States with inadequate asylum systems.⁵ This article will consider some of the recent amendments made to the Dublin III Regulation. It will consider whether Member States are likely to use the criteria appropriately to bring family relations together, in light of past tendencies not to do so, and whether increased judicial intervention will further prevent transfers to Member States which are overstretched. Finally, the article will consider what the Dublin III Regulation will mean for applicants in Ireland.

¹ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), 29 June 2013.

² Council Regulation (EC) No 343/2003 and the Dublin Convention.

³ Commission Staff Working Document (2008), ‘Impact Assessment’, SEC (2008) 2962.

⁴ A primary aim of the Common European Asylum System

⁵ Jesuit Refugee Service (2013), ‘Protection Interrupted: The Dublin Regulation's Impact on Asylum seekers' Protection’.

Changes introduced by the Dublin III Regulation

The Dublin III Regulation attempts to increase the Dublin system’s efficiency and contains enhanced procedural safeguards for applicants, including a right to information⁶ and a personal interview,⁷ right to an effective remedy,⁸ revision to time limits,⁹ restrictions on detention,¹⁰ and a mechanism for early warning, preparedness and crisis management.¹¹ Unlike the Dublin II Regulation, which related to refugee status only, the Dublin III Regulation applies equally to applicants for and beneficiaries of subsidiary protection¹² to ensure uniformity with the Qualification Directive.¹³

Criteria

The hierarchy of criteria to be considered in determining which Member State is responsible under the Dublin III Regulation remains essentially unchanged from that under the Dublin II Regulation; the Member State where family members are present is at one end of the spectrum and the Member State where the applicant irregularly entered at the other end. Similarly, if no Member State is responsible on the basis of the criteria, the Member State where the applicant first lodged his or her application must determine the claim.¹⁴ Member States however may still derogate from the criteria and consider an application under the discretionary clauses.¹⁵

What has changed is the emphasis on family unity and family reunification possibilities for unaccompanied minors. The best interests of the child¹⁶ and respect for family life¹⁷ must be primary considerations of Member States when applying the Dublin III Regulation. This is accomplished by widening the extent of the unaccompanied minor and family provisions, together with the introduction of the dependent persons clause¹⁸ and broadening of the discretionary clause.¹⁹

⁶ Article 4.

⁷ Article 5.

⁸ Article 27.

⁹ Articles 21, 22, 23, 24, 25 and 29.

¹⁰ Article 28.

¹¹ Article 33.

¹² Recital 10 and Article 2(b).

¹³ Qualification Directive (Directive 2011/95/EU).

¹⁴ Article 3(2).

¹⁵ Article 17.

¹⁶ Recital 13.

¹⁷ Recital 14.

¹⁸ Article 16.

¹⁹ Article 17.

Enhanced Procedural Safeguards

The Dublin III Regulation has enhanced safeguards for children, particularly unaccompanied minors. The principle of the primacy of the best interests of the child is now incorporated throughout the Dublin III Regulation and a requirement has been introduced for unaccompanied minors to have a qualified representative appointed with respect to all procedures.²⁰ Member States are also required to trace family members, siblings and relatives of the unaccompanied minor as soon as possible after his or her application has been lodged.²¹

The Member State responsible for examining an application lodged by an unaccompanied minor is the Member State where a family member of the unaccompanied minor is legally present, provided it is in the best interests of the unaccompanied minor.²² This is broader than the Dublin II Regulation as unaccompanied minors can now be reunited with siblings and a married minor whose spouse is not legally present in a Member State may be reunited with his or her parents or siblings. Where a relative of the unaccompanied minor – defined as an adult aunt, uncle or grandparent²³ – is legally present in another Member State and is able to take care of him or her, the minor may also be united with him or her, provided it is in his or her best interests.²⁴

In the absence of a family member, the Member State responsible for examining the application is the one where the unaccompanied minor lodged his or her application, provided that it is in his or her best interests.²⁵ This provision, which remains unchanged from the Dublin II Regulation, is silent on which Member State is responsible if the unaccompanied minor has lodged applications in multiple Member States. The Court of Justice of the European Union (CJEU) in *MA* considered this provision.²⁶ The Court decided that as “unaccompanied minors form a category of particularly vulnerable persons, it is important not to prolong more than is strictly necessary the procedure for determining the Member State responsible, which means that, as a rule, unaccompanied minors should not be transferred to another Member State”. The CJEU interpreted the corresponding provision in the Dublin II Regulation to

mean “the Member State in which that minor is present after having lodged an asylum application there is to be designated the ‘Member State responsible’.”

During the negotiations of the Dublin III Regulation, the European Parliament and the Council agreed to leave this matter open until the CJEU ruled in *MA*. Subsequently, the Commission released a Proposal in line with the CJEU’s ruling.²⁷ The Proposal specifies that in the absence of a legally present family member, sibling or relative, the Member State responsible, provided it is in the best interests of the minor, is the one in which the minor is present and lodged its most recent application.²⁸ The Proposal also addresses the situation where a minor is present in a Member State without having lodged an application there - the minor will be able to apply for international protection in that Member State.²⁹ UNHCR has welcomed this Proposal as it provides clarity and predictability.³⁰ UNHCR also commends this Proposal, as it “does not distinguish between stages of the procedure in the Member State where the child first lodged an application”; instead the best interests of the child are the primary consideration.³¹

Mouzourakis suggests that *MA* seriously questions the suitability of the Dublin system as the judgment implies that all applicants’ claims would be more quickly dealt with by the Member State where he or she is present.³² This is very persuasive particularly as the Dublin III Regulation have revised but not necessarily tightened time limits and it is possible that the procedures under the Dublin system might in practice become more prolonged and challenging due to the enhanced procedural safeguards for applicants.³³

Dependent Persons and Discretionary Clauses

Another new binding responsibility criterion in the Dublin III Regulation is “the existence of a relationship

²⁷ European Commission’s Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 604/2013 as regards determining the Member State responsible for examining the application for international protection of unaccompanied minors with no family member, sibling or relative legally present in a Member State, COM (2014) 382.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ UNHCR (2015), Protecting the best interests of the child in Dublin Procedures.

³¹ *Ibid.*

³² M. Mouzourakis (2014), “We Need to Talk about Dublin”: Responsibility under the Dublin System as a blockage to asylum burden-sharing in the European Union”, RSC Working Paper Series.

³³ *Ibid.*

²⁰ Article 6(1) and (2).

²¹ Article 6(4).

²² Article 8(1).

²³ Article 2(h).

²⁴ Article 8(2).

²⁵ Article 8(4).

²⁶ C-648/11 *MA v Secretary of State for the Home Department* [2013] ECR I-0000, 6 June 2013.

of dependency”.³⁴ Article 16(1) requires Member States to keep or bring together dependent persons - which specifically includes those who are pregnant, new-borns, seriously ill, severely disabled or old - with his or her child, sibling or parent who is legally resident in a Member State, provided that family ties existed in the country of origin, they can take care of the dependent person and a written request has been made. The Member State responsible for examining the dependent person’s application is the one where the child, sibling or parent is legally resident unless health issues prevent the dependent applicant from travelling for a significant period of time.³⁵ If this is the case, the Member State responsible for examining the dependent person’s application is the one where the dependent applicant is present.³⁶

Although the definition of family members remains relatively narrow by maintaining the restriction to relationships that ‘already existed in the country of origin’,³⁷ the discretionary clause has been refined. It allows Member States to reunite family relations, on humanitarian grounds based in particular on family or cultural considerations, even where that Member State is not responsible under the family unity or dependent persons criteria.³⁸ This permits Members States to act flexibly. Nevertheless, the discretionary clause should not be applied contrary to the applicant’s interests³⁹ and the consent of the applicant must be obtained.⁴⁰ This, in turn, may lead to more sustainable outcomes.⁴¹

Implementation of family related criteria

Under the Dublin III criteria, Member States must now conduct a personal interview of applicants in a language that they understand or are reasonably supposed to understand (although there are limited exceptions to this entitlement).⁴² It is expected that this provision will result in a more accurate application of the criteria under the Dublin III Regulation as Member States will be able to more fully consider the individual circumstances of the applicant including family links

³⁴ Recital 16.

³⁵ Article 16(2).

³⁶ Article 16(2).

³⁷ Article 2(g)

³⁸ Article 17.

³⁹ European Commission’s Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, COM (2008) 820.

⁴⁰ Article 17(2).

⁴¹ UNHCR (2014), “Asylum and international protection in the EU: strengthening cooperation and solidarity”.

⁴² Article 5.

and prevent transfers if a fundamental right of the applicant might be breached.

Notwithstanding their position at the top of the hierarchy, the family criteria were previously underutilised by Member States,⁴³ or were interpreted in a restrictive way.⁴⁴ Mouzourakis contends that the Dublin system has ‘provided incentives for Member States to deflect from the allocation criteria in order to avoid responsibility for applications’.⁴⁵ It is yet to be seen whether the broader discretionary clause in the Dublin III Regulation, which enables Member States to derogate from the responsibility criteria and take responsibility even when they are not the Member State responsible, will be liberally applied.

Furthermore, the Dublin system does not consider other significant links an applicant may have with a particular Member State, such as relations too far removed from the definition in the Dublin III Regulation, previous abode, linguistic ties and work opportunities.⁴⁶ Accordingly there may still remain compelling motivations for secondary movement or to seek to evade the system under the Dublin III Regulation.⁴⁷

Judicial intervention

According to Mouzourakis, the ‘disincentive’ for Member States to correctly implement the responsibility criteria has led to certain Member States at the geographical outskirts of the EU becoming responsible because that is generally where many applicants irregularly enter or lodge their first application.⁴⁸ Mouzourakis notes that the introduction of EURODAC⁴⁹ was a strong signal of Member States’ intention to allocate responsibility to the external borders.⁵⁰ High influxes of asylum applicants in certain Member States at the external borders of the EU have overburdened their asylum and reception systems. Dublin take back requests may in such instances put additional strains on these systems. These pressures have prompted active judicial intervention⁵¹ which has

⁴³ UNHCR (2014), Consolidating the CEAS: innovative approaches after the Stockholm Programme? UNHCR’s recommendations to Italy for the EU Presidency July - December 2014.

⁴⁴ European Council on Refugees and Exiles (2013), “Dublin II Regulation: Lives on hold” - European Comparative Report”.

⁴⁵ Mouzouraki, above n 31, 18.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Council Regulation (EC) No 2725/2000.

⁵⁰ Mouzouraki, above n 31, 13.

⁵¹ Ibid.

had consequences for the implementation of the Dublin system and deflected responsibility from external border Member States.⁵²

The Dublin system is based on the presumption that all Member States operate a fair and effective asylum system, including the provision of suitable reception conditions, respect for the rights of applicants and the grant of protection in accordance with international and European law.⁵³ A common criticism is that it does not take into account the major disparities between the different asylum systems even though it was adopted as part of a wider strategy to establish a common policy on asylum in Europe.⁵⁴

In *M.S.S.*,⁵⁵ the Grand Chamber of the European Court of Human Rights (ECtHR) considered the compatibility of the Dublin II Regulation with the European Convention on Human Rights (ECHR). This judgment essentially stopped transfers under the Dublin system to Greece as the Court concluded that the applicants' detention and living conditions, as well as the deficiencies in Greece's asylum system, indicated that there were substantial grounds to consider that transfers to Greece created a real risk of the applicants being subjected to treatment contrary to Article 3 (prohibition of inhuman or degrading treatment or punishment) of the ECHR. The Greek asylum system was considered to have 'systemic deficiencies' contradicting the presumption that all Member States operate a fair and effective asylum system.

In *N.S.*,⁵⁶ the Grand Chamber of the CJEU stated that the Dublin system anticipates that all Member States would observe the fundamental rights of applicants, including the rights outlined in the Geneva Convention and its 1967 Protocol, the Charter of Fundamental Rights of the European Union (Charter) and the ECHR. The Court, however, made it clear that there can be no conclusive presumption that the responsible Member State observes the fundamental rights of the EU. The Court held that a Member State cannot be "unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum-

seekers in that Member State amount to substantial grounds for believing that the asylum-seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter". In such cases a Member State in which the applicant is present cannot transfer him or her to the responsible Member State; it must instead take responsibility for determining the application itself.

Article 3(2) of the Dublin III Regulation codifies *N.S.* by making reference to 'systemic flaws'.⁵⁷ The provision ensures that the Member State carrying out the determination procedure is responsible for examining an application where the transfer of an applicant to the Member State designated under the Dublin III Regulation is inappropriate because the reception conditions or the shortcomings of the asylum procedure would result in a risk of inhuman and degrading treatment.⁵⁸

Costello and Mouzourakis ask if things have to be 'as bad' as they were in Greece to preclude removal under Dublin.⁵⁹ In *Tarakhel*⁶⁰ the Grand Chamber of the ECtHR found that a Member State planning to transfer an applicant to another Member State has a duty to conduct a "thorough and individualised examination of the situation" of the applicant and suspend the transfer should a risk of inhuman or degrading treatment be established. The *Tarakhel* judgment, however, is difficult to reconcile with *Abdullahi*,⁶¹ a decision of the Grand Chamber of the CJEU, which held that 'the only way' to challenge a transfer under the Dublin system is by 'pleading systemic deficiencies in the asylum procedure and in the conditions for the reception of applicants' such that this would constitute inhuman or degrading treatment within the meaning of Article 4 of the Charter. It will be interesting to see how these two decisions will be resolved in light of the introduction of the Dublin III Regulation and in what circumstances Member States will take responsibility to protect an applicant's fundamental rights.

What does this mean for applicants in Ireland?

The Dublin III Regulation entered into force on 26 June 2013 and applies to all applications for refugee status and subsidiary protection status, lodged on or

⁵² Ibid.

⁵³ UNHCR (2010), "UNHCR oral intervention before the European Court of Human Rights in the case of *M.S.S. v. Belgium and Greece*".

⁵⁴ Transnational Advisory and Assistance Network for Asylum-Seekers under a Dublin Process (2011), Final Report.

⁵⁵ *M.S.S. v Belgium and Greece*, (2011) 53 EHRR 2.

⁵⁶ Joined Cases C 411/10 *N.S. v Secretary of State for the Home Department* and C 493/10 *M.E. v Refugee Applications Commissioner & Minister for Justice, Equality and Law Reform* [2012] 2 CMLR 9.

⁵⁷ Article 3(2).

⁵⁸ Council of the European Union (2008), Draft Statement of the Council's reasons, 2008/0243 (COD).

⁵⁹ C. Costello & M. Mouzourakis (2015), "Reflections on reading *Tarakhel*: Is 'How Bad is Bad Enough' Good Enough?"

⁶⁰ *Tarakhel v. Switzerland*, Application No. 29217/12 (ECtHR, 4 November 2014).

⁶¹ C-394/12 *Abdullahi v Bundesasylamt* [2013] ECR I-0000, 10 December 2013.

after 1 January 2014. However, the Irish Statutory Instrument (S.I.) pertaining to the Dublin III Regulation only came into operation on 25 November 2014.⁶² Up until 25 November 2014, the Irish authorities suspended outward requests under the Dublin system applying the discretionary clause and examined all applications lodged in Ireland regardless of whether the criteria would have deemed another Member State responsible. During this time, Ireland did, however, process inward requests made from other Member States.

The transitional provisions in the Dublin III Regulation provide that applications for international protection submitted prior to 1 January 2014, where a take charge or take back request was sent to the responsible Member State prior to this date, will be determined under the Dublin II Regulation.⁶³ Conversely in the case of applications submitted prior to 1 January 2014, where a take charge or take back request was sent to the responsible Member State after this date, will be determined in accordance with the procedures under the Dublin III Regulation.⁶⁴

The 2014 S.I. supplements the Dublin III Regulation and outlines procedures for personal interviews⁶⁵ and challenging transfer decisions.⁶⁶ A personal interview will give applicants the opportunity to alert the Office of the Refugee Applications Commissioner (ORAC) of the presence of family members, relatives or other family relations in Ireland (or another Member State) and where appropriate to urge ORAC to be flexible if there is a significant link in Ireland to warrant the use of the discretionary clause, for example to bring together adult siblings or parents and adult children or to ensure family relations that were not formed in the country of origin are reunited.

Consistent with the Dublin III Regulation, the 2014 S.I. now permits a full appeal to the Refugee Appeals Tribunal (RAT), in fact and law, against a transfer decision.⁶⁷ This is very significant since under the former S.I. the RAT could only have regard to whether or not the Member State responsible for the examination of the application had been properly established in accordance with the hierarchy of criteria.⁶⁸ This meant that the RAT was unable to

consider the humanitarian or sovereignty clauses under the Dublin II Regulation. However, the RAT will now be able to consider the corresponding provisions, the dependent persons and discretionary clauses under the Dublin III Regulation. Furthermore, given recent judgments there is also increased scope to argue that transfers to certain countries should not occur and a 'thorough and individualised' assessment must be conducted.⁶⁹ Another significant addition is the availability of an oral appeal to all applicants who request one.

Moreover, in accordance with one of the options provided for in Article 27 of the Dublin III Regulation, the 2014 S.I. specifies that if an applicant appeals a transfer decision, the applicant is entitled to remain in Ireland pending the outcome of the appeal.⁷⁰ This is very noteworthy because under the former S.I. an appeal did not, of itself, operate to suspend the transfer of the application and the applicant to the Member State considered responsible.⁷¹ This meant that if a decision to transfer an applicant was ultimately set aside on appeal, Ireland would have to make arrangements for the applicant to be transferred which in practice could be difficult to arrange leading to further delay.⁷²

Finally, it seems that the 2014 S.I. has created a somewhat unusual inconsistency in the application of deemed withdrawn provisions in Ireland. Pursuant to the Refugee Act, 1996 (as amended) an applicant for refugee status may withdraw⁷³ or be deemed to have withdrawn his or her application if they fail to comply with certain requirements.⁷⁴ In these circumstances, a recommendation that the applicant should not be declared to be a refugee is made.⁷⁵ An applicant may not appeal such a recommendation in the case of a withdrawn application, however he or she may subsequently seek the permission of the Minister in the normal way to make a subsequent application pursuant to section 17(7) of the Refugee Act, 1996 (as amended).⁷⁶ Under the 2014 S.I., where the State agrees to take back an applicant pursuant to the Dublin III Regulation, the applicant may have his or her application reopened without the need to apply to the Minister for permission under s.17(7).⁷⁷ The disparity arises as a consequence of Ireland opting into the

⁶² S.I. No. 525 of 2014, 25 November 2014.

⁶³ Article 49.

⁶⁴ Article 49; however the criteria to be applied in determining which Member State is responsible will be that contained under the Dublin II Regulation.

⁶⁵ Regulation 4.

⁶⁶ Regulation 6.

⁶⁷ Regulation 6(1).

⁶⁸ *Refugee Act 1996 (Section 22) Order 2003*, S.I. No. 423 of 2003, 15 September 2003, Article 8(8).

⁶⁹ *Tarakhel v. Switzerland*, Application No. 29217/12 (ECHR, 4 November 2014).

⁷⁰ Regulation 7(1).

⁷¹ Article 6(2)(b).

⁷² Article 6(2)(c).

⁷³ Section 11(9).

⁷⁴ Sections 11(10) and 11(11).

⁷⁵ Section 13(2)(b).

⁷⁶ Section 17(7).

⁷⁷ Regulation 10.

Recast Dublin Regulation but not the Recast Procedures Directive. As a result the anomalous situation arises in the case of an applicant whose application has been withdrawn or deemed withdrawn, that if they travel to another Member State and are taken back by Ireland under the Dublin III Regulation, they will be in a more advantageous position than had they not left the State.

The 2014 S.I. has only been in operation now for a number of months and Ireland certainly has not been the only country to experience delay in the full implementation of the Dublin III Regulation. It will be interesting to see whether Member States, including Ireland, will act more flexibly than they have previously done to bring family relations together and prevent transfers to Member States which are overstretched. By doing so, this may reduce incentives to evade the Dublin system or move on to another Member State leading to more permanent outcomes for applicants for international protection, thus reducing secondary movement, one of the primary aims of the Common European Asylum System.

White Monsters and Deadly Beliefs: The Killing of People with Albinism in Tanzania⁷⁸



Patrick Dowling, Refugee Documentation Centre

Introduction

In May 2014 40-year-old Munghu Lugata from Mwachalala, was murdered, having had her left leg and two fingers from her left hand hacked off⁷⁹; Munghu was attacked because she was a person with albinism.⁸⁰ Lugolola Bunzari, a 7-year-old boy with albinism from Kanunge, was also attacked and killed because of his albinism, having had his forehead slashed and left arm chopped off in January 2013.⁸¹ In

⁷⁸ White Monsters is one of the terms in Tanzania used to describe people with Albinism, see: Under the Same Sun (February 2014) *Classifying Albinism: Transforming Perceptions & Ushering In Protection*, p.31 <http://www.underthesamesun.com/sites/default/files/Albinism-A%20Definition%20for%20A%20Change.pdf>; Following *Under the Same Sun* guidelines, this article will use the term “Albinism” in delineation, see: Under the Same Sun (Undated) “*Albino*” Vs “*Person With Albinism (PWA)*” http://www.underthesamesun.com/sites/default/files/WHY-WE-PREFER-THE-TERM-PERSON-WITH-ALBINISM_0.pdf

⁷⁹ UN News Service (15 May 2014) *UN rights chief calls for greater protection for Albinos after barbaric killing in Tanzania*

<http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=printdoc&docid=5379c4a14>

⁸⁰ The Guardian (14 May 2014) *Killers of people with albinism strike again* <http://www.ippmedia.com/frontend/index.php?l=67820>; The Guardian (15 May 2014) *UTSS condemns killing of woman with albinism* <http://www.ippmedia.com/frontend/index.php?l=67861>

⁸¹ Reuters (5 March 2013) *U.N. condemns "abhorrent" attacks on Tanzania albinos* <http://www.reuters.com/article/2013/03/05/tanzania-albinos-idUSL6N0BXL1G20130305>;

Office of the United Nations High Commissioner for Human Rights (12 September 2013) *Persons with albinism, Report*



January 2008 Mariam Eammanuel, aged 5, from Nyangh'olo, had her legs chopped off in another killing associated with the victim being a person with albinism.⁸² The majority of attacks against people with albinism in Tanzania are against children.⁸³ Attacks against people with albinism in Tanzania occur due to witchcraft practices and beliefs about albinism.⁸⁴ This article focuses on attacks and killings of those with albinism in Tanzania including governmental and societal responses.

Fatal Discrimination

From 2000 to 2015 over 70 persons with albinism have been killed in Tanzania.⁸⁵ In 2008 alone, over 25

*of the Office of the United Nations High Commissioner for Human Rights**, p.6

http://www.underthesamesun.com/sites/default/files/Attacks%20and%20discrimination%20against%20persons%20with%20albinism%20-%20%20UN%20OHCHR%20Report_1.pdf

⁸² The Guardian (21 August 2014) *Albinos' right to life compromised*

<http://www.ippmedia.com/frontend/index.php?l=71282>;
On the Spot: Albinos in Tanzania (25 July 2010) *Mother describes how her albino child was killed*
<http://albinos-in-tanzania.blogspot.ie/2010/07/mother-describes-how-her-albino-child.html>

⁸³ Under the Same Sun (16 April 2013) *Children with Albinism: Violence & Displacement*, p.12

http://www.ecoi.net/index.php?js=true&countrychooser_country=190232%3A%3ATanzania%2C+United+Republic&ExtendedSearchFormTab=normal&ES_countrychooser_country=190232%3A%3ATanzania%2C+United+Republic%3A%3ATZ%3A%3ATZ%3A%3A190235%3A%3A%3A%3AAtanzania-united-republic%3A%3A341902&ES_query=sun&ES_query_hidden=&ES_source=&ES_documenttype=&ES_orlanguage=&ES_after=&ES_before=&ES_sort_by=1&ES_usethesaurus=on&x=0&y=0

⁸⁴ Washington Post (6 October 2014) *Seeking refuge for young persons with albinism in Tanzania*

<http://www.washingtonpost.com/news/in-sight/wp/2014/10/06/persons-with-albinism/>;
Under the Same Sun (February 2014) *Classifying Albinism: Transforming Perceptions & Ushering In Protection*, p.4
<http://www.underthesamesun.com/sites/default/files/Albinism-A%20Definition%20for%20A%20Change.pdf>; &
The Guardian (4 November 2008) *Albinos live in fear after body part murders*

<http://www.theguardian.com/world/2008/nov/04/tanzania-albinos-murder-witchcraft>

⁸⁵ BBC News (19 January 2015) *Tanzania offers reward for missing 4-year-old albino*

<http://www.bbc.com/news/world-africa-30886207>;
CNN (9 June 2014) *'We are killed, we are hunted': Albino activist fights witchcraft murders*
<http://edition.cnn.com/2013/05/17/world/africa/josephatorner-albinism-tanzania/>;

people with albinism were killed, though the total of killings from 2008 into 2015, may be higher due to many cases going unreported.⁸⁶ Attacks and killings of people with albinism have occurred across Africa including in South Africa, Egypt and Burundi.⁸⁷ The

National Geographic (11 October 2013) *As Tanzania's Albino Killings Continue, Unanswered Questions Raise Fears*

<http://news.nationalgeographic.com/news/2013/10/131011-albino-killings-witch-doctors-tanzania-superstition/>; &
United Nations Office of the High Commissioner for Human Rights (4 December 2014) *Protect the rights of people with albinism*

<http://www.ohchr.org/EN/NewsEvents/Pages/rightspeoplewithalbinism.aspx>

⁸⁶ The Times (2 January 2015) *Albino girl feared killed for witch doctors' potion*

<http://www.lexisnexis.com/uk>;
New York Times (8 June 2008) *Albinos, Long Shunned, Face Threat in Tanzania*

http://www.nytimes.com/2008/06/08/world/africa/08albino.html?_r=0&pagewanted=print;

The Guardian, *op.cit.*, ;

Reuters (5 May 2011) *Albinos in Tanzania murdered or raped as AIDS "cure"*

<http://www.reuters.com/article/2011/05/05/us-tanzania-albinos-aids-idUSTRE7441P020110505>;

Under the Same Sun (21 August 2014) *11 days of horror creates fear in Tanzania*

http://www.underthesamesun.com/sites/default/files/NR%20-%20August%2021%202014_1.pdf;

Under the Same Sun (15 July 2013) *History of Attacks against Persons with Albinism (PWA)*, p.4

<http://www.underthesamesun.com/sites/default/files/History%20of%20Attacks%20against%20PWA.pdf>; &

Office of the United Nations High Commissioner for Human Rights (12 September 2013) *Persons with Albinism, Report of the Office of the United Nations High Commissioner for Human Rights**, p.6; p.10

http://www.underthesamesun.com/sites/default/files/Attacks%20and%20discrimination%20against%20persons%20with%20albinism%20-%20%20UN%20OHCHR%20Report_1.pdf

⁸⁷ The Times (16 January 2015) *Ban on witchdoctors to end albino killings*

<http://www.lexisnexis.com/uk>;
United Nations Office of the High Commissioner for Human Rights (4 December 2014) *Protect the rights of people with albinism*

<http://www.ohchr.org/EN/NewsEvents/Pages/rightspeoplewithalbinism.aspx>;

Office of the United Nations High Commissioner for Human Rights (12 September 2013) *Persons with albinism, Report of the Office of the United Nations High Commissioner for Human Rights**, p.6

http://www.underthesamesun.com/sites/default/files/Attacks%20and%20discrimination%20against%20persons%20with%20albinism%20-%20%20UN%20OHCHR%20Report_1.pdf; &

UNHCR (29 January 2009) *Witchcraft allegations, refugee protection and human rights: a review of the evidence*, p.18

vast majority of attacks against people with albinism in Africa have however, happened in Tanzania.⁸⁸

The number of people with albinism in Tanzania is approximately 30,000⁸⁹ out of a total population of just under 50 million.⁹⁰ A significant majority of the population believe in witchcraft.⁹¹ Such beliefs include the contention that bodily parts of people with albinism are invested with magical or supernatural powers which, when concocted as part of a potion by a witchdoctor, bring good fortune, luck and health to the witchdoctors adherents.⁹² An article published by the

<http://www.refworld.org/docid/4a54bbefd.html>
Under the Same Sun (16 April 2013) *Children with Albinism: Violence & Displacement*, p.11
http://www.ecoi.net/index.php?js=true&countrychooser_country=190232%3A%3ATanzania%2C+United+Republic&ExtendedSearchFormTab=normal&ES_countrychooser_country=190232%3A%3ATanzania%2C+United+Republic%3A%3ATZ%3A%3ATZ%3A%3A190235%3A%3A%3A%3AAtanzania-united-republic%3A%3A341902&ES_query=sun&ES_query_hidden=&ES_source=&ES_documenttype=&ES_origlanguag=&ES_after=&ES_before=&ES_sort_by=1&ES_usethesaurus=on&x=0&y=0;

⁸⁸ Under the Same Sun (13 January 2015) *Reported Attacks of Persons with Albinism*, p.10

<http://www.underthesamesun.com/node/525>

⁸⁹ BBC News (9 December 2014) *Tanzania's albino community: 'Killed like animals'*

[http://www.bbc.co.uk/news/world-africa-30394260;](http://www.bbc.co.uk/news/world-africa-30394260)

BBC News (19 January 2015) *Tanzania offers reward for missing 4-year-old albino*

<http://www.bbc.com/news/world-africa-30886207>

⁹⁰ CIA (20 June 2014) *The World Factbook, Tanzania*
<https://www.cia.gov/library/publications/the-world-factbook/geos/tz.html>

⁹¹ The Times (2 January 2015) *Albino girl feared killed for witch doctors' potion*

<http://www.lexisnexis.com/uk>

⁹² Reuters (14 January 2015) *Tanzania bans witch doctors to deter albino killings*

<http://www.reuters.com/article/2015/01/14/us-tanzania-albinos-idUSKBN0KN16B20150114;>

BBC News (13 January 2015) *Tanzania bans witchdoctors over albino attacks*

[http://www.bbc.com/news/world-africa-30794831;](http://www.bbc.com/news/world-africa-30794831)

Office of the United Nations High Commissioner for Human Rights, *op.cit.*;

Under the Same Sun (15 July 2013) *History of Attacks against Persons with Albinism (PWA)*, p.4

[http://www.underthesamesun.com/sites/default/files/History%20of%20Attacks%20against%20PWA.pdf;](http://www.underthesamesun.com/sites/default/files/History%20of%20Attacks%20against%20PWA.pdf)

Reuters (5 May 2011) *Albinos in Tanzania murdered or raped as AIDS "cure"*

<http://www.reuters.com/article/2011/05/05/us-tanzania-albinos-aids-idUSTRE7441P020110505;>

UNHCR, *op.cit.*, p.17; &

BBC News (21 July 2008) *Living in fear: Tanzania's albinos*
<http://news.bbc.co.uk/2/hi/africa/7518049.stm>

Washington Post in October 2014 includes malaria as an example where healing can occur with usage of a witchdoctor's potion which includes bodily parts of someone with albinism.⁹³ The UNHCR in September 2013 cite usage by fishermen and miners of bodily parts of people with albinism which is believed will bring good in their endeavors.⁹⁴ The fishing and mining regions of Mwanza, Mara and Shinyanga around Lake Victoria are among the areas of Tanzania where people with albinism are most at risk.⁹⁵ The United Nations has referenced the issue of increased threats to people with albinism in Tanzania around the time of elections - next due in October 2015 - where political campaigners have been known to turn to witchdoctors for good luck.⁹⁶ The United Nations has also reported on law officials' lacuna in dealing with crimes against people with albinism.⁹⁷ A report in

⁹³ Washington Post, *op.cit.*,

⁹⁴ Office of the United Nations High Commissioner for Human Rights, *op.cit.*, p.5

⁹⁵ UNICEF (24 December 2008) *UNICEF calls for crackdown on albino murders in Tanzania*

<http://www.un.org/apps/news/story.asp?NewsID=29409;>

UNHCR, *op.cit.*, p.17 ;

Open Society Institute (June 2013) *Tackling the Dangerous Drift*, pp.24-25

<http://www.opensocietyfoundations.org/reports/tackling-dangerous-drift;>

United States Department of State (27 February 2014)

Country Reports on Human Rights Practices for 2013, Tanzania

<http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper;>

National Geographic, *op.cit.*, ;

BBC News (21 July 2008) *Living in fear: Tanzania's albinos*

[http://news.bbc.co.uk/2/hi/africa/7518049.stm;](http://news.bbc.co.uk/2/hi/africa/7518049.stm) &

Reuters (5 May 2011) *Albinos in Tanzania murdered or raped as AIDS "cure"*

<http://www.reuters.com/article/2011/05/05/us-tanzania-albinos-aids-idUSTRE7441P020110505>

⁹⁶ Agence France Presse, *op.cit.*, ;

Agence France Presse (14 May 2014) *Tanzania 'witch doctors' arrested after albino murder*

[http://www.lexisnexis.com/uk;](http://www.lexisnexis.com/uk) &

Under the Same Sun (13 May 2014) *Shocking Brutality in Tanzania*

http://www.underthesamesun.com/sites/default/files/NR%20-%20May%2013%202014_0.pdf

⁹⁷ National Geographic, *op.cit.*, ; &

Office of the United Nations High Commissioner for Human Rights (12 September 2013) *Persons with albinism, Report of the Office of the United Nations High Commissioner for Human Rights**, p.4

http://www.underthesamesun.com/sites/default/files/Attacks%20and%20discrimination%20against%20persons%20with%20albinism%20-%20UN%20OHCHR%20Report_1.pdf

See also:

UNHCR, *op.cit.*, p.18; &

BBC News, *op.cit.*,

BBC News, *op.cit.*,

January 2015 by BBC News notes the lack of convictions for those accused of murder against people with albinism.⁹⁸

In 2013 a new trend emerged in attacks on people with albinism in Tanzania where perpetrators hacked at the bodies of live people believing it would make the resulting potion more potent due to the screaming of the victims.⁹⁹ The Times reports on a case from August 2014 where a 15-year-old girl in Tabora had her right arm hacked off.¹⁰⁰ The body parts of people with albinism are sold on the black market for usage in witchcraft rituals; body parts sell for around \$600 with a full corpse valued approximately at \$75,000.¹⁰¹

⁹⁸ BBC News (13 January 2015) *Tanzania bans witchdoctors over albino attacks*

<http://www.bbc.com/news/world-africa-30794831>

See also:

Reuters (5 March 2013) *U.N. condemns "abhorrent" attacks on Tanzania albinos*

<http://www.reuters.com/article/2013/03/05/tanzania-albinos-idUSL6N0BXL1G20130305>;

Voice of America (12 March 2013) *Attacks on Albinos Surge in Tanzania*

<http://www.voanews.com/content/attacks-on-albinos-surge-in-tanzania/1619907.html>;

Under the Same Sun (16 April 2013) *Children with Albinism: Violence & Displacement*, p.14

http://www.ecoi.net/index.php?js=true&countrychooser_country=190232%3A%3ATanzania%2C+United+Republic&ExtendedSearchFormTab=normal&ES_countrychooser_country=190232%3A%3ATanzania%2C+United+Republic%3A%3ATZ%3A%3ATZ%3A%3A190235%3A%3A%3A%3AAtanzania-united-republic%3A%3A341902&ES_query=sun&ES_query_hidden=&ES_source=&ES_documenttype=&ES_origlanguag=&ES_after=&ES_before=&ES_sort_by=1&ES_usethesaurus=on&x=0&y=0; &

Office of the United Nations High Commissioner for Human Rights, *op.cit.*, p.10

⁹⁹ UNICEF (2013) *Why Invest in Children?*, p.51

http://www.unicef.org/tanzania/resources_14410.html;

Office of the United Nations High Commissioner for Human Rights, *op.cit.*, p.6 ;

Reuters (5 March 2013) *U.N. condemns "abhorrent" attacks on Tanzania albinos*

<http://www.reuters.com/article/2013/03/05/tanzania-albinos-idUSL6N0BXL1G20130305>;

Office of the High Commissioner for Human Rights (4 May 2013) *"Not ghosts, but human beings... persons with albinism"*

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13294&LangID=E#sthash.J73ii5fB.dpuf>; & Voice of America, *op.cit.*,

¹⁰⁰ The Times, *op.cit.*,

¹⁰¹ Agence France Presse (14 January 2015) *Tanzania bans witchdoctors to stem grisly albino murders*

<http://reliefweb.int/report/united-republic-tanzania/tanzania-bans-witchdoctors-stem-grisly-albino-murders>;

People with albinism in Tanzania are prone to what the NGO Under the Same Sun calls "fatal discrimination".¹⁰² And alongside attacks on bodily parts, people with albinism have to contend with familial rejection of children with albinism, and discrimination in healthcare, education, housing and employment.¹⁰³ Most people with albinism in Tanzania who do manage to find employment work outdoors in agricultural labour, subsistence farming, or roadside trading for example.¹⁰⁴ Working outdoors and exposure to the sun is extremely dangerous for people with albinism due to the reduced protection their skin offers to the sun and they run the risk of developing skin cancer.¹⁰⁵

Albinism

Albinism is a hereditary genetic condition which leaves people lacking in pigmentation in their hair, eyes and skin.¹⁰⁶ A consequence of this is extreme

The Times (16 January 2015) *Ban on witchdoctors to end albino killings*

<http://www.lexisnexis.com/uk>;

United Nations Office of the High Commissioner for Human Rights (4 December 2014) *Protect the rights of people with albinism*

<http://www.ohchr.org/EN/NewsEvents/Pages/rightspeoplewithalbinism.aspx>; &

National Geographic, *op.cit.*,

¹⁰² Under the Same Sun (Undated) *Poor Documentation of PWA Related Discrimination and Attacks in sub-Saharan Africa*, p.1

<http://www.underthesamesun.com/sites/default/files/Poor%20Documentation%20re%20PWA%20in%20Africa.pdf>

¹⁰³ United Nations Office of the High Commissioner for Human Rights, *op.cit.*, ;

The Guardian (15 July 2014) *Doctors alleged to misguide persons with albinism – UTSS*

<http://www.ippmedia.com/frontend/index.php?l=69972>; & National Geographic, *op.cit.*,

¹⁰⁴ *ibid*; &

International Federation of Red Cross And Red Crescent Societies (19 December 2009) *Through albino eyes: The plight of albino people in Africa's Great Lakes region and a Red Cross response - Advocacy report*, p.9

<http://reliefweb.int/report/burundi/through-albino-eyes-plight-albino-people-africas-great-lakes-region-and-red-cross>

¹⁰⁵ New York Times, *op.cit.*, ; &

International Federation of Red Cross And Red Crescent Societies (28 June 2010) *Tanzania: Living in fear: daylight provides no protection for albinos*

<http://reliefweb.int/report/united-republic-tanzania/tanzania-living-fear-daylight-provides-no-protection-albinos>

¹⁰⁶ Agence France Presse (9 January 2015) *UN demands investigation into albino girl abduction*

<http://www.dw.de/un-demands-investigation-into-albino-girl-abduction/a-18181211>

vulnerability to sun exposure and bright lights.¹⁰⁷ People with albinism are therefore more susceptible to developing skin cancer.¹⁰⁸ People with albinism are also usually visually impaired.¹⁰⁹ Albinism affects people all over the world though is most prevalent in Tanzania where it is estimated 1 in 1,400 people are affected.¹¹⁰ The ratio for North American and Europe is 1 in every 20,000.¹¹¹ Inbreeding in Tanzania is considered a factor in the rate of albinism there.¹¹² There are many forms of albinism with oculocutaneous albinism being the most common, including in East Africa.¹¹³

Conclusion

The government of Tanzania in January 2015 banned witchdoctors in an effort to stem the attacks on people with albinism.¹¹⁴ The government has also established

¹⁰⁷ Under the Same Sun (Undated) *UTSS Official Summary of Albinism*

<http://www.underthesamesun.com/sites/default/files/Albinism-A%20Definition%20for%20A%20Change.pdf>

¹⁰⁸ Washington Post, *op.cit.*, ;

Under the Same Sun (February 2014) *Classifying Albinism: Transforming Perceptions & Ushering In Protection*, p.7

<http://www.underthesamesun.com/resources>;

International Federation of Red Cross And Red Crescent Societies (19 December 2009) *Through albino eyes: The plight of albino people in Africa's Great Lakes region and a Red Cross response - Advocacy report*, p.8

<http://reliefweb.int/report/burundi/through-albino-eyes-plight-albino-people-africas-great-lakes-region-and-red-cross>

¹⁰⁹ UNICEF (May 2013) *The State of the World's Children 2013, Children with Disabilities*, p.6

<http://www.unicef.org/sowc2013/report.html>

¹¹⁰ Reuters (14 January 2015) *Tanzania bans witch doctors to deter albino killings*

<http://www.reuters.com/article/2015/01/14/us-tanzania-albinos-idUSKBN0KN16B20150114>;

Associated Press (25 August 2014) *UN: Children with albinism segregated in Tanzania*

<http://www.lexisnexis.com/uk>; &

Under the Same Sun (Undated) *Frequency of Albinism / Rates of Occurrence*

<http://www.underthesamesun.com/sites/default/files/Frequency%20of%20Albinism.pdf>

¹¹¹ Office of the United Nations High Commissioner for Human Rights, *op.cit.*, p.4 ; &

Agence France Presse, *op.cit.*,

¹¹² The Times, *op.cit.*,

¹¹³ Office of the United Nations High Commissioner for Human Rights, *op.cit.*, p.4

¹¹⁴ Agence France Presse (14 January 2015) *Tanzania bans witchdoctors to stem grisly albino murders*

<http://reliefweb.int/report/united-republic-tanzania/tanzania-bans-witchdoctors-stem-grisly-albino-murders>;

BBC News (19 January 2015) *Tanzania offers reward for missing 4-year-old albino*

a task force which will: prosecute witchdoctors defying the ban; conduct operations in areas – including Mwanza, Shinyanga and Tabora – where people with albinism have been most attacked; and review previous court cases involving attacks and killings.¹¹⁵ The Tanzania Albino Society will be involved in the task force alongside government agencies including the police.¹¹⁶ An education campaign on albinism has also been launched in January 2015 by the government in tandem with the task force and the ban on witchdoctors.¹¹⁷ The UNHCR in December 2014 had noted the government's earlier measures to deal with the issue of attacks and killings on people with albinism in the country.¹¹⁸ And alongside governmental initiatives, support and advocacy groups for people with albinism have emerged in recent years.¹¹⁹ Indeed, a United Nations representative called people with albinism in Tanzania an "exceptionally vulnerable community".¹²⁰ Furthermore, refugee status has been granted internationally to asylum seekers with albinism from Tanzania.¹²¹



<http://www.bbc.com/news/world-africa-30886207>;

The Telegraph (14 January 2015) *Tanzania bans witchdoctors after albino murders; East African country has seen surge in murders, savage attacks and grave robberies of people with albinism*

<http://www.lexisnexis.com/uk>; &

BBC News (9 December 2014) *Tanzania's albino community: 'Killed like animals'*

<http://www.bbc.co.uk/news/world-africa-30394260>

¹¹⁵ Reuters, *op.cit.*, ; &

Voice of America (14 January 2015) *Tanzania Bans Witchcraft to Stop Albino Killings*

<http://www.voanews.com/content/tanzania-bans-witchcraft-to-stop-albino-killings/2598171.html>

¹¹⁶ Agence France Presse, *op.cit.*,

¹¹⁷ *ibid*

¹¹⁸ United Nations Office of the High Commissioner for Human Rights (4 December 2014) *Protect the rights of people with albinism*

<http://www.ohchr.org/EN/NewsEvents/Pages/rightspeoplewithalbinism.aspx>

¹¹⁹ National Geographic, *op.cit.*,

¹²⁰ UN News Service (15 May 2014), *op.cit.*,

¹²¹ Under the Same Sun (February 2014) *Classifying Albinism: Transforming Perceptions & Ushering In Protection*, pp.17-18

<http://www.underthesamesun.com/sites/default/files/Albinism-A%20Definition%20for%20A%20Change.pdf>

Disability and Asylum Law



Catherine Fahy, Refugee Legal Service

In the asylum process certain groups are rightly provided with specific safeguards; traditionally awareness of the complex vulnerability of women and children means that they are groups who are afforded special protection. However, scant attention has been paid to how to deal with persons with disabilities who find themselves displaced by war or persecution and the question of whether a person with a disability can be considered a member of a social group is not a heavily litigated issue. This article will look at the difficulties such persons face and consider the legal obligations owed to them by advocates and adjudicators.

Difficulties faced by asylum seekers with disabilities

According to the World Health Organisation, approximately 15% of the world's population have some form of disability¹²². In conflict situations numbers could be much higher as temporary or new permanent disability affects many people with injuries.¹²³ The difficulties that all asylum seekers face are compounded for those with disabilities. In many cases the very process of identifying persons with disabilities is difficult; persons with disabilities will have a diverse range of impairments and degrees thereof and thus varying assistance needs. Marginalised at the best of times, they face additional challenges compared to those faced by other asylum seekers during flight and displacement. Hurdles can be

¹²² World Health Organisation Disability and Health Factsheet No 352 December 2014 Given that there were 51.2 million displaced people at the end of 2013, it can be estimated that there are 7.68 million displaced persons with disabilities

¹²³ Disability and displacement Aleema Shivji July 2010

due to communication or physical barriers and potentially negative attitudes. Persons with mental or intellectual difficulties may face particular difficulties in substantiating their claim, recalling what has happened to them with coherence and articulating their reception needs.¹²⁴ In addition, people with disabilities who are outside their country of origin can face an increased level of disability because of changes in their environment or lack of appropriate care and services. Furthermore, persons with disabilities are extremely vulnerable to protection violations ranging from physical, sexual and emotional abuse. Extremely worrying is the estimate that children with disabilities are three to four times more likely to be physically or emotionally abused.¹²⁵

Identifying Disability

Efforts should be made by both advocates and adjudicators to identify persons with disabilities in the asylum process as early as possible. The Preamble to the UN Convention on the Rights of Persons with Disabilities (CRPD)¹²⁶ describes disability as, "*an evolving concept*" and does not provide a full definition of the term. The Disability Convention at Article 1 recognises that "*persons with disabilities*" includes "*those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.*" Thus the CRPD signals a shift towards acceptance of the 'social' model of disability which acknowledges that a person's disability is created more by society than by inherent physical impairment.¹²⁷

In this jurisdiction applicants are asked to declare any special needs/disabilities in their initial Section 8 interview. Following on from this, the Questionnaire asks applicants:

"Do you have a disability or medical condition which is relevant to or affects your application or which would necessitate the provision of special facilities during your interview?" (Question 30)

For advocates to be able to assist and advise applicants on how to answer this question, it would be most

¹²⁴ See UNHCR 2007a: para.11; Amnesty 2007:33)-

¹²⁵ Nordstrom, K. World Blind Union (2004) Quality Education for Persons with Disabilities

¹²⁶ United Nations Convention on the Rights of Persons with Disabilities (CRPD) entered into force 3 May 2008

¹²⁷ Mary Crock, Christine Ernst & Ron Mc Callum 'Where Disability and Displacement Intersect: Asylum Seekers and Refugees with Disabilities' International Journal of Refugee Law Vol. 24 No. 4 pp 737

helpful to have sight of their Medical Screening Form. Whilst this may not provide a detailed analysis of a client's disability, it should at least aid in identifying the nature of a disability and the supports that will be required. Information in relation to the asylum process needs to be provided in an accessible format and it may be necessary to grant persons with disabilities extra time to prepare their claim. At substantive interview challenges facing applicants with a disability can include difficulties in understanding questions and instructions, difficulties in communicating answers intelligibly, behavioural difficulties, difficulties in delivering a coherent and consistent testimony and/or difficulties in recalling and recounting events. As a result an applicant may appear incoherent, inconsistent, defensive or uncommunicative. The need to demonstrate subjective fear can be problematic for people with mental or intellectual disabilities who lack the psychological or cognitive abilities to appreciate situations that are objectively dangerous.¹²⁸ Canadian courts recognise that where a refugee applicant is incompetent by virtue of age or disability it may be appropriate to infer a subjective fear from the available evidence.¹²⁹

It is submitted that identifying asylum seekers with a disability is of vital importance because the disability may constitute a vulnerability which needs to be taken into account when protection needs are being assessed. This is in line with the UNHCR Resettlement Handbook which states that

*When assessing whether a particular treatment or measures amount to persecution, decision makers consider it/them in light of the opinions, feelings and psychological make-up of the applicant. The same act may affect people differently depending on their previous history, profile and vulnerability. In each case, decision makers must determine in light of all the specific individual circumstances whether or not the threshold of persecution is reached.*¹³⁰

Accommodating Disability

In addition to identifying persons with a disability, it is equally important to make reasonable procedural accommodations for such persons so that their experience of disability is not exacerbated and so they

¹²⁸ Mary Crock and Laurie Berg, *Immigration, Refugees and Forced Migration: law, Policy and Practice in Australia* (Federation Press 2011), 383

¹²⁹ *Canada (Minister of Citizenship v Immigration) v Patel*, [2008] FC 747, paras 29 and 38 (Lagacé DJ) *Yusuf v Canada (Minister of Employment and Immigration)* [1992] 1 FC 629, 632 (Hugessen JA)

¹³⁰ UNHCR, 'Resettlement Handbook' UNHCR (2011)

can participate fully in the refugee status determination process. The CRPD requires state parties to provide 'reasonable accommodation' which is defined as "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms" to persons with disabilities".¹³¹ Under this treaty it is clear that disability is a protected status in international law; states "undertake to secure and promote the full realisation of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability"

In his Interim Report of 28 July 2008 the then United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr Manfred Nowak, noted as follows:

"50. ... Persons with disabilities often find themselves in [situations of powerlessness], for instance when they are deprived of their liberty in prisons or other places... In a given context, the particular disability of an individual may render him or her more likely to be in a dependent situation and make him or her an easier target of abuse...

*...
53. States have the further obligation to ensure that treatment or conditions in detention do not directly or indirectly discriminate against persons with disabilities. If such discriminatory treatment inflicts severe pain or suffering, it may constitute torture or other form of ill-treatment....*

54. The Special Rapporteur notes that under Article 14, paragraph 2 of the CRPD, States have the obligation to ensure that persons deprived of their liberty are entitled to 'provision of reasonable accommodation.' This implies an obligation to make appropriate modifications in the procedures and physical facilities of detention centres... to ensure that persons with disabilities enjoy the same rights and fundamental freedoms as others, when such adjustments do not impose disproportionate or undue burden. The denial or lack of reasonable accommodation for persons with disabilities may create detention ... conditions that amount to ill-treatment or torture."

Ireland was amongst the 82 countries which signed the UN Convention on the Rights of Persons with Disabilities in December 2007. However, Ireland has failed to ratify the Convention and so has not made the

¹³¹ CRPD Articles 5(3), 14(2), 18(2) (c), 18(5), 27(1)(i)

appropriate legislative changes to abide by the Convention terms.

Disability and the 1951 Refugee Convention

The Refugee Convention¹³² applies only to persons who meet the definition of refugee under the five grounds set out in Article 1A(2) of the instrument (as modified by the 1969 Protocol). This requires that a refugee's fear is of persecution on one of five groups namely race, religion, nationality, membership of a particular social group or political opinion.

Persecution has been defined as acts which are

- (a)*sufficiently serious by their nature and repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15 (2) of the European Convention for the Protection of Human Rights and Fundamental freedoms; or*
- (b)*an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a)*¹³³

This fear is to be “*well-founded*” which imports both subjective and objective elements: asylum seekers must actually fear persecution and that fear must be reasonable.¹³⁴ The UNHCR Handbook states that discrimination can amount to persecution where it produces “consequences of a substantially prejudicial nature.”¹³⁵ Such consequences include serious restrictions on the right to earn a living or serious restrictions on access to normally available educational facilities. In addition, measures which do not of themselves amount to persecution, may amount to persecution when they are considered in multiple realms.¹³⁶

¹³² The 1951 Convention (189 U.N.T.S. 2545 entered into force on April 22, 1954) together with the Protocol relating to the Status of Refugees adopted in 1967 form the cornerstone of today's international regime of refugee protection.

¹³³ Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country nationals or stateless persons as refugees or as persons who otherwise need international protection and the context of the protection granted.

¹³⁴ UNHCR, ‘Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees’, UN doc HCR/IP/4/Eng/REV.1 (1992, rev edn), paras 38-41

¹³⁵ Paragraph 54 UNHCR

¹³⁶ Paragraph 53 UNHCR

The most appropriate Convention ground for a person with a disability would appear to be membership of a particular social group. However, there is no universally accepted definition of what constitutes a ‘*particular social group*’. The UNHCR proposes that a particular social group be defined as “*a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.*”¹³⁷

Meeting the key elements of the Convention definition of a refugee can prove challenging for a person with a disability who is seeking asylum. The harm experienced by persons with disabilities is often the result of omission by the state rather than a series of positive acts. Decision makers will investigate whether the omission arises from something more than resource limitations. If it is grounded in a deliberate and wilful disregard for the rights of persons with disabilities, it may constitute persecution by reason of a person's membership of a particular social group comprising persons with disabilities.¹³⁸ In other jurisdictions decision makers have been willing to accept that a social group may be constituted by a range of physical and intellectual disabilities including visual impairment¹³⁹ and congenital deafness¹⁴⁰ In adjudicating such claims, it has been recognized that “[w] hile not all disabilities are ‘*innate*’ or ‘*inherent*’ ... they are usually, unfortunately, ‘*immutable*’.”¹⁴¹ According to Hathaway and Foster¹⁴² it is nonetheless clear that a group defined by reference to disability is within the ambit of social group under *ejusdem generis* analysis and that disability would classify as an innate or unchangeable characteristic.

Asylum Seekers with Disabilities in the Directives

Under the current various asylum directives there are limited general safeguards for the category of

¹³⁷ UNHCR ‘Guidelines on International Protection: Guideline No. 2 at para. 11 “Membership of a particular social group” within the context of article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees’ 7 May 2002

¹³⁸ Mary Crock, Christine Ernst & Ron McCallum ‘Where Disability and Displacement Intersect: Asylum Seekers and Refugees with Disabilities’ International Journal of Refugee Law Vol. 24 No. 4 pg.753

¹³⁹ Canada Re BOG, VAO-03441[2001] CRDD 121

¹⁴⁰ Re H (GY), T94-05654 and T94-05655 [1995] CRDD 70

¹⁴¹ Tchnukhrova v Gonzales (USCA, 9th Cir., Apr. 21, 2005

¹⁴² The Law of Refugee Status, 2014

'vulnerable' groups.¹⁴³ The Reception Conditions Directive proposes individual assessments in order to establish an applicant's special needs and strong provisions with regards to health care. Under Article 21 people with disabilities are considered to belong to a category of vulnerable applicants which "*shall be considered to have special needs.*" The Recast Asylum Procedures directive also recognises the '*special needs*' of '*disabled people*'. This Directive also provides for an applicant's particular circumstances to be considered in an assessment of credibility. Under Article 13(3)(a), states must ensure that interviewers are "*sufficiently competent to take account of the personal or general circumstances surrounding the application, including the applicant's cultural origin or vulnerability.*"¹⁴⁴

Conclusion

Despite there being general endorsement of the principles of non-discrimination in Community Law, there is no common approach on how to deal with persons with disability in the asylum process. Although not ratified in this jurisdiction, it is submitted that the very existence of the Convention on the Rights of Persons with Disabilities and the Recast Directives should operate to make refugee advocates and adjudicators more alive to the particular vulnerabilities and needs of persons with disabilities.



¹⁴³ The association of disability with vulnerability is contested

¹⁴⁴ Council Directive 2005/85/EC of 1 Dec 2005 on Minimum Standards on Procedures in Member States for granting and withdrawing refugee status

Libya – Two Parliaments, No State? RDC Researcher David Goggins Investigates



David Goggins, Refugee Documentation Centre

Introduction

For 42 years Libya was ruled by the autocratic dictator Muammar Gaddafi who, when he was finally overthrown and killed in October 2011, left behind a country lacking in any meaningful state institutions. Following the ousting of Gaddafi Libya was nominally ruled by a National Transitional Council (NTC) which represented the numerous armed militias which had taken part in the rebellion. The NTC proved incapable of providing stable government, instead fragmenting into rival factions which frequently fought with one another. Elections held in July 2012 resulted in the NTC being replaced by the General National Congress (GNC). This new government failed to bring about the desired transition to democracy and instead the country experienced an intensification of violence between the many competing groups.

Commenting on the events of 2014 Amnesty International states:

"Following months of deepening political polarization and crisis over the legitimacy and mandate of the General National Congress (GNC), Libya's first elected parliament, the country descended into chaos as Benghazi, Derna, Tripoli, Warshafana, the Nafusa Mountains and other areas became engulfed in armed conflicts along political, ideological, regional and tribal lines."¹⁴⁵

Two Centres of Power

In July 2014 elections were held for a new parliament which was to be known as the House of

¹⁴⁵ Amnesty International (25 February 2015) Report 2014/15 – Libya

Representatives (HoR). In this election the Islamists who had dominated the GNC were heavily defeated by liberal secular candidates, who won 158 of the 200 seats available.¹⁴⁶ The defeated Islamists refused to recognise the legitimacy of the HoR and set up a rival parliament which they called the Shura Council of Benghazi Revolutionaries. As a result of this schism Libya now has two competing governments, one of which is based in Benghazi and is backed by a coalition of militias known as Libya Dawn, and a rival government based in Tobruk which is supported by militias from Zintan and Warshafana.¹⁴⁷ The Tobruk government has allied itself with Operation Dignity, a military campaign directed against the Islamists. Operation Dignity was instigated by Khalifa Haftar, a former general who became an opponent of Gaddafi and who is alleged to have links with the CIA.¹⁴⁸ In March 2015 Operation Dignity was formally incorporated into the new Libyan army, with General Haftar appointed as its commander.¹⁴⁹

A recent Human Rights Watch report outlines the current political situation as follows:

“The current armed conflicts, which began in May 2014 in eastern Libya and spread to the west two months later, has left the country with two rival governments: an internationally recognized government based in al-Bayda in the east, and a rival, self-proclaimed government in Tripoli that controls much of western Libya. Both claim to be the legitimate government of all of Libya, but neither has been able to exert control nationally. Meanwhile, Libya’s institutions, particularly its judiciary, are at near-collapse, with courts and prosecutors in most cities no longer functioning because of direct targeting of judges and prosecutors by militants, and general insecurity.”¹⁵⁰

The relationship between the two rival parliaments is also explained by the author of a document published on Qantara, an Internet portal sponsored by several prominent German institutions, who says:

“Each of the two centres of power has put up a government and is co-operating with an alliance of militias. The North-eastern city of Tobruk is the seat of

¹⁴⁶ Turkish Weekly (22 July 2014) Libya publishes parliamentary election results

¹⁴⁷ Amnesty International (30 October 2014) Rule of the gun: Abductions, torture and other militia abuses in western Libya

¹⁴⁸ The New Yorker (23 February 2015) The Unravelling

¹⁴⁹ Federal Office for Migration and Refugees (Germany) (9 March 2015) Briefing Notes

¹⁵⁰ Human Rights Watch (24 February 2015) Libya/Egypt: Civilian Toll in Derna Air Strikes

Prime Minister Abdullah al-Thinni's internationally recognised government, legitimised by its roots in the parliament elected in June 2014. It is linked to the "Karama" (dignity) militia, led by former Gaddafi general Khalifa Haftar, whose goal is to take the Libyan capital, Tripoli. Since August, the capital has been occupied by rebel forces, who have established a parallel government there under Omar al-Hassi. They are allied to the "Fajr" (dawn) group of militias, who are said to have a radical Islamist outlook. However, they are not on the same level as "Ansar al-Sharia", an IS-like organisation operating independently in Benghazi.”¹⁵¹

Human Rights Abuses

Commenting on the many human rights abuses committed by militia groups Amnesty International states:

“Since the start of the armed confrontations, militias on all sides have carried out tit for tat abductions. Many civilians, including civil society activists, lawyers, journalists and public figures have been threatened, abducted and subjected to torture and other ill-treatment solely on account of their origin, opinion or perceived political affiliation”¹⁵²

During 2014 there were hundreds of assassinations in the cities of Benghazi and Derna. Commenting on these crimes Human Rights Watch states:

“The latest killings raise the total number of seemingly politically motivated assassinations to at least 250 in Benghazi and nearby Derna in 2014 alone. No one has claimed responsibility and there have been no known arrests for the killings. Libyan authorities have failed to conduct investigations, or prosecute those responsible for any of the unlawful killings since 2011, fostering a culture of impunity that has fueled further abuses.”¹⁵³

Justice System

The absence of government authority over the militia groups has seriously impacted on the effectiveness of Libya’s justice system. The many problems faced by this system are acknowledged in the Human Rights Watch report for the events of 2014 which states:

¹⁵¹ Qantara (27 January 2015) Civil war in Libya: A stateless society

¹⁵² Amnesty International (30 October 2014) Rule of the gun: Abductions, torture and other militia abuses in western Libya

¹⁵³ Human Rights Watch (24 September 2014) Libya: Assassinations May Be Crimes Against Humanity

“Libya’s justice system suffered serious setbacks. Militias attacked judges, prosecutors, lawyers, and witnesses, causing the closure of courts and prosecutors’ offices in Benghazi, Derna, Sirte, and Sebha, and a near breakdown of the justice system. The Justice Ministry in Tripoli shut down in July due to the fighting there. The government failed to secure control over detainees held in militia-run facilities, including Saif al-Islam Gaddafi, and retained only nominal control of facilities formally under its authority. Authorities failed to grant detainees basic due process rights, including access to lawyers, judicial reviews of their cases, and access to key evidence.”¹⁵⁴

The 2013 annual human rights report published by the US Department of State also commented on the absence of a functioning system of justice, stating:

“The most serious human rights problems during the year resulted from the absence of effective justice and security institutions. Consequences of the failure of the rule of law included arbitrary and unlawful killings, including politically motivated killings by groups outside or only nominally under government control; torture and other cruel, inhuman, or degrading treatment or punishment; and harsh and life-threatening conditions in (sometimes illegal) detention and prison facilities.”¹⁵⁵

Referring to conditions in Libyan prisons this report states:

“Prisons and detention facilities fell well short of international standards, and could be harsh and life-threatening, with overcrowding the greatest threat to the well-being of detainees and prisoners”¹⁵⁶

Amnesty International was similarly critical of Libyan prison conditions, stating:

“Torture and other ill-treatment remained widespread in both state and militia prisons, and deaths in custody caused by torture continued to be reported.”¹⁵⁷

Corruption

The failings of the justice system have hampered efforts to reduce the corruption that was prevalent

¹⁵⁴ Human Rights Watch (29 January 2015) World Report 2015 - Libya

¹⁵⁵ US Department of State (27 February 2014) 2013 Country Reports on Human Rights Practices - Libya

¹⁵⁶ *ibid*

¹⁵⁷ Amnesty International (25 February 2015) Report 2014/15 – Libya

under the Gaddafi regime. Referring to this problem a report published by the Sadeq Institute states:

“Corruption permeates every sector of Libya’s society and institutions, including the government, public sector, and private businesses. According to international organizations and observers, such as Transparency International and the World Bank (2012), corruption intensified after the 2011 Libyan revolution against Muammar Gaddafi’s regime. Despite efforts to fight corruption, Libya is characterized by impunity for corruption during and after Gaddafi’s rule.”¹⁵⁸

The issue of corruption is also addressed in a report jointly published by country analysts from Belgium, the Netherlands, Norway and Sweden which states:

“A report by the Libya based think tank Sadeq Institute argues that financial corruption peaked after the ousting of Qadhafi, caused by the absence of a judicial authority. According to the think tank, nepotism is one of the most problematic issues in Libya today, alongside the weak security situation. This is enhanced by bribery, making it relatively easy for Libyans to avoid legal penalties. So far, government efforts to eradicate corruption have failed.”¹⁵⁹

Vulnerable Groups

The breakdown of law and order has resulted in members of certain vulnerable groups being particularly at risk of discrimination or violence. These groups include members of minority groups, journalists, human rights defenders, religious minorities and women.

Ethnic Minorities

The majority of Libya’s population is Arab, but there are a number of minority groups. Certain groups are particularly at risk due to their perceived support for Gaddafi. This includes the dark-skinned “Black Libyans” of the Tawergha and the Tuerag communities. A UK Home Office report on Libyan ethnic minorities states:

“Perceived supporters of Gaddafi and his regime are at risk of extra-judicial killings, abduction, enforced disappearance, arbitrary detention, including in

¹⁵⁸ Sadeq Institute (23 October 2014) Libya’s Other War: Fighting Corruption for Sustainable Stability

¹⁵⁹ Office of the Commissioner General for Refugees and Stateless Persons, et al (19 December 2014) Libya: Judiciary and Security Sector

unofficial detention centres, torture, ill-treatment and death in detention.¹⁶⁰

Regarding the Tawergha this report states:

“Militias mainly from Misrata continued to arbitrarily detain, torture, harass and kill Tawerghans in custody. At the beginning of 2014, 1,300 people from Tawergha were detained, mainly in Misrata, or unaccounted for.”¹⁶¹

Other ethnic groups who have suffered discrimination are the Tebu, the Amazigh and the Mashashiya.

Journalists

In the years after the ousting of the old regime Libyan journalists experienced freedoms which had not previously existed. As the political situation deteriorated the risk of violence from militia groups increased and the country is now one of the most dangerous in the world to be a journalist. Observing the current situation for journalists Amnesty International states:

“Mounting attacks against journalists and media professionals by militias and armed groups involved in the conflict have become a hallmark of Libya. Militia attacks, including assassinations, assassination attempts, abductions and physical assaults against journalists who write about what are deemed to be politically-sensitive topics have been on the rise since 2013, pushing many into self-censorship, and forcing some to abandon their profession, go into hiding or leave the country for their own safety.”¹⁶²

Human Rights Defenders

In its annual report on human rights and democracy the UK Foreign and Commonwealth Office states:

“The UN received numerous reports of harassment, intimidation, abductions and murder of members of civil society, after fighting increased in May in Benghazi, and later in Tripoli and elsewhere in Libya.”¹⁶³

¹⁶⁰ UK Home Office (18 February 2015) Libya: Minority ethnic groups

¹⁶¹ ibid

¹⁶² Amnesty International (30 October 2014) Rule of the gun: Abductions, torture and other militia abuses in western Libya

¹⁶³ UK Foreign and Commonwealth Office (FCO) (12 March 2015) Human Rights and Democracy: The 2014 Foreign & Commonwealth Office Report [Country of Concern – Libya]

Religious Minorities

Regarding the lack of state protection for members of minority religions the US Department of State report on religious freedom in Libya states:

“The government lacked the capacity to maintain law and order through its own formal justice and security structures; it relied on a variety of groups – revolutionary brigades, tribal militias, local strongmen – outside of the armed forces and police to support local security. The government exerted varying degrees of control over these armed groups and its response to instances of violence against Coptic Christians and attacks on Sufi sites across the country was limited to condemnations of the violence.”¹⁶⁴

Women

The situation for women is remarked upon in a report published by the Bertelsmann Foundation which states:

“Equality of opportunity was largely achieved under the prerevolutionary Libyan regime. Women and members of ethnic or religious groups had near-equal access to education, public office and employment. This changed significantly following the revolution. The situation for women worsened significantly in terms of sexual harassment and religion-based restrictions on personal freedom.”¹⁶⁵

A report presented to the United Nations Security Council by the Secretary General mentions that:

“Attacks on women activists increased during the reporting period, with many having to flee Libya after threats against them or their children.”¹⁶⁶

ISIS-Affiliated Groups

In September 2014 fighting broke out between rival factions in the city of Derna. The most extreme of these groups is the Islamic Youth Shura Council, which has pledged allegiance to the Islamic State of Iraq and ash-Sham (ISIS), the extremist rebel group currently fighting in Syria and Iraq.

¹⁶⁴ US Department of State (28 July 2014) 2013 International Religious Freedom Report - Libya

¹⁶⁵ Bertelsmann Foundation (January 2014) Bertelsmann Transformation Index (BTI) 2014: Libya Country Report

¹⁶⁶ United Nations Security Council (26 February 2015) Report of the Secretary-General on the United Nations Support Mission in Libya

These militants are alleged to have committed serious human rights abuses, as recorded by Human Rights Watch:

“Armed militias that control the eastern city of Derna are terrorizing residents through summary executions, public floggings, and other violent abuse. The abuses are taking place in the absence of state authorities and the rule of law. The groups include some that have affiliated with the extremist group Islamic State (also known as ISIS).”¹⁶⁷

More recently Human Rights Watch has referred to the activities of these groups as follows:

“Several armed groups in eastern Libya publicly pledged allegiance to ISIS in November 2014, declared that they had established “Barqa Province,” and conducted public extrajudicial executions and floggings. At least two other armed groups have claimed affiliation to ISIS in what they refer to as the Tripoli and Fezzan Provinces, respectively western Libya – including the capital, and southern Libya. These armed groups have claimed responsibility for several attacks, including the apparent mass killing of 21 Christian Copts near Sirte, and a January 27, 2015 attack on a luxury hotel in Tripoli that killed nine civilians.”¹⁶⁸

Militants pledging allegiance to ISIS provoked widespread condemnation by beheading 21 Egyptian Coptic Christians on 15 February 2015. Egypt responded by launching a series of air strikes which were said to have killed innocent civilians as well as ISIS fighters.¹⁶⁹

An article from The Guardian states:

“Facts about it are hard to pin down, but the group appears to be drawing support from Libyans who previously fought with the homegrown militants of Ansar al-Sharia, whose stronghold is in Benghazi, Libya’s second city. Others have returned from fighting in Syria. And, just as in Syria, Isis has been a magnet for those already inclined to the uncompromising violence of the Salafi-jihadi world view.”¹⁷⁰

¹⁶⁷ Human Rights Watch (27 November 2014) Libya: Extremists Terrorizing Derna Residents

¹⁶⁸ Human Rights Watch (24 February 2015) Libya/Egypt: Civilian Toll in Derna Air Strikes

¹⁶⁹ Human Rights Watch (24 February 2015) Libya/Egypt: Civilian Toll in Derna Air Strikes

¹⁷⁰ The Guardian (15 February 2015) Isis claim of beheading Egyptian Copts in Libya shows group's spread

Refugees

The ongoing fighting in many parts of the country has led to the displacement of a large section of the population. Regarding this a United Nations Security Council report states:

“The humanitarian situation in Libya deteriorated markedly during the reporting period. Approximately 400,000 people are estimated to be internally displaced, of whom 360,000 were displaced as a result of the fighting that began in July 2014.”¹⁷¹

The deteriorating situation in Libya has led many of its citizens to seek asylum abroad. Regarding the advisability of returning asylum seekers to Libya Human Rights Watch advocates that:

“All countries should suspend any forcible returns of Libyans and third country nationals to Libya as they may face serious harm if forced to return there. The armed conflicts and lawlessness in Libya are giving rise to indiscriminate violence and widespread human rights abuses. As a result, anyone forcibly returned to any part of Libya would be exposed to a real risk of serious harm, which would constitute what is known as refoulement under international law.”¹⁷²

The most recent position paper published by the UN High Commissioner for Refugees (UNHCR) states:

“Refugees, asylum-seekers and migrant workers have found themselves in a very vulnerable and exposed situation, with many of them trapped in areas affected by fighting without having the means to move to safety.”¹⁷³

Outlining its position on returns to Libya the UNHCR states:

“As the situation in Libya remains fluid and uncertain, UNHCR calls on all countries to allow civilians fleeing Libya access to their territories. UNHCR furthermore commends any measure taken by States to suspend forcible returns of nationals or habitual residents of Libya, including those who have had their asylum claim rejected. UNHCR urges all States to suspend

¹⁷¹ United Nations Security Council (26 February 2015) Report of the Secretary-General on the United Nations Support Mission in Libya

¹⁷² Human Rights Watch (5 December 2014) Libya: Countries Should Suspend Forcible Returns

¹⁷³ UN High Commissioner for Refugees (12 November 2014) UNHCR Position on Returns to Libya

forcible returns to Libya until the security and human rights situation has improved considerably.”¹⁷⁴

Current Situation

Joseph Walker-Cousins, a British diplomat who served in Benghazi in the aftermath of the revolution assesses the current situation in Libya as follows:

“Just four years later, Libya is witnessing an explosion in violence, led by al-Qaida and Islamic State (Isis): the gruesome murder of Egyptian Christians, devastating suicide bombings, the kidnapping of western oil workers and the discovery of countless headless soldiers and civil-society activists in Benghazi.”¹⁷⁵

An assessment of Libya’s near future from the International Crisis Group states:

“On the current trajectory, the most likely medium-term prospect is not one side’s triumph, but that rival local warlords and radical groups will proliferate, what remains of state institutions will collapse, financial reserves (based on oil and gas revenues and spent on food and refined fuel imports) will be depleted, and hardship for ordinary Libyans will increase exponentially.”¹⁷⁶

A similarly pessimistic opinion may be found in a US Congressional Research Service report which states:

“More than three years after the start of the 2011 anti-Qadhafi uprising in Libya and two years after the September 2012 attacks on the U.S. facilities and personnel in Benghazi, Libya’s security situation is dire and the future of its political transition is in question.”¹⁷⁷

Libya’s Future?

The Jamestown Foundation has suggested four possible outcomes to the present crisis:

1. Libya continues on a course towards becoming a failed state;

2. Libya starts the process of building a national army that is able to unify the country and protect its elected institutions;

3. Libya descends into a long struggle, or even civil war, between competing groups, mainly Islamists and nationalists;

4. Libya becomes a military-led dictatorship.¹⁷⁸

All reports and articles referred to in this document may be obtained on request from the Refugee Documentation Centre.

¹⁷⁴ ibid

¹⁷⁵ The Guardian (13 March 2015) Islamists are leading Libya to annihilation – and the west is letting them

¹⁷⁶ International Crisis Group (26 February 2015) Libya: Getting Geneva Right

¹⁷⁷ US Congressional Research Service (8 September 2014) Libya: Transition and U.S. Policy



¹⁷⁸ Jamestown Foundation (30 May 2014) Operation Dignity: General Haftar's Latest Battle May Decide Libya's Future

Implications of *Tarakhel v Switzerland* on the Dublin Transfer System



Triona Jacob, Legal Intern, Office of the Refugee Applications Commissioner. Any views expressed are the author's own.

On 4 November 2014, the European Court of Human Rights (ECtHR) issued a judgment in *Tarakhel v Switzerland*¹⁷⁹ on whether the transfer of a family from Switzerland to Italy under the Dublin Regulation would be contrary to the European Convention of Human Rights. Regulation 604/2013, known as Dublin II, establishes the criteria and mechanism for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national. The objective of the regulation is to identify as quickly as possible the Member State responsible for examining an asylum application and to prevent abuse of asylum procedures.

The Dublin system arose out of the principle of “mutual confidence” between participating states which presumes that the treatment of asylum seekers in all Member States complies with the requirements of both the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights. In certain cases this presumption of compliance with Article 3 ECHR can be rebutted preventing a transfer under the Dublin system. Prior to the *Tarakhel* judgment, conflicting CJEU, ECtHR and domestic judgments led to uncertainty as to when these circumstances arise. *Tarakhel* clarifies this and sets a new standard resulting in Dublin transfers becoming much more difficult. The judgment examines the necessity of “systemic deficiencies” to prevent such transfers, the requirement of participating states to

conduct individual assessments and guarantees in relation to Dublin transfers and the rights of the child.

Facts of the Case

The applicants, an Afghan family with five children, arrived in Italy by boat in 2011 and were fingerprinted and placed in a reception facility. The applicants described living conditions at the reception centre as very poor, lacking adequate sanitation facilities and privacy and also claimed there was a prevailing climate of violence among residents. The family travelled to Austria and submitted an asylum claim which was rejected on the basis of the Dublin II Regulation. The family further went on to claim asylum in Switzerland claiming that the living conditions in Italy were difficult and they would be unable to find employment there. Switzerland also rejected the application based on Dublin II and Italy agreed to take back the applicants. A subsequent appeal was dismissed by the Swiss Federal Administrative Court. While the Court had previously halted transfers in other cases, it did not consider the difficult living conditions in Italy as being sufficient to prevent the applicant's return. On 10 May 2012 the applicants, now a family with six children, applied to the European Court of Human Rights challenging their removal on a number of different grounds including under Article 3 of the European Convention on Human Rights (ECHR).

Violation of Article 3 ECHR

Article 3 ECHR provides that:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment”.

Many applicants have challenged their return under the Dublin Regulations claiming that upon return, their rights under Article 3 will be violated. The sending country is under an obligation to protect the rights of asylum seekers under this Article, and if a national or European court finds that these rights are at risk upon return, the Dublin transfer will not take place.

In a previous decision¹⁸⁰, the ECtHR effectively stopped all Dublin transfers to Greece. In *MSS*¹⁸¹, the applicant, an asylum seeker who arrived in Greece, found himself living on the street for several months with no access to any resources or sanitation facilities or any means of providing for essential needs¹⁸². The Court held that detention conditions in Greece, and a lack of protection from its Asylum system amounting to “systemic deficiencies” meant that the risk of return

¹⁷⁹ *Tarakhel v. Switzerland*, Application No. 29217/12 (ECtHR, 4 November 2014)

¹⁸⁰ *MSS v Belgium and Greece* (2011) 53 EHRR 2.

¹⁸¹ *ibid*

¹⁸² *Ibid* at para 263

to Greece fell within the scope of Article 3 of the Convention. Any asylum seekers transferred to Greece under the Dublin Regulation were at risk of having their Article 3 rights violated.

The CJEU referred to this decision in *NS/ME*¹⁸³, and interpreted it in such a way as “systemic breaches” being a legal requirement in preventing the return of asylum seekers under Dublin II.¹⁸⁴ This position was further upheld by the CJEU in the case of *Abdullahi*,¹⁸⁵ where the court found that an asylum seeker could only challenge a transfer under Dublin II, by claiming systemic deficiencies in the asylum procedure and reception facilities which amounted to a violation of Article 3 of the ECHR. Therefore, in order for a Dublin transfer to be resisted on the basis of a breach of fundamental rights, the court would have to be satisfied that there was a widespread systemic breach in both the asylum process and the reception centres in that country, as is the case in Greece.

On the basis of these CJEU rulings it would appear that in order to prevent the transfer of the Tarakhel family to Italy, it would have to be shown that “systemic deficiencies” existed in the Italian asylum process and reception facilities. However, the ECtHR in *Tarakhel* took a different, perhaps contradictory approach.

Outcome in Tarakhel

The Grand Chamber of the ECtHR recognised that the situation in Italy could not be compared to the situation in Greece at the time of *MSS*, that while there were shortcomings in the Italian system, these did not amount to systemic deficiencies and all transfers to Italy should not be halted as was the case in *MSS* with Greece. However the court also recognised the difficult conditions in Italy and that there were many asylum seekers either without accommodation or living in overcrowded often violent facilities without privacy.

The court found that there is no irrebuttable presumption that a participating state will respect the ECHR and that “systemic flaws in the asylum procedure and in the reception conditions for asylum applicants in the Member State responsible¹⁸⁶” are not the only ground for challenging a transfer under Dublin II. In *Tarakhel*, unlike in *Abdullahi*, only the

¹⁸³ Joined Cases C-411/10 *NS v Secretary of State for the Home Department* and 4-493/10 *ME v Refugee Applications Commissioner and Minister for Justice Equality and Law Reform* [2012] 2 CMLR 9.

¹⁸⁴ *Ibid* at para 94

¹⁸⁵ Case C-394/12 *Abdullah v Bundesaylamt* [2013] EHR 1-0000, 10 December 2013.

¹⁸⁶ *Ibid*

conditions of the reception centre were challenged and not the asylum process itself. The ECtHR endorsed the decision of the United Kingdom Supreme Court in *EM (Eritrea)*¹⁸⁷ which held that a “violation of Article 3 does not require (or, at least, does not necessarily require) that the complained of conditions said to constitute inhuman or degrading conditions are the product of systemic shortcomings”. The ECtHR found that the presumption of safety is rebutted where:

“In view of the overall situation with regard to the reception arrangements for asylum seekers in [the State responsible] and the applicants’ specific situation, substantial grounds have been shown for believing that the person faces a real risk of being subjected to treatment contrary to article 3 ECHR in the receiving country.”

Rather than focusing on systemic breaches, the ECtHR held that individual assessments are required and that a violation of Article 3 would occur if the applicants were transferred to Italy without “individual assessments” from the Italian authorities that they “would be taken charge of in a manner adapted to the age of the children and that the family would be kept together.”

The court also recognised that the applicants, a family, were more vulnerable and in need of greater protection and that reception conditions in Italy should be “adapted to their age” to avoid a “situation of stress and anxiety with particularly traumatic consequences.”¹⁸⁸

Individual Assessments and Guarantees

Following *Tarakhel*, rather than systemic deficiencies amounting to an outright halt on Dublin transfers to specific countries, a violation of Article 3 ECHR may still be found in individual cases preventing a transfer. Automatic transfers under the Dublin Regulation will no longer be carried out. This requirement means greater procedural rights and places a burden on the sending state to conduct individual assessments on applicants to be transferred under the Dublin Regulation, and if necessary to obtain guarantees from the relevant national authorities as to how those applicants will be received if returned. In *Tarakhel* the court found that an individual guarantee should contain reliable information concerning the “specific facility, the physical reception conditions and the preservation of the family unit”. Accordingly, the burden on the

¹⁸⁷ *EM (Eritrea) v Secretary of State for the Home Department* [2014] UKSC 12.

¹⁸⁸ *Tarakhel* paras 119 – 119

applicant is significantly reduced as in order to resist a Dublin transfer, an applicant need only raise doubts as to the capacity of the reception facility to meet the needs of that applicant's individual circumstances. If the applicant had particular needs, such as that of a family, the individual guarantee must also contain reliable information as to how those needs will be met. This individual guarantee would also have to be for at least the duration of the asylum process.

Children's Rights

As the *Tarakhel* case deals with a family, the rights of the child are an important issue. The court, while recognising the vulnerability of asylum seekers in general notes that "the child's extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrants." The court further observed that the Convention on the Rights of the Child encourages States to take appropriate measures to ensure that a child who is seeking to obtain refugee status enjoys protection and humanitarian assistance, whether the child is alone or accompanied by his or her parents." This judgment confirms the significance the ECtHR places on the best interests of the child when assessing violations under Article 3 ECHR. Under *Tarakhel*, in order for an asylum seeker to be transferred under the Dublin system, the sending state must conduct individual assessments, and if problems arise receive specific assurances that the reception conditions will meet the needs of the applicants concerned. The needs of children will differ to those of adults and in the case of children, these assurances must also be in light of the best interests of the child.

Conclusion

The *Tarakhel* judgment has drastically altered the system of transfers under the Dublin Regulations. Rather than "systematic deficiencies" being required to establish a violation of Article 3 ECHR, States are required to carry out a holistic assessment of the overall situation of conditions in the country concerned and also of the individual circumstances of the applicant concerned, and where necessary receive individual assurances that reception conditions in the country concerned will meet the needs of the individual applicant. These needs and assurances are further enhanced where the applicant concerned is a minor and therefore particularly vulnerable in the asylum system. This places a greater procedural burden on the sending state which may result in a reduction of transfers taking place.

The Anguish of Syria's Refugees Enters a Fifth Year

With Syria's conflict entering a fifth year amid a growing humanitarian crisis UNHCR has appealed for billions of dollars to help bring aid to Syria's refugees. With partners, the refugee agency is providing shelter, medical care, food and education. But what the refugees need most is an end to the devastating conflict, so they can regain hope of returning to Syria and rebuilding their broken homeland.



Syrian refugees cross over into the outskirts of Kobani, Turkey, after fleeing their homes. UNHCR / I. Prickett



A wide view of Za'atari refugee camp shows mixed tent and caravan areas. UNHCR / J. Kohler



Syrian refugees remove snow from their shelters at an informal tented settlement in the Bekaa Valley, Lebanon. Winter storm 'Zina' swept through the region in January 2015, bringing snow and harsh conditions to millions of refugees. UNHCR / A. McConnell



Syrian civilians carry a wounded Syrian man after he arrives at the Jordanian border. UNHCR / O.Laban-Mattei



Syrian refugees live in the shell of an abandoned onion factory in Faida, in the Bekaa Valley, Lebanon. UNHCR/ L. Addario



Um Abdullah and her daughter Maysaa, 13, pack a suitcase in preparation for their journey to Germany, at their temporary home in Barja, Lebanon. The family of nine will travel to Germany under the resettlement program. UNHCR / Andrew McConnell



Nizal Hammid Jasim, 14, is tended to by his mother (left) and a relative, after falling ill with a high fever and vomiting. The family live in a small, tented area on the outskirts of Adana in southern Turkey, after fleeing Syria five months ago. UNHCR / I. Prickett



Syrian refugees shelter against the cold at Za'atari refugee camp, Jordan. Between midnight and 4 A.M., 369 refugees fleeing from conflict in neighboring Syria made their way to the camp, which is now home to 31,000 Syrian refugees. UNHCR / B. Sokol