



The RESEARCHER

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Welcome to the April 2018 issue of *The Researcher*.

In this issue of *The Researcher* we are delighted to have an article from Hilikka Becker this time in her role as chairperson of the International Protection Appeals Tribunal (IPAT). Hilikka provides a snapshot of the last year at IPAT and comments on the expected increase in Appeals for 2018.

John Stanley, deputy chairperson at IPAT provides us with a concise summary of case law on International Protection from 2017.

Noeleen Healy of the Law Centre, Smithfield writes on the topical issue of Brexit discussing the uncertainty for protection applicants post brexit.

David Goggins of the Refugee Documentation Centre writes on the ongoing conflict in the Democratic Republic of Congo.

Boris Panhoelzl, Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD) highlights the re-launch of ecoinet and provides a clear insight to the new look website, one of the important databases hosting country of origin information from a wealth of reliable sources.

We are very grateful for contributions to this issue, if you would like to contribute to future issues please contact us at the email below.

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

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The International Protection Act 2015 - one year on. A snapshot from the International Protection Appeals Tribunal



Hilikka Becker, Chairperson of the International Protection Appeals Tribunal (IPAT)

The Tribunal and its jurisdiction

The International Protection Appeals Tribunal (hereinafter referred to as 'the Tribunal') was established on the 31st of December 2016, in accordance with section 61 of the International Protection Act 2015, to determine appeals and perform such other functions as may be conferred on it by or under the International Protection Act 2015 and the Dublin System Regulations.

The Tribunal, like its predecessor, the Refugee Appeals Tribunal, is independent in the performance of its functions and exercises a quasi-judicial function under the International Protection Act 2015. In that regard, the Refugee Appeals Tribunal was recognised by the Court of Justice of the European Union (CJEU) as a 'court or tribunal' for the purpose of Article 267 of the Treaty on the Functioning of the European Union (TFEU).¹

The Tribunal decides appeals from persons in respect of whom an International Protection Officer has recommended that they should not be given a refugee declaration and should be given a subsidiary protection declaration, and from persons in respect of whom an International Protection Officer has recommended that they should be given neither a refugee declaration nor a subsidiary protection declaration. The Tribunal also determines appeals under the European

Union (Dublin System) Regulations 2018², which implement Regulation (EU) No. 604/2013 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 (hereinafter referred to as 'the Dublin Regulation').

Moreover, with the commencement of the International Protection Act 2015, the Tribunal's remit was expanded to also determine appeals against an International Protection Officer's recommendation to deem an application for international protection inadmissible pursuant to section 21(2) of the Act, as well as appeals against an International Protection Officer's recommendation that a subsequent application for international protection not be allowed pursuant to section 22(5) of the Act.

With regard to applications for international protection, the Tribunal may affirm the recommendation made at first instance or set aside the recommendation and recommend to the Minister for Justice and Equality that refugee status or, as the case may be, subsidiary protection status be granted. Whereas under the old legislation, the Refugee Act 1996 (as amended), a decision of the Tribunal was binding on the Minister for Justice and Equality only where it was setting aside a negative recommendation of the then Refugee Applications Commissioner, the Minister is now bound by Tribunal decisions whether they are positive or negative. The only exception to that general rule is contained in section 47(3) of the International Protection Act 2015, which permits the Minister to refuse to give a refugee declaration to an applicant who is a refugee, where there are either "*reasonable grounds for regarding him or her as a danger to the security of the State*", or the person, having been by final judgment convicted, whether in Ireland or not, of a particularly serious crime, constitutes a danger to the community of the State. The legislation does not provide a similar exception with regard to the giving of a subsidiary protection declaration pursuant to section 47(4) of the Act. Similarly, with regard to recommendations on admissibility and subsequent applications, the Minister does not have residual discretion following a decision by the Tribunal.

¹ *H.I.D. & anor v Refugee Applications Commissioner & ors.* (Case C-175/11), paras. 101 and 104.

² S.I. No. 62 of 2018.

The discretionary function pursuant to Article 17 of the Dublin III Regulation – a matter for the Tribunal?

The question whether the exercise of the discretionary function of the ‘determining member state’ pursuant to article 17 of the Dublin Regulation, which permits a member state to examine a protection application by a non-EU national even if such examination is not the particular state’s responsibility under the criteria laid down by the Regulation, rests with an International Protection Officer and would therefore be subject to an appeal to the Tribunal also, has been the subject of significant debate and is currently the subject of a reference to the Court of Justice of the European Union (hereinafter referred to as ‘the CJEU’).³

In November last year, Humphreys J., in the case of *M.A. (a minor) v The International Protection Appeals Tribunal & ors* [2017] IEHC 677,⁴ referred *inter alia* the following question to the CJEU: “does the concept of the ‘determining member state’ in the Dublin Regulation include the role of the member state in exercising the power recognised or conferred by art. 17 of the Regulation?”. In his judgment, Humphreys J. expressed the view that the answer to the proposed question should be that “based on *N.S.*⁵ and *C.K.*⁶ the concept of the determining member state must include the member state insofar as it is exercising functions under art. 17”. He further set out that: “The relevance of the question to the proceedings is that it would follow that the Commissioner (now the International Protection Office) does have jurisdiction to determine art. 17 issues by virtue of the 2014 regulations as they are currently drafted. (...)”. In that regard, Humphreys J also opined that the answer to the fourth question posed to the CJEU, namely whether “the concept of an effective remedy [does] apply to a first instance decision under art. 17 of [the Dublin Regulation] such that an appeal or equivalent remedy must be made available against such a decision and/or such that national legislation providing for an appellate procedure against a first instance decision under the

regulation should be construed as encompassing an appeal from a decision under art. 17?”, should be that: “by virtue of art. 27(1) of the regulation in the light of C.K. it follows that an effective remedy should apply to any first instance decision under art. 17. Accordingly the national legislation should be interpreted to allow such a remedy; thus the appeal against a transfer decision should impliedly be taken to include an appeal against a decision not to exercise any discretion to the contrary under art. 17”. The relevance of this proposed answer for the Tribunal is, as explained by Humphreys J, that: “(...), it would follow that the tribunal had a jurisdiction to hear an appeal from the commissioners’ decision not to apply art. 17 and erred in law in refusing to entertain such an appeal”.

Currently, there are upwards of 100 cases pending before the High Court in which the question whether the Tribunal has jurisdiction to exercise the jurisdiction conferred by article 17(1) of the Dublin III Regulation.

On the 20th of December 2017, the CJEU rejected the request by the High Court that the reference be determined pursuant to the expedited procedure provided for in Article 105(1) of the Rules of Procedure of the Court. It will therefore be some time before this matter is determined and answers to the very pertinent questions asked by the High Court can be expected.

Transitional provisions of the International Protection Act 2015

At the time of commencement of the new legislation on the 31st of December 2016, more than 1,800 applications against a recommendation by the Refugee Applications Commissioner that refugee status be refused, were pending before the Tribunal and subsequently, under the transitional provisions of the Act, had to be transferred to the International Protection Office for the consideration of the applicants’ possible entitlement to subsidiary protection and the consideration of the granting of permission to remain.

It is expected that a significant proportion of those cases will be returned to the Tribunal following the submission of appeals under Section 41 of the International Protection Act 2015. The legislative context to the matter in question is section 70(2) of the 2015 Act. That sub-section provides *inter alia* that, “where, before the date on which this subsection comes into operation, a person has

³ *M.A., S.A., A.Z. v International Protection Appeals Tribunal & ors* (Case C-661/17).

⁴ 8th November 2017 (see:

<http://courts.ie/Judgments.nsf/bce24a8184816f1580256ef30048ca50/56e8e706e6a134a4802581de00312e1b?OpenDocument>).

⁵ *N.S. & ors v Secretary of State for the Home Department* (Case C-411/10).

⁶ *C.K. v Republika Slovenija* (Case C-578/16).

made an appeal under section 16 of the Act of 1996 against a recommendation of the Refugee Applications Commissioner and, by that date, the appeal has not been decided, the person shall be deemed to have made an application for international protection under section 15 and the provisions of this Act shall apply accordingly, subject to the following modifications and any other necessary modifications (...). The “modifications” referenced in this section include section 70(2)(d) of the 2015 Act, which applies where an International Protection Officer makes a recommendation that an applicant should not be given a refugee declaration and should be given a subsidiary protection declaration (section 39(3)(b)) or that an applicant should be given neither a refugee declaration nor a subsidiary protection declaration (section 39(3)(c)).

Moreover, section 70(2)(d)(i) of the 2015 Act provides that, subject to sub-paragraph (ii), the person’s appeal under section 16 of the Act of 1996, which was pending before the Tribunal at the time of commencement of the 2015 Act, shall be “deemed to be an appeal made in accordance with section 41(1)(a)” and the provisions of the 2015 Act apply. Furthermore, section 70(2)(d)(ii) provides that, where an appeal is lodged under section 41(1)(b) against a recommendation of an International Protection Officer that an applicant should be given neither a refugee declaration nor a subsidiary protection declaration (pursuant to section 39(3)(c) of the 2015 Act), the person’s previous appeal made under section 16 of the 1996 Act is deemed to be included in the appeal under the 2015 Act.

A smaller number of appeals fall to be considered under sections 70(5), 70(7) and 70(8), with the consequence of Refugee Act 1996, European Communities (Eligibility for Protection) Regulations 2006 and the European Union (Subsidiary Protection) Regulations 2013 still applying to the latter two, in defined circumstances.

Chairperson’s Guidelines 2018/1 on the application of ‘compelling reasons’

The effect of removal of the ‘compelling reasons’ ground, which was previously contained in regulation 5(2) of the European Communities (Eligibility for Protection) Regulations 2006, from the International Protection Act 2015, on refugee status appeals originally submitted to the Tribunal pursuant to s.16(1) of the Refugee Act 1996, prior to the commencement of the International

Protection Act 2015, required detailed consideration by the Tribunal.

Following amendment by the European Union (Subsidiary Protection) Regulations 2013, the ‘compelling reasons provision’ applied to applications for refugee status only and provided that: “The fact that a protection applicant has already been subject to persecution, or to direct threats of such persecution, shall be regarded as a serious indication of the applicant’s well-founded fear of persecution, unless there are good reasons to consider that such persecution will not be repeated but compelling reasons arising out of previous persecution alone may nevertheless warrant a determination that the applicant is eligible for protection as a refugee”.

As set out above, on the ordinary meaning of section 70(2), appeals pending under section 16 of the 1996 Act at the time of commencement were transformed by operation of law into appeals pursuant to section 41(1) of the 2015 Act. This means that the 2015 Act test applies in relation to applications for refugee status, which test does not include compelling reasons.

Nevertheless, as set out in recently issued *Chairperson’s Guidelines on the ‘Application of ‘Compelling Reasons’ in the consideration of refugee status appeals originally submitted to the Tribunal pursuant to s.16(1) of the Refugee Act 1996, prior to the commencement of the International Protection Act 2015*,⁷ for the limited number of applicants potentially falling into this category, if the 2015 Act test was to be applied by the Tribunal on appeal in such cases, this would have the effect of denying those applicants the possibility of relying on ‘compelling reasons’ arguments. The Tribunal recognises that for at least some of the appeals that were pending at the time of entry into force of the 2015 Act, the removal of the possibility of relying on ‘compelling reasons’ could cause them significant prejudice.

Therefore, and bearing in mind that the general rule set out in section 70(2) is expressly subject to “any other necessary modifications”, as well as the section 70(2)(d)(ii) proviso that, where an International Protection Officer recommends that an applicant should be given neither a refugee declaration nor a subsidiary protection

⁷ See:

[http://protectionappeals.ie/website/rat/ratweb.nsf/page/MJOF-AXAA8J7595728-en/\\$File/IP%20Guideline%202018-1%20on%20Compelling%20Grounds.pdf](http://protectionappeals.ie/website/rat/ratweb.nsf/page/MJOF-AXAA8J7595728-en/$File/IP%20Guideline%202018-1%20on%20Compelling%20Grounds.pdf).

declaration, the prior section 16 appeal is “deemed to be included” in the 2015 Act appeal, the concept of ‘including’ the section 16 appeal within the 2015 appeal suggests that the substantive test applicable to that section 16 appeal remains intact.

Consequently, following a recommendation at first instance on an applicant’s refugee status application, which was completed prior to commencement of the Act, the applicant, in the view of the Tribunal, has a legitimate expectation that the test applied on appeal would not be a less favourable test than that applicable at first instance. Moreover, interpreting Article 47 of the Charter of Fundamental Rights of the European Union, the right to an effective remedy, in conjunction with this principle, and the principle of legal certainty, the right of appeal to the Tribunal cannot be considered to be effective in circumstances where the opportunity to challenge the decision-maker’s finding on the ‘compelling reasons’ ground is lost.

However, it must be borne in mind that the interpretation of the transitional provisions of section 70(2) so as to allow consideration of ‘compelling reasons’ by the Tribunal only applies in a finite number of ‘ring-fenced’ refugee status appeals. Moreover, even where applicable in the limited number of cases now coming back to the Tribunal following consideration of the entitlement of an appellant to subsidiary protection by an International Protection Officer, the consideration of ‘compelling reasons’ is limited to circumstances in which past persecution has been so atrocious as to give rise to a grant of refugee status based on ‘compelling reasons’ alone.

In this regard, guidance was provided by Cooke J. in *M.S.T.* wherein he (in the context of dealing with a claim for the grant of subsidiary protection on the basis of ‘compelling reasons’ arising out of serious harm) opined: “*It is possible (...) to envisage a situation in which an applicant had escaped from an incident of mass murder, genocide or ethnic cleansing in a particular locality. Even if the conditions in the country of origin had so changed that no real risk now existed of those events happening once again, the trauma already suffered might still be such as to give rise to compelling reasons for not requiring the applicant to return to the locality of the earlier suffering because the return itself could be so*

traumatic as to expose the applicant to inhuman or degrading treatment”.⁸

International Protection Act 2015 (Procedures and Periods for Appeals) Regulations 2017

2017 also saw the introduction of the International Protection Act 2015 (Procedures and Periods for Appeals) Regulations 2017 (hereinafter referred to as ‘the Appeals Regulations’). The Appeals Regulations prescribe appeal periods for the purpose of the 2015 Act, prescribe the form of appeals to the Tribunal and provide certain rules on the hearing of cases, adjournments and corrections.

The Appeals Regulations have been further interpreted by way of ‘*Chairperson’s Guidelines on Adjournments and Postponements of Appeal Hearings*’.⁹ In that regard, when considering whether to adjourn or postpone the hearing of an appeal, and in assessing whether it is in the interests of justice to do so, Members of the Tribunal are required take account of the decision of Barr J. in *A.P. (Albania) v Refugee Appeals Tribunal* [2014] IEHC 493,¹⁰ wherein he stated in relation to a request for an adjournment to remedy interpretation difficulties that had been made by an appellant that: “(…) *the RAT erred in not granting an adjournment to the applicant so that an interpreter who understood and spoke the applicant’s dialect of Albanian could be found. (...)*”.¹¹

Similarly, the High Court quashed a decision of the Tribunal’s predecessor because it had declined to give an adjournment so that the applicant could call a witness. Although recognising that: “(…) *a Tribunal Member must enjoy very considerable flexibility in deciding whether to adjourn a case or to permit a case to be re-opened and further evidence heard*”, and agreeing with Smyth J. in the case of *Mihalescu v The Refugee Applications Commissioner & Anor*¹² that there was “*the possibility that applications for adjournments and re-opening might, in some circumstances, serve as*

⁸ *M.S.T. & anor v Minister for Justice Equality & Law Reform* [2009] IEHC 529, 4th December 2009, at para.32.

⁹ See:

[http://protectionappeals.ie/website/rat/ratweb.nsf/page/MJOF-AXAA8T802728-en/\\$File/IP%20Guideline%202018-2%20on%20Adjournments%20and%20Postponements.pdf](http://protectionappeals.ie/website/rat/ratweb.nsf/page/MJOF-AXAA8T802728-en/$File/IP%20Guideline%202018-2%20on%20Adjournments%20and%20Postponements.pdf).

¹⁰ 2nd October 2014 (see:

<http://www.courts.ie/Judgments.nsf/0/442B17E13237190280257DA5003CAD02>).

¹¹ At para.50.

¹² High Court (unreported), 25th June 2002.

a *delaying tactic*”,¹³ Birmingham J. held that where “(M)aterial was in existence which was clearly potentially relevant and the combined effect of Tribunal rulings precluded the applicant from relying on it. (...), there was a material unfairness in refusing to hear the evidence of [the witness]”.¹⁴

However, the Guidelines provide that Tribunal Members should also bear in mind, as held by Mac Eochaidh J. in *L.H.C. (a minor) v Refugee Appeals Tribunal & ors*¹⁵ [2014] IEHC 75, that: “Where it is alleged in judicial review proceedings that an asylum claimant has been unfairly denied the opportunity to submit evidence (whether by reason of refusal of an adjournment or by some other decision) it seems (...) that the applicant must describe the substance of the excluded evidence and in addition must describe the prejudice caused by its exclusion. (...)”.¹⁶ In the particular case, Mac Eochaidh J. held that: “The applicant has failed to establish what new evidence would or could have been submitted and has failed to establish any prejudice that arose from the refusal of the adjournment”.¹⁷

A postponement or adjournment will therefore be granted only where an appellant or the Minister establishes that prejudice will arise from the refusal of an adjournment.

Furthermore, when considering whether to adjourn or postpone the hearing of an appeal on the basis of pending judicial reviews of the underlying recommendation of an International Protection Officer pursuant to section 39 of the Act, a Member of the Tribunal should have regard to the decision of MacEochaidh J. in *H.T.K. (a minor) v Minister for Justice, Equality and Law Reform & anor*¹⁸ [2016] IEHC 43 wherein he ruled that:

“(...) the R.A.T. may only stay an appeal if so ordered by the High Court. Appeals must be processed notwithstanding a judicial review challenging the decision of the Commissioner unless an applicant obtains an injunction staying

¹³ *N. (J.) v. Minister for Justice, Equality and Law Reform & Anor* [2009] 1 IR 146, [2008] IEHC 214, para.11.

¹⁴ *Ibid.*, para. 12.

¹⁵ 20th February 2014 (see:

<http://www.courts.ie/Judgments.nsf/0/D6992D0C18FA019680257C8B0056A51F>).

¹⁶ At para.11.

¹⁷ At para.12.

¹⁸ 15th January 2016 (see:

<http://www.bailii.org/ie/cases/IEHC/2016/H43.html>).

the appeal. Such application must of course be made on notice to the R.A.T. but I cannot imagine that the Tribunal would appear, much less participate at the injunction hearing”.¹⁹

Any request for a postponement of a hearing, whether made by or on behalf of an appellant or by the Minister, should be made in writing or adjournment of a hearing is made on the date of or on occasion of the hearing in question, any such request should be made in writing to the Tribunal.

The new Tribunal – 2018 and beyond

Under the new legislation, the Tribunal shall, in addition to the Chairperson, consist of “not more than 2 Deputy Chairpersons, who shall be appointed in a whole-time capacity” (s.62(1)(b)) and the legislation further foresees the appointment of ordinary members of the Tribunal “either in a whole-time or a part-time capacity” (s.62(1)(c)). Additionally, the legislation provides for the appointment of a Registrar of the Tribunal (s.66(1), who manages and controls generally the staff and administration of the Tribunal, and performs such other functions as may be conferred to him or her by the Chairperson (s.67(1)).

The ordinary Members of the Tribunal are appointed by the Minister for Justice and Equality on a part-time basis for a term of 3 years. A Member must have been a practising barrister or solicitor for at least five years to qualify for appointment.

Currently, the Tribunal has 72 ordinary Members as well as, in addition to the Chairperson, two Deputy Chairpersons.

2017 was a period of transition for the Tribunal with only 454 appeals pending at the beginning of the year and the Tribunal issuing a total of 606 decisions by the end of the year. This was due to the majority of appeals that had been pending before the Tribunal in 2016 being transferred to the International Protection Office, for the assessment of appellants’ subsidiary protection claims under the transitional provisions of the 2015 Act.

The number of appeals reaching the Tribunal in 2018 and beyond is expected to rise significantly and already reached close to 400 in the first

¹⁹ At para.23.

quarter of the year, compared to 60 in the same period in 2017.

2017 Review of Case Law on International Protection



John Stanley, Deputy Chairperson of the International Protection Appeals Tribunal

Below is a summary of the case law from the Irish Superior Courts and the Court of Justice of the European Union from 2017 on matters relevant to Irish international protection law.

Qualification for Refugee Status

The High Court clarified that the correct standard of proof in respect of past events in international protection applications is the balance of probabilities with, where appropriate, application of the benefit of the doubt (***O.N. v Refugee Appeals Tribunal [2017] IEHC 13, O'Regan J., 17 January 2017***). The High Court refused a subsequent challenge (***N.N. v Minister for Justice and Equality [2017] IEHC 99, Keane J., 15 February 2017***) and a request for a certificate to appeal (***P.D. v Minister for Justice [2017] IEHC 330, O'Regan J., 24 May 2017***) on this point.

The Court of Appeal clarified that the burden of proof in international protection cases does not shift to require a decision maker to conduct his or her own investigation to establish the authenticity of a document relied on by an applicant, save for in “special circumstances” (***A.O. v Refugee Appeals Tribunal [2017] IECA 51, 27 February 2017***). The High Court subsequently said that such “special circumstances”, strictly speaking, arise in the context of deportation, rather than the international protection process (***T.T. (Zimbabwe) v Refugee Appeals Tribunal [2017] IEHC 750, Humphreys J., 31 October 2017***).



In respect of the refugee definition, the Supreme Court refused leave to appeal the High Court ruling that the then Refugee Applications Commissioner's system whereby an application would be refused where two of seven of the ingredients of the definition were not satisfied (*J.N.E. v Minister for Justice and Equality* [2017] IESCDET 86, 25 July 2017). There was some consideration given in the Superior Courts to the issue of country of nationality. The Supreme Court had to discontinue its consideration of an appeal in which the issue was whether arbitrary denial of a person's citizenship meant that the denying state was, nonetheless, the person's "country of nationality" for the purposes of the refugee definition, or whether the person was stateless (*D.T. v Minister for Justice and Law Reform* [2017] ISEC 45, 14 June 2017). Subsequently, the Court of Appeal clarified that a person who is a national of a state cannot be a stateless person, and that his or her claim must be assessed against that country of nationality, regardless of whether he or she also has lived subsequently, and obtained refugee status in, other states, and is capable of being understood as de facto stateless (*F.F. v Minister for Justice, Equality and Law Reform* [2017] IECA 273, 25 October 2017). In respect of Convention "nexus", the High Court distinguished a situation in which a person is targeted because of his interactions with a particular person, from a situation in which a person is part of a particular social group (*B.K. (Albania) v Refugee Appeals Tribunal* [2017] IEHC 746, 31 October 2017).

Credibility of Applicants for International Protection

The Court of Appeal clarified that if reasons impugning an appellant's credibility are material, they must be put in some way to the appellant before they can be relied upon to support the decision. If they are not so put, they cannot be counted among the reasons that form a cumulative basis for a decision (*B.W. v Refugee Appeals Tribunal* [2017] IECA 296, 15 November 2017). The Court of Appeal held also that where an appellant whose credibility is otherwise fundamentally undermined presents information which, if accepted, would put his or her claim in a new light, it is incumbent on the Tribunal to assess such documentary evidence – if necessary by making findings on their authenticity and probative value – so that credibility can be assessed by reference to all relevant available evidence (*R.A. v Refugee Appeals Tribunal* [2017] IECA 297, 15

November 2017). Considerations of peripheral matters in credibility assessment was the subject of *N.N. v Minister for Justice and Equality* [2017] IEHC 99, Keane J., 15 February 2017 and *RS v Minister for Justice and Equality* [2017] IEHC 187, Stewart J., 24 March 2017, with both of those decisions tending to give ballast to an approach whereby peripheral matters may undermine an applicant's general credibility.

The importance of properly dealing with future risk, and how it is not necessarily disposed of by considerations of past events, was emphasised in several cases, including *B.A. v International Protection Appeals Tribunal* [2017] IEHC 36, Keane J., 27 January 2017; *S.W.A. v Refugee Appeals Tribunal* [2017] IEHC 40, O'Regan J., 30 January 2017; *O.N. v Refugee Appeals Tribunal* [2017] IEHC 55, O'Regan J., 9 February 2017.

Exclusion from International Protection

The Court of Justice provided important guidance on exclusion from refugee status, clarifying that the concept is not confined to the perpetrators of terrorist acts, but can extend to those engaged in activities such as recruitment, organisation and transportation of equipment and individuals who perpetrate and plan terrorist acts (*Case C-573/14 Lounani*, Grand Chamber, 31 January 2017, ECLI:EU:C:2017:71)

The International Protection Process

The Supreme Court granted leave on the issue of the alleged unlawfulness of the then Commissioner's system of delegating the "investigation" for the first instance decision in *I.G. v International Protection Appeals Tribunal* [2017] IESCDET 65, 13 June 2017. The High Court held that an explanation for non-attendance at a hearing provided before the hearing does not satisfy the legal requirement of an explanation for non-attendance within three days of the date fixed for the oral hearing (*P.C. v International Protection Appeals Tribunal* [2017] IEHC 162, Keane J., 8 March 2017). In a similar vein, the High Court clarified that the Tribunal cannot extend the time within which an applicant might indicate if an appeal is proceeding (*M.G.O.L v Refugee Appeals Tribunal* [2017] IEHC 216, O'Regan J., 4 April 2017 (the Court refused a certificate to appeal in *M.G.O.L. v Refugee Appeals Tribunal*, 17 July 2017).

The Subsidiary Protection Procedure

The consequences of the “bifurcated”, or consecutive, system for determining international protection claims generated significant litigation. The Court of Justice confirmed that it is possible for a decision maker to take into account, for the purpose of examining an application for subsidiary protection, information or material gathered at an applicant’s previous asylum interview, which contribute to the ability to determine that application with full knowledge of the facts (**Case C-560/14 M v Minister for Justice and Equality, Third Chamber, ECLI:EU:C:2017:101**). Meanwhile, the High Court clarified that the Tribunal is obliged to invite appellants seeking subsidiary protection to comment on adverse credibility findings in the asylum process where such findings are to be relied on in the decision on subsidiary protection (**M.L. (D.R.C.) v Minister for Justice and Equality [2017] IEHC 570, McDermott J., 20 June 2017**). By contrast, the High Court held that for the hearing of an application for subsidiary protection to be effective, it is not necessary to reconsider ab initio the credibility of a statement already the subject of a properly reasoned adverse credibility assessment in the preceding application for refugee status (**S.J. v Minister for Justice and Equality [2017] IEHC 591, Keane J., 10 October 2017** (the Court refused a certificate to appeal in **S.J. v Minister for Justice and Equality [2017] IEHC 747, Keane J., 13 December 2017**). The High Court also held that it is unlawful for a decision maker determining a subsidiary protection claim to rely on credibility findings and determinations of the Tribunal in the asylum appeal, without giving the appellant an opportunity to address them (**C.K. v Minister for Justice, Equality and Law Reform [2017] IEHC 742, McDermott J., 12 December 2017**). Finally, the Supreme Court clarified that, generally, entitlement to an oral procedure on applying for subsidiary protection depends on the applicant having a vulnerability relating to, e.g., age, health or as a result of serious violence (**A.A.A. v Minister for Justice [2017] IESC 80, 21 December 2017**).

“Subsequent” Applications for International Protection

In respect of subsequent applications, it is clear from the High Court judgment in **R.W.B. v Minister for Justice, Equality and Law Reform [2017] IEHC 370, Faherty J., 10 March 2017**, that being a failed asylum seeker can ground an

application for a subsequent application. The High Court also emphasised that to ensure the rationale for a decision is evident from its face, it is necessary not merely to list the material relied on, but also to consider the documentation in the body of the decision (**D.M.K.K. (D.R.C.) v Minister for Justice and Equality [2017] IEHC 764, Stewart J., 14 December 2017**). The High Court in its judgment in **D.M.K.K.** commented obiter that “a certain materiality of evidence” is needed to ground an application under what is now s.22(4)(a) of the International Protection Act 2015. The Court was satisfied that under the 1996 Act regime, the “previous application” for the purposes of the request to make a subsequent application is the previous asylum application and does not include a subsidiary protection application.

Implementation of the Dublin III Regulation

A challenge to the fundamental lawfulness of the Dublin III Regulation based on the proposition that it was invalid in the light of Art.31(2) of the Refugee Convention (which precludes unnecessary restrictions on refugees’ freedom of movement) was rejected at the leave stage, with the Court noting that applicant had chosen to seek asylum in the country to which he was to be transferred, the UK, hence the transfer order (**M.A.H. v International Protection Appeals Tribunal [2017] IEHC 462, O’Regan, 17 July 2017**).

In respect of interpreting the hierarchy of criteria under Dublin III, the CJEU clarified that toleration by a Member State of a person who does not satisfy entry conditions does not amount to issuing a visa for the purpose of art.12 of the Regulation, but does amount to an illegal border crossing for the purpose of art.13 (**Case C-646/16 Jafari, Grand Chamber, 26 July 2017, ECLI:EU:C:2017:586**).

Several judgments considered the ambit of the effective remedy required by art.27 of Dublin III. The CJEU confirmed that an applicant is entitled to appeal against a transfer decision in respect of an incorrect application of art.13 (**Case C-490/16 AS v Slovenia, Grand Chamber, 26 July 2017, ECLI:EU:C:2017:585**), in respect of expiry of the period stipulated in art.21 of Dublin III for a take charge request (**Case C 670/16, Mengesteab, Grand Chamber, 26 July 2017, ECLI:EU:C:2017:587**), and in respect of expiry of the six month period stipulated in art.27 of Dublin III to effect transfer (**Case C-201/16, Shiri, Grand**

Chamber, 25 October 2017, **ECLI:EU:C:2017:805**). The Irish Court of Appeal, however, held that art.27 of the Regulation does not require an effective remedy of a transfer decision on the ground that there was a failure to comply with art.34 where the Commissioner failed to complete the required form properly (**B.S. v Refugee Appeals Tribunal [2017] IECA 179, 14 June 2017**).

The Irish Superior Courts gave several judgments on the issue of the discretion under art.17 of the Dublin III Regulation. It is not clear if art.17 gives the discretion in question to the State, or merely recognises that the State inherently has such a discretion. In this context, the High Court has said that the 2014 Regulations did not give the art.17 discretion to the Commissioner or to the Tribunal as such delegation would have required primary legislation (**U. v Refugee Appeals Tribunal [2017] IEHC 490, O'Regan J., 26 June 2017**). In another case the court allowed an appellant leave to argue that the Minister had failed to ensure that someone would consider whether to exercise discretion under art. 17 (**M.E. v Refugee Appeals Tribunal [2017] IEHC 464, O'Regan J., 17 July 2017**). The judgment in *U v Refugee Appeals Tribunal* notwithstanding, the High Court, in **M.A. v International Protection Tribunal [2017] IEHC 677, Humphreys J., 8 November 2017**, made a series of preliminary references to the Court of Justice of the EU, in essence to ascertain whether Ireland should consider the implications of Brexit before transferring someone to the UK and, if it should, whether the discretion to consider that in the context of art.17 is with the decision-making bodies in the State by virtue of the adoption in the Irish regulations of the language in the Regulation, in particular in respect of the meaning of "determining Member State".

The Court in **U. v Refugee Appeals Tribunal [2017] IEHC 613, O'Regan J., 24 October 2017**, rejected, on discretionary grounds, a claim that Article 8 ECHR can counteract operation of Dublin III. It did, however, comment, obiter, that if Article 8 was to counteract Dublin III, it would do so only in especially compelling cases.

Rights of Applicants for International Protection

There was significant development both for the rights of applicants for international protection, and for the development of understanding personal rights under the Constitution of Ireland for non-Irish nationals in the State, in **N.H.V. v**

Minister for Justice and Equality [2017] IESC 35, 30 May 2017. The Supreme Court held in its judgment in that case that the complete removal of the right to work in the Refugee Act was unlawful in light of Art.40.3 of the Constitution of Ireland. It also provided a test for establishing whether a non-Irish national is entitled to invoke any particular unenumerated right under the Constitution.



Conflict in the Congo: RDC Researcher David Goggins Investigates:



David Goggins, Refugee Documentation Centre

Background

The Democratic Republic of Congo (DRC) is the second largest country in Africa, with a population of about 80 million people. With its vast natural resources and great mineral wealth the DRC has the potential to become a very prosperous country, but at present the majority of the population are very poor. According to the World Bank:

“Despite a decrease in the poverty rate, from 71% to 64% between 2005 and 2012, the DRC still ranks among the poorest countries in the world.”²⁰

A BBC report on the present situation in the DRC elaborates on the World Bank’s assessment as follows:

“The land in the DR Congo has a lot of natural resources like oil, minerals and precious metals, which can make a country more wealthy. But despite this, millions of people who live there are incredibly poor and are suffering because of fighting that is going on there.”²¹

Regarding the vast natural wealth available to the DRC Human Rights Watch Central Africa Director Ida Sawyer states:

²⁰ The World Bank (5 December 2017) Democratic Republic of Congo: Overview

²¹ BBC (28 March 2018) What is happening in the Democratic Republic of Congo?

“The potential opportunities that a stable Congo could bring to the Congolese people and the broader region are mind boggling. The country is teeming with natural resources – gold, diamonds, coltan, tin, uranium, and oil – just to name a few.”²²

Explaining the reasons why such wealth has not enriched the Congolese people Ida Sawyer states:

“Yet despite these riches, Congo is one of the world’s poorest countries in the world. Ten out of 100 children in Congo die before they reach the age of 5, and more than 40 percent have stunted growth due to malnutrition. Poor governance and large scale abuses by armed groups and members of the Congolese security forces – fueled by widespread impunity and struggles for control over the country’s vast resources – have stunted the country’s development and left countless victims.”²³

Recent History

Formerly a Belgian colony, the DRC gained its independence in 1960, which was then followed by several years of unrest and civil war. In 1965 General Joseph-Désiré Mobutu seized power, changing his name to Mobutu Sese Seko and renaming the country Zaire. Mobutu ruled as an absolute dictator for over thirty years, becoming notorious for his widespread corruption and human rights abuse. Mobutu’s grip on power was eventually broken in 1997 when he was deposed as president and replaced by Laurent Kabila, a rebel leader supported by a coalition of ten African countries. One of Kabila’s first acts was to change the name of the country back to the Democratic Republic of Congo. Kabila soon fell out with some of his allies, resulting in what became known as Africa’s World War, in which the Kabila regime was supported by Angola, Namibia and Zimbabwe against invading armies from Rwanda and Uganda. In 2001 Kabila was assassinated by one of his own bodyguards, with his son Joseph Kabila succeeding him as president. The war officially ended in 2003, but conflict continued in the eastern Kivu provinces

²² Human Rights Watch (9 April 2018) Overview of the Political Crisis in DR Congo and the Human Rights, Security, and Humanitarian Consequences

²³ Human Rights Watch (9 April 2018) Overview of the Political Crisis in DR Congo and the Human Rights, Security, and Humanitarian Consequences

where various rebel militias acted as proxies for Rwanda and Uganda.

Kabila's Elections

Joseph Kabila was elected as president in 2006 in what was generally accepted as a fair election. He was re-elected in 2011, but on this occasion there were widespread allegations of irregularities. According to the constitution the president may only serve two terms, which meant that Kabila was not entitled to stand again in the election scheduled for December 2016. However this election has been repeatedly postponed, leading to fears that Kabila has no intention of relinquishing his hold on power.

The failure to hold an election in December 2016 resulted in widespread protests by opposition groups, which the government forcibly suppressed. Referring to these events a UK Foreign & Commonwealth Office report states:

“According to UN estimates there were over 600 arrests of opposition and youth activists in December, alongside reported abductions of activists. Most have been released but there were increasing concerns that the judicial system was being used for the regime for political purposes.”²⁴

An immediate crisis was averted on 31 December 2016 when an agreement known as the Saint Sylvestre accord was signed between the regime and virtually all of the opposition parties. This agreement, which had been mediated by the Catholic Church, permitted Kabila to remain as president with the understanding that elections would be held in December 2017. In spite of this agreement the scheduled elections were not held, which brought thousands of opposition supporters out into the streets of Kinshasa and other cities. The regime responded to these protests with deadly force, including the use of live ammunition, with the result that scores of people were killed.

Regarding the outlook for the Kabila regime should elections be eventually held the International Crisis Group states:

“Elections present several challenges for the regime, first and foremost that of selecting a successor Kabila trusts. But overall his regime is

²⁴ UK Foreign & Commonwealth Office (8 February 2017) Human Rights and Democracy Report 2015 – Human Rights Priority update report: July to December 2016 – Democratic Republic of the Congo (DRC)

operating from a position of relative strength: it retains firm control of the state and electoral machinery and the opposition remains split.”²⁵

In an article published by the Australian media outlet The Conversation Nadine Ansorg, Lecturer in International Conflict Analysis, University of Kent, states:

“The latest election date has been set for December 2018, although it is doubtful that the government will hold the poll. It has already pointed to apparent logistical and financial obstacles to a December election. This has become an ongoing excuse to keep Kabila in power.”²⁶

Anti-Government Protests

Commenting on the crisis arising from the failure to hold elections Human Rights Watch states:

“The Democratic Republic of Congo is facing a worsening political, economic, and security crisis. President Joseph Kabila was due to step down in December 2016 at the end of his constitutionally mandated two-term limit. But he has managed to hold on to power by delaying elections and overseeing a brutal crackdown against those calling for the constitution to be respected.”²⁷

On 31 December 2017 a number of protests were held at Catholic churches in Kinshasa and other cities. The security forces quelled these protests by shooting, beating and arbitrarily arresting protesters. A Human Rights Watch report on these events states:

“When confronted by the heavily armed police and soldiers, some protesters, dressed in white, sang hymns or knelt on the ground. At least eight people were killed and dozens injured, including at least 27 with gunshot wounds, but the actual number killed and wounded may be much higher.”²⁸

A United Nations report on the killing of anti-government protesters during 2017 states:

²⁵ International Crisis Group (4 April 2018) Electoral Poker in DR Congo

²⁶ The Conversation (11 April 2018) The DRC is still in crisis but there is a way out

²⁷ Human Rights Watch (4 December 2017) "Special Mission" :- Recruitment of M23 Rebels to Suppress Protests in the Democratic Republic of Congo

²⁸ Human Rights Watch (19 January 2018) DR Congo: Security Forces Fire on Catholic Churchgoers

“Between 1 January 2017 and 31 January 2018, at least 47 people, including women and children, were killed in the context of demonstrations and there are indications that Congolese security services have attempted to cover up these serious human rights violations by removing the bodies of victims and obstructing the work of national and international observers.”²⁹

The Kamwina Nsapu Rebellion

The political instability arising from the delay in holding elections is not the only crisis facing the Kabila regime, as there are currently a number of conflicts ongoing in the South and West of the country. By far the most serious of these is in the Kasai region where open warfare has raged since August 2016. Kasai is one of the DRC’s least developed regions, with high levels of poverty, child mortality and illiteracy. It is also the birthplace of former UDPS party leader Etienne Tshisekedi and is regarded as an opposition stronghold. The present conflict arose following the installation of Jean Pierre Pandi, as the Kamwina Nsapu³⁰, a local customary position. The government refused to recognise the Kamwina Nsapu’s appointment due to his perceived anti-government stance, which led to him becoming increasingly hostile to the Kabila regime.

In a report on the origin of the rebellion in Kasai the International Refugee Rights Initiative states:

“After security services visited his town to search for weapons in April 2016, Mpandi accused them of violating sacred sites and of harassing citizens, including some of his family members. He mobilised many people, including children, from surrounding towns, set up barricades and instigated several attacks against state properties. The situation escalated. Members of the Congolese national army (Forces Armées de la République Démocratique du Congo, FARDC) killed Mpandi and several of his followers on 12 August 2016.”³¹

However this did not end the rebellion, with the Kamwina Nsapu militia continuing its campaign against the government’s forces. There have

²⁹ United Nations News Centre (21 March 2018) DR Congo: UN report finds 47 protestors killed, freedom of assembly curtailed by use of force. Full report is only available in French

³⁰ Some reports use the alternative spelling Kamuina Nsapu

³¹ International Refugee Rights Initiative (January 2018) Conflict and Displacement in the Kasai

since been numerous reports of atrocities committed by both side in this conflict.

Referring to the strife in Kasai Human Rights Watch states:

“Between August 2016 and September 2017, violence involving Congolese security forces, government-backed militias, and local armed groups left up to 5,000 people dead in the country’s southern Kasai region. Six hundred schools were attacked or destroyed, and 1.4 million people were displaced from their homes, including 30,000 refugees who fled to Angola. Nearly 90 mass graves have been discovered in the region, the majority of which are believed to contain the bodies of civilians and militants killed by government security forces using excessive force against alleged militia members or sympathizers.”³²

A typical incident occurred in February 2017 when the Congolese army responded to a rebel attack by killing over one hundred people, including 39 women. Commenting on this clash UN’s human rights spokeswoman Liz Throssell stated:

“We are deeply concerned at the reported high number of deaths, which, if confirmed, would suggest excessive and disproportionate use of force by the soldiers.”³³

The rebel militia has also been guilty of atrocities. In March 2017 Al Jazeera reported that the Kamwina Nsapu had captured over 40 policemen and then beheaded them.³⁴

Another actor in this conflict is a pro-government militia known as the Bana Mura, which has attacked both the Kamwina Nsapu and the local population, allegedly killing a large number of civilians. Describing the actions of the Bana Mura a Los Angeles Times article states:

“They killed everyone they could find in the remote village of Cinq. They murdered with guns and machetes and set babies and pregnant

³² Human Rights Watch (18 January 2018) World Report 2018 - Democratic Republic of Congo

³³ Al Jazeera (14 February 2017) UN: Soldiers kill 101 in clashes with Kamwina Nsapu

³⁴ Al Jazeera (25 March 2017) Kamwina Nsapu militia kill 40 policemen in DR Congo

women on fire. They attacked the clinic and killed 90 patients and medical staff."³⁵

A report on a fact-finding mission conducted by the International Federation for Human Rights (FIDH) and its Congolese member organisations refers to:

"Villages destroyed by heavy artillery, attacks on hospitals and places of worship, executions, torture and mutilation, sexual violence, looting, arbitrary arrests and detention."³⁶

This report concludes that these attacks were:

"Planned, directed and also actually committed by Congolese State agents, along with their Bana Mura militia auxiliaries, whom they helped to structure and arm."³⁷

Conflict in North Kivu

The ongoing struggle in the Kasai region is not the only conflict currently taking place in the DRC. In North Kivu a military operation by the Congolese army to defeat the FDLR, a Rwandan Hutu militia, exacerbated long-standing inter-ethnic tensions between the Nande and Hudu groups and the local Hutu community, whom they regard as foreigners and supporters of the FDLR. Among the reports of atrocities committed in this inter-ethnic quarrel is an account of an attack on a village in North Kivu in February 2017 from the German broadcaster Deutsche Welle which is described as follows:

"An estimated 25 people, mostly Hutus, have been hacked to death with machetes by militiamen from the Nande ethnic group in eastern Democratic Republic of Congo. They were reportedly beheaded by the attackers."³⁸

Ituri Province

During the 1998-2003 war thousands of lives were lost in fighting between the Hema and Lendu ethnic groups. In the years following the war these two groups managed to live in relative

³⁵ Los Angeles Times (26 June 2017) They're killing babies and torching villages: Who is behind the Democratic Republic of Congo's ugly new war?

³⁶ International Federation for Human Rights (20 December 2017) Slaughter in Kasai: Crimes against humanity perpetrated to create chaos

³⁷ ibid

³⁸ Deutsche Welle (19 February 2017) Militiamen kill 25 civilians in ethnic attack in DR Congo

peace despite long-standing grievances dating back to the colonial period. This dormant dispute flared up again in December 2017 when the Lendu launched a wave of attacks against the Hema community. An Al Jazeera report on the current fighting in Ituri states:

"Though it has been generally understood that Lendu groups have instigated the recent violence, armed with machetes, spears, bows and arrows and some with guns, their motives behind the sudden attacks and whether they were acting autonomously has remained unclear."³⁹

The Congolese government has portrayed the unrest in Ituri province as a quarrel between the Hema and Lendu. However a Human Rights Watch report suggests that there may be more sinister reasons for the recent violence, saying:

"While government officials have insisted that the recent violence is the consequence of inter-ethnic tensions, baffled residents say that isn't so. Many referred to an 'invisible hand' – seemingly professional killers came into their villages and hacked people to death in what appeared to be well-planned assaults. Some alleged that government officials may be involved."⁴⁰

Refugees

The ongoing conflicts in Kasai and Ituri have produced a flood of refugees into Angola and Uganda respectively. Reporting on the situation for Congolese civilians who have fled from Kasai into Angola the International Refugee Rights Initiative states:

"While the humanitarian situation in Angola is gradually improving, none of the asylum seekers in Angola had been granted refugee status. The Angolan government has restricted freedoms for asylum seekers and harassed many of them. Several interviewees told IRRRI that people who they believed could qualify as asylum seekers and refugees were being sent back to the DRC, which could be in violation of the principle of *non-refoulement*."⁴¹

One refugee who fled to Angola to escape the fighting in Kasai reported that:

³⁹ Al Jazeera (11 April 2018) Violence returns to DR Congo's Ituri province

⁴⁰ Human Rights Watch (13 April 2018) The Congolese Government is at War with its People

⁴¹ International Refugee Rights Initiative (January 2018) Conflict and Displacement in the Kasai

“They shot at everyone. They destroyed our houses and killed a lot of people.’ said one refugee. ‘It was a slaughterhouse.’ Along with others, he described how the army killed civilians, committed sexual violence, and looted and burned many homes.”⁴²

As a result of the hostilities in Ituri an estimated 40,000 Hema have made the dangerous journey across Lake Albert to neighbouring Uganda, where they are currently living in a refugee camp. Explaining why she had fled to Uganda with her family Congolese refugee Rebecca Salama stated:

“When you go to pick your crops, or go to the forest for firewood, if you’re a man, they kill you, and if you are a woman, they’ll rape you. That is why we came here.”⁴³

Prospects for 2018

A recent report from Human Rights Watch assesses the current situation in the DRC as follows:

“Congolese security forces and armed groups have killed thousands of civilians in the past two years, adding to at least six million Congolese who have died from conflict-related causes over the past two decades – making the conflict in Congo the world’s deadliest since World War II. Today, some 4.5 million Congolese are displaced from their homes – more than in any other country in Africa. Tens of thousands have fled into Uganda, Angola, Tanzania, and Zambia in recent months – raising the specter of increased regional instability.”⁴⁴

An article published by African Arguments magazine looks at the possible courses of action that the United Nations might take in response to the situation in the DRC, saying:

“In the coming months, the DRC will again be on the agenda of the UN Security Council and the UN Human Rights Council. They will have to decide between two broad approaches. One would be to further limit the resources of the overstretched MONUSCO, while maintaining a wait-and-see approach to elections and

accountability for crimes in the Kasai. The other would be to take tangible action in actively urging the government to de-escalate the political crisis, protect civilians and support accountability. Only one has a hope of defusing the national political crisis and, with it, the deadly and disruptive local conflicts it stimulates.”⁴⁵

The International Crisis Group offers the following pessimistic prognosis for the DRC’s immediate future:

“The most likely course in 2018 is gradual deterioration. But there are worse scenarios. As the regime clamps down, fails to secure parts of the country, and stokes instability in others, the risk of a steeper descent into chaos remains – with grave regional implications. There are already troubling signs. Popular discontent raises the risk of unrest in urban centers; in recent days, the violent dispersal of protesters in Kinshasa and other towns has left several people dead. Elsewhere, local militias plague several provinces. Fighting over the past year in the Kasai region has reportedly left more than 3,000 dead, and the conflict in the country’s east claims dozens of lives each month.”⁴⁶

In an online discussion Gregoire Borgoltz, Concern Worldwide Country Director for DRC, gives his opinion regarding likely developments in the DRC:

“It is hard to know what will happen, but I have not heard anyone who thinks that the situation will improve in 2018. DRC is very unpredictable and there’s potential for things to get a lot worse.”⁴⁷

All documents and reports referred to in this article may be obtained upon request from the Refugee Documentation Centre.



⁴² African Arguments (16 January 2018) The Congo’s political crisis is stirring deadly violence in Kasai and beyond.

⁴³ Al Jazeera (January 2018) Thousands flee to Uganda as violence surges

⁴⁴ Human Rights Watch (13 April 2018) The Congolese Government is at War with its People

⁴⁵ African Arguments (16 January 2018) The Congo’s political crisis is stirring deadly violence in Kasai and beyond.

⁴⁶ International Crisis Group (2 January 2018) 10 Conflicts to Watch in 2018

⁴⁷ Concern Worldwide U.S. (22 January 2018) What’s going on in Congo? Your questions answered

UNCERTAINTY FOR PROTECTION APPLICANTS POST-BREXIT



Noeleen Healy, Law Centre, Smithfield

1. Dublin procedures

The Dublin III Regulation (EU No 604/2013) provides the mechanism for determining which country in Europe is responsible for determining a protection applicant's protection claim. Signatories to the Regulation include all twenty-eight EU member states and Norway, Iceland, Switzerland and Liechtenstein, as associated countries. If a country other than Ireland is deemed the responsible country, the protection applicant is then transferred to that country to have his claim for protection assessed. The basis of the system is an understanding that each of the countries offers similar protection for applicants.

The European Union (Dublin System) Regulations 2018 (SI No. 62 of 2018) came into effect on 6 March 2018, demonstrative of Ireland and the EU's continued commitment to transfers under the Dublin procedures and likely transfers to the UK pending the country's withdrawal from the Union. It is unclear at present whether the UK will remain as an associated country for the purposes of the Dublin procedures.

2. Subsidiary protection

The Qualification Directive (2004/83/EC) applies to both the granting of subsidiary protection and refugee status. Subsidiary protection is a complementary form of protection granted under the auspices of the EU. It provides protection for applicants whose claim does not fit the definition

of refugee but who would be at risk of serious harm if returned to their country of origin.

Although the UK is signatory to the 1951 Refugee Convention, the protection framework is substantially governed by EU law. The Qualification Directive sets out the provisions and criteria for granting subsidiary protection, referred to as humanitarian protection in the UK. It has been transposed into UK law through the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 and through immigration rules of procedure. The regulations and immigration rules are not primary legislation and are subject to change by ministerial decision. If, upon exiting the UK, a policy decision is taken that subsidiary protection as a discrete form of status, is to be substantially amended, this could be done by ministerial order. Applicants being transferred from Ireland to the UK, face real uncertainty as to whether they will be able to make an application for subsidiary protection in the UK post-Brexit, their right under EU law.

3. Legal certainty

Legal certainty is a fundamental aspect of the rule of law. In *Belgocodex SA v Belgium*, Case C-381/97 (3 December, 1998), the Court of Justice of the European Union (CJEU) stated as follows.

"It must be recalled in this regard that the principle of protection of legitimate expectations and the principle of legal certainty form part of the Community legal order and must be observed by the Member States when they exercise the powers conferred on them by Community directives." (at para.26)

Whereas, upon exiting the EU, the UK would no longer be bound by the judgment of the CJEU, Ireland would remain so bound. As the European Court of Human Rights (ECtHR) has pointed out, absolute legal certainty is unattainable, but there should be a degree of foreseeability, so that one might conduct themselves accordingly.

"[A] norm cannot be regarded as a 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail." (*Sunday Times v*

UK (No 1) (1979-80) 2 EHRR 245 at para. 49)

Foreseeability is an essential element in interpretation of EU law, as was stated by the CJEU in *Paola Faccini Dori v Recreb Srl*. Case C-91/92 (14 July, 1994). The right to legal certainty was noted as having a constitutional basis in *King v AG* [1981] IR 233 in this jurisdiction, although here in the context of criminal offences. Legal certainty is intertwined with foreseeability and although usually expressed in the maxim *nullem crimen sine lege* in the criminal law field, a protection applicant has no less right to know how his case will be treated, whether a particular protection will form part of the State's system and what evidentiary threshold needs to be met. The recent judgment of Donnelly J in *Minister for Justice v. Celmer* [2018] IEHC 119, in relation to European arrest warrants and the Polish judicial system, highlights how legal certainty is central to the functioning of Union rules.

4. An uncertain future

Legal certainty, and foreseeability as a constitute element of that principle, is no less applicable to protection applications than to the criminal sphere. The status of subsidiary protection in the UK, and EU law generally, is currently shrouded with uncertainty. For applicants transferred to the UK under the Dublin procedures, that lack of certainty could result in them not being permitted to claim what is their legal entitlement under Union law.

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Boris Panhoelzl, ACCORD - Austrian Centre for Country of Origin and Asylum Research and Documentation

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DOCUMENTS SINCE 3 MARCH 2018	DOCUMENTS IN TOTAL	SOURCES COVERED ON A REGULAR BASIS	COUNTRIES

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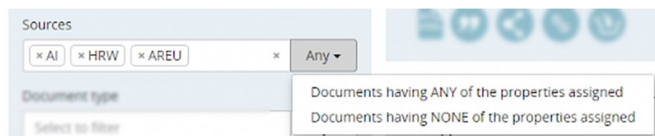
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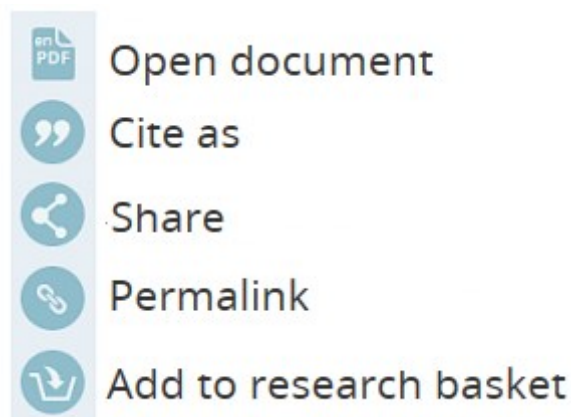
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