

# The Researcher

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## Welcome to the June 2009 issue of The Researcher.

In this issue Patricia Brazil looks at the whole process of family reunification in Ireland against the international background, examines rights to it under Irish law, notes the delays in the system, evaluates the aspect of fraud and the requirement to documentary evidence and considers the definition of dependency. Aileen Collard analyses recent caselaw on the assessment of documentation and country of origin information in the asylum process and gives practical pointers on submission of COI and documentation to ORAC and the Refugee Appeals Tribunal. We are delighted to be able to publish here articles by lawyers from Italy and Slovenia. Maria Cristina Romano gives a general overview of the Italian asylum procedure and then outlines some problematic aspects. Vita Habjan compares procedural safeguards provided for in detention of asylum seekers and custody of suspects in criminal proceedings in Slovenia. UNHCR have kindly contributed the Executive Summary of their recent report *Mapping Integration* and also an introduction to their *Guidance Note on Refugee Claims* relating to FGM. Patrick Dowling investigates farmer suicides in India and John Stanley BL gives an update on recent developments in refugee and immigration Law.

Paul Daly, RDC



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### Disclaimer

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## Recent issues in Refugee Family Reunification under Irish law



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### Introduction

Article 41.1.1° of the Irish Constitution recognises the family as “the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.” In view of its special status, the State is committed by Article 41.1.2° to “protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.” This emphasis on the family at the heart of social and civic life is not unique to Irish law, but is in fact a familiar refrain in international human rights instruments; as Jastram and Newland note, “the role of the family as a central unit of human society is entrenched in virtually all cultures and traditions, including the modern, universal legal ‘culture’ of human rights”.<sup>1</sup> For refugees, the right to family unity, and to family reunification,<sup>2</sup> is of crucial importance. Separation from family members can have numerous detrimental effects, from hindering a refugee’s ability to overcome the traumatic effect of his or her experiences by reason of the ongoing separation from loved ones, to acting as a barrier to integration in the host State.

The significant growth in refugee applications in Ireland since the 1990s has been well documented.<sup>3</sup> For those applicants who were ultimately recognised as refugees in the State, family reunification is of vital significance, yet a number of difficulties in the law and practice governing this right have become apparent. This article proposes to explore the right to family reunification in the international and domestic legal contexts. It is intended to highlight a number of difficulties which have arisen in relation to family

<sup>1</sup> Jastram and Newland “Family unity and refugee protection” in Feller, Turk & Nicholson (eds) *Refugee Protection in International Law* (Cambridge University Press 2003) at p.556.

<sup>2</sup> As Professor Hathaway notes, “while state practice nearly universally affirms the duty of states to act lawfully, the duty to take affirmative steps to facilitate family reunification is more controversial”: Hathaway *The Rights of Refugee under International Law* (Cambridge University Press 2005) at p.546.

<sup>3</sup> See Egan and Brazil “Asylum and Immigration Law” in Byrne and Binchy (eds) *Annual Review of Irish Law 2004* (Thomson Round Hall 2005).

reunification in Ireland in recent times, and to make proposals designed to ensure that refugee family reunification is informed by a rights based perspective in both law and practice.

### A Right to Family Reunification?

Given the universal acceptance of the importance of the family unit, it is somewhat surprising that the Convention Relating to the Status of Refugees 1951 makes no reference to the concept of family reunification. Instead, the issue was dealt with by the Final Act of the Conference Plenipotentiaries at Recommendation B, where it was recommended that governments take the necessary measures for the protection of the refugee’s family, especially with a view to “(1) ensuring that the unity of the refugee’s family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country, and (2) the protection of refugees who are minors, in particular unaccompanied children and girls.”<sup>4</sup> While many international and regional human rights instruments recognise the right to family life and prohibit unlawful or arbitrary interference with family rights,<sup>5</sup> the only explicit recognition of a right to family reunification can be found in Article 10 of the Convention on the Rights of the Child, which states that “applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States in a positive, humane and expeditious manner”.

Despite the absence of a mandatory regime for family reunification under international law,<sup>6</sup> “once formally recognized as a Convention refugee, most developed countries grant refugees a formal legal right to be reunited with family members”.<sup>7</sup> Directive 2003/86/EC of 22 September 2003 on the right to family reunification sought to harmonise the law of the

<sup>4</sup> Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 189 U.N.T.S. 37, 1951, Section IV. B on the Principle of the Unity of the Family.

<sup>5</sup> See, eg, Article 16 of the Universal Declaration of Human Rights, Articles 17 & 23 of the International Covenant on Civil and Political Rights, Article 10 of the International Covenant on Economic, Social and Cultural Rights, and Article 8 of the European Convention on Human Rights.

<sup>6</sup> Note that although Professor Hathaway attempts to make a case for the recognition of a customary legal norm to protect the family unity of refugees, he acknowledges that on close examination “it is clear that while there is a continuing insistence that the family members of a primary applicant refugee should be admitted to protection, most refugee-specific formulations fail to define with any precision the content of an affirmative dimension of the principle of family unity”: Hathaway *The Rights of Refugee under International Law* (Cambridge University Press 2005) at p.545.

<sup>7</sup> *Ibid* at p.535.

European Union member states on conditions for admission and residence of family members of third country nationals, including refugees. However, Ireland has exercised its right to opt out of this Directive, and the right to refugee family reunification under Irish law is thus exclusively governed by the provisions of section 18 of the Refugee Act 1996<sup>8</sup>.

Section 18 provides for two classes of family reunification: under section 18(3)(b) there is a mandatory entitlement (subject only to national security or public policy) to family reunification in respect of a refugee's spouse, the parents of a refugee who is under the age of 18 on the date of application for family reunification, or the children of a refugee who are under the age of 18 and unmarried on the date of application for family reunification. The second class of family reunification is on a discretionary basis only, and relates to dependent members of the refugee's family who are defined in section 18(4)(b) as "any grandparent, parent, brother, sister, child, grandchild, ward or guardian of the refugee who is dependent on the refugee or is suffering from a mental or physical disability to such extent that it is not reasonable for him or her to maintain himself or herself fully." The procedure for applications for family reunification is set out in bare detail in section 18(1)-(3): a refugee in respect of whom a declaration is in force may apply to the Minister for Justice for permission to be granted to his or her family to enter and reside in the State. Such application is referred to the Refugee Applications Commissioner which is required to investigate the application and to submit a report in writing to the Minister, which report "shall set out the relationship between the refugee concerned and the person the subject of the application and the domestic circumstances of the person".<sup>9</sup> If the Minister is satisfied upon receipt of the Commissioner's report that the person is a member of the family of the refugee, the Minister shall grant permission to the person to enter and reside in the State in the case of family members as defined in section 18(3), or may grant permission to the person to enter and reside in the State in the case of dependent members of the family as provided by section 18(4)(b).

Section 18 is remarkably lacking in detail in respect of crucial aspects of the family reunification process: what is the extent and nature of the "investigation" to be conducted by the Refugee Applications Commissioner? Is the Minister required, or even permitted, to conduct his own investigations upon receipt of the Commissioner's report? Does the family reunification

<sup>8</sup> Note that family reunification in respect of persons who have been granted subsidiary protection is provided for by Regulation 16 of SI 518 of 2006, in similar terms to section 18 of the 1996 Act.

<sup>9</sup> Section 18(2) of the Refugee Act 1996.

procedure permit or require oral interview, or must it be an application on the papers only? What is the definition of "dependency"? The failure to lay down clear and transparent guidelines for the processing, investigation and determination of family reunification applications has resulted in a number of difficulties in recent times, some of which are addressed below.

### Delay

As Professor Hathaway notes, "there are often prolonged delays in authorising family reunification in developed states."<sup>10</sup> Staver reports that "20% of family reunification applications for refugees in Canada take more than 32 months to process for applicants from West Africa, more than 39 months from Pakistan and more than 37 months from Sri Lanka."<sup>11</sup> Jastram and Newland attribute the growing phenomenon of extensive delays in processing family reunification applications to "heightened security concerns following the 11 September 2001 terrorist attacks in the United States" as a result of which "family reunification procedures have become stricter and more protracted as more concrete evidence of family relationships and identity are demanded".<sup>12</sup>

Whilst national security concerns may have contributed to the growing problem of delays in the family reunification system in recent times, such delay has long been of concern to the UNHCR. It is twenty eight years since the UNHCR Executive Committee recognised the desirability that "countries of asylum and countries of origin support the efforts of the High Commissioner to ensure that the reunification of separated refugee families takes place with the least possible delay,"<sup>13</sup> and ten years since it called for "prioritisation of family unity issues at an early stage in all refugee applications."<sup>14</sup> Similarly, the European Council on Refugees and Exiles (ECRE) has recommended that "[f]amily reunification should take place with the least possible delay and within a period of six months from the time an application is made".<sup>15</sup>

<sup>10</sup> Hathaway *The Rights of Refugee under International Law* (Cambridge University Press 2005) at p.537.

<sup>11</sup> Staver "Family Reunification: A Right for Forced Migrants?" Refugee Studies Centre, Working Paper No. 51, November 2008 at p.9 citing Canadian Council for Refugee *Making Speedy Family Reunification a Priority: Manifesto for Family Reunification* (2007).

<sup>12</sup> Jastram and Newland "Family unity and refugee protection" in Feller, Turk & Nicholson (eds) *Refugee Protection in International Law* (Cambridge University Press 2003) at p.562.

<sup>13</sup> UNHCR Excom Conclusion No.24, "Family Reunification" (1981) at paragraph (2).

<sup>14</sup> UNHCR Excom Conclusion No.88 "Protection of the Refugee's Family" (1999) at paragraph (b)(iv).

<sup>15</sup> European Council on Refugees and Exiles *Position on Family Reunification* (July 2000), paragraph 32.

In a recent report on refugee integration in Ireland, UNHCR was critical of delays which were arising in the family reunification system in Ireland, reporting that “the main concern in relation to family reunification and integration is the processing time which can take up to 18 or 24 months.”<sup>16</sup> Anecdotal evidence suggests that some applications take even longer; in at least one case there was a delay of over three years in the issuing of visas on foot of a successful family reunification application.<sup>17</sup>

Section 18 of the Refugee Act 1996 contains no guidelines as to the length of time for processing family reunification applications. However, a recent decision of the High Court may be of some assistance to refugees awaiting a decision on a family reunification application. In the case of *M v Minister for Justice, Equality and Law Reform*,<sup>18</sup> the applicants complained of delay in the determination by the Minister of an application for permission to reside in the State on the basis of marriage to an Irish national. The High Court (Edwards J.) held that six months was an acceptable period of time for the initial stage of the process, namely “gathering of information and the making of enquiries”. In respect of the second stage of the process, namely the making of the decision itself, Edwards J. held:

“Having regard to the complexity of the issues to be considered by the Minister in the present case, and his duty to consider the first named applicant’s case judicially, and with due regard to the imperative of promptitude in order to minimise prejudice to applicants, I think that to allow him a further period of three to six months beyond the information gathering and enquiries stage would be reasonable in all the circumstances”.

Thus, Edwards J. concluded that “[i]f the applicant were kept waiting for a decision longer than 12 months I would have no hesitation in finding the delay to be unreasonable and, being unjustifiable notwithstanding any scarcity of resources, unconscionable.” It is submitted that this decision has clear ramifications for the family reunification process, as the importance of the right to spousal reunification at issue in *M v Minister for Justice* can be equated to the right to family reunification for refugees.

<sup>16</sup> “Mapping Integration: UNHCR’s Age, Gender and Diversity Mainstreaming Project on Refugee Integration in Ireland 2008/2009” April 2009, at p.86.

<sup>17</sup> See “Review of visa system after family left in camp for 3 years” *Irish Times*, July 26, 2008. Although the Minister for Justice subsequently apologised for what was described as an “isolated error”, anecdotal evidence suggests that this “profound system failure” was not unique: “Refugee group says visa errors common”, *Irish Times*, July 28, 2008.

<sup>18</sup> High Court, unreported, Edwards J., July 17, 2007; [2007] IEHC 234.

Indeed, a recent High Court decision would appear to have accepted the urgency with which family reunification must be treated. In *POT v Minister for Justice, Equality and Law Reform*,<sup>19</sup> Hedigan J. commented on the four year delay in determining the applicant’s application for family reunification as follows:

“the Court finds the timeline in the present case to be most disturbing. The requirements of constitutional justice dictate that an applicant seeking administrative relief, whether in the immigration context or otherwise, is entitled to a decision within a reasonable time (see *Awe v. The Minister for Justice, Equality and Law Reform* [2006] IEHC 6; *Iatan and Others v. The Minister for Justice, Equality and Law Reform and others* [2006] IEHC 30; *K.M. and G.D. v. The Minister for Justice, Equality and Law Reform* [2007] IEHC 234). The applicant in the present case applied for family reunification in June, 2003 and did not receive a decision until August, 2007; there was, therefore, a delay of over 4 years. This is a most unsatisfactory state of affairs.”

It is thus submitted that the present practice of the Department of Justice, in advising applicants for family reunification that such applications take in the region of 24 months to determine, is prima facie in breach of the right to a decision within a reasonable period of time.

### Investigation of Applications

As noted above, there is a regrettable lack of clarity in section 18 of the Refugee Act 1996 as to the procedures governing the investigation of an application for family reunification. The practice is that upon receipt of a request from the Minister for Justice to investigate an application for family reunification, the Refugee Applications Commissioner issues to the applicant a questionnaire designed to elicit information as to the nature of the relationship, the present location of the relevant family members and their circumstances. Once the applicant has completed the questionnaire and returned it to the Commissioner, in some cases the Commissioner may raise queries by correspondence based on the information given in the questionnaire; it is common for documentary evidence of relationship and/or dependency etc to be sought in this manner. The Commissioner will subsequently furnish a report on its findings to the Minister pursuant to section 18(2) of the 1996 Act. This report is not required to be furnished to the applicant.

<sup>19</sup> High Court, unreported, Hedigan J., November 18, 2008, [2008] IEHC 361.

However, in a number of recent cases, it has become apparent that concerns had arisen in relation to information furnished by the applicant in relation to the family reunification application. Such concerns can relate to the nature of the relationship, the location of the relevant family members or the true extent of the claimed relationship of dependency between them. The difficulty arises in such cases where neither the Commissioner nor the Minister alerts the applicant to such concerns, thus depriving the refugee of the ability to satisfactorily address such concerns. The case of *POT v Minister for Justice, Equality and Law Reform*<sup>20</sup> is a classic illustration of such a scenario. The applicant was recognised as a refugee in March 2003. He applied for family reunification in June 2003, which application was eventually refused in August 2007, over four years later. The reasons given for the refusal related *inter alia* to concerns as to the authenticity of birth certificates furnished in support of the application, and the absence of evidence of dependency in respect of one of the applicant's family members. Hedigan J. accepted that the Minister must carefully examine documents submitted in support of an application for family reunification, but held that where such an examination gives rise to concern as to the validity of the documents submitted, constitutional justice requires that the Minister must enter into communication with the applicant and afford him or her an opportunity to explain inconsistencies and/or dispel doubts in that regard. It was held that a letter requiring a satisfactory explanation would be sufficient. Hedigan J emphasised that:

“the obligation of communication between the Minister and an applicant applies only in the unique and special situation where the Minister is unsatisfied as to the validity of documentation submitted in support of an application for family reunification, in circumstances where that dissatisfaction has the potential to impact on the Minister's final decision in the matter. Failure to elicit a possibly complete answer could, after all, result in a two-year delay in family reunification while the applicant made a new application, as suggested by the respondent. The Irish Constitution, which places such importance on family unity, could not countenance such an injustice”.

This is an important affirmation of the importance of the rights at issue in an application for family reunification and the heightened obligations on the Minister for Justice when dealing with such applications.

<sup>20</sup> High Court, unreported, Hedigan J., November 18, 2008, [2008] IEHC 361.

### **Fraud and the Requirement of Documentary Evidence**

Another issue which has also arisen in recent times relates to concerns as to the prevalence of fraud in the family reunification system. In the case of the Somali refugee (referred to above) who received an apology for the three year delay in issuing family reunification visas, it was subsequently reported that the refugee was arrested for suspected identity fraud as a result of concerns that “the woman's relationship to some of her family members may not be as described by her in the application for family reunion”.<sup>21</sup> Such concerns are not unique to this jurisdiction; Staver notes that “according to Taitz et al., ‘58% of Somalis given DNA testing by Danish authorities between January, 1997, and September, 1998, received a negative result.’”<sup>22</sup> Similar concerns in the United States have led to the suspension of the Family Reunification (Priority 3) Program.<sup>23</sup>

It must be recognised that in some cases, a refugee applying for family reunification will be unable to obtain documentary evidence in support of the application, whether as a result of the country of origin being a “failed state” such as Somalia, or because the refugee is unable to seek assistance from the authorities of the country of origin by reason of the persecution which gave rise to the refugee claim.<sup>24</sup> Such difficulties are recognised by ECRE, who recommend that the absence of documentary proof of relationships should not affect the credibility of the application for family reunification nor result in the application being considered fraudulent.<sup>25</sup> Instead, it is recommended that authorities should seek to establish plausible family links through the information provided in the family reunification application form and supporting documentation:

<sup>21</sup> “Somali woman at centre of visa affair was arrested in Dublin” *The Irish Times*, November 25, 2008.

<sup>22</sup> Staver “Family Reunification: A Right for Forced Migrants?” Refugee Studies Centre, Working Paper No. 51, November 2008 at p.9 citing Taitz, Weekers and Mosca (2002) “DNA and Immigration: the Ethical Ramifications” (2002) *The Lancet* 359: 794.

<sup>23</sup> See US Bureau of Population, Refugees, and Migration “Fact Sheet on Fraud in the Refugee Family Reunification (Priority Three) Program” February 3, 2009, which reportedly confirmed biological relationships in fewer than 20% of cases after a pilot DNA testing program.

<sup>24</sup> Indeed, in some cases such an approach would be incompatible with the recognition of the individual as a refugee and might be regarded as grounds for revocation of refugee status: see Article 1C of the Convention Relating to the Status of Refugees and UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, paras 118-125.

<sup>25</sup> European Council on Refugees and Exiles *Position on Family Reunification* (July 2000), paras 39-48.

“If this is not feasible, the principal applicant and/or family members should be given a fair interview by the competent authorities with the sole purpose of establishing family links and identifying family members. The family reunification interview should not be used under any circumstances as a means to reassess the validity of the refugee status of the principal applicant.”

ECRE conclude that applicants “should be given the benefit of the doubt if they can provide a credible account of the relationship that matches the information provided by family members and the explanation for any lack of documents is reasonable when considering available country information, the circumstances of flight from the country of origin and risks associated with establishing contact with authorities of the country of origin.”<sup>26</sup>

In cases where concerns persist in relation to an application for family reunification, DNA testing may offer a means of resolving such concerns, subject to a number of caveats. Clearly, DNA testing will be unable to prove every family relationship; as ECRE note:

“If DNA tests are to take place, they should be solely used as a last resort for verification of family ties in cases where doubts are so grave that the request for reunification would otherwise be denied, or when the applicants themselves request a test in lieu of an interview. Due consideration needs to be given to the tests’ limitations in view of cultural differences in the definition of ‘family’ which in some cases, might include members of a household with whom there might not exist biological links.”<sup>27</sup>

Further concerns identified by Thomas Hammarberg, Council of Europe Commissioner for Human Rights, include the fact that:

“DNA testing can have serious implications for the right to privacy. Though voluntary testing can be accepted in certain circumstances in order to prevent fraud, this activity should be carefully regulated and the sharing of obtained data should be bound by the principle of confidentiality. When testing is considered necessary the costs should be born by the requesting authorities.”<sup>28</sup>

<sup>26</sup> *Ibid* at paragraph 41.

<sup>27</sup> *Ibid* at paragraph 43. For an interesting discussion of the Western-centric emphasis on nuclear families and its implications for refugee family reunification see Staver “Family Reunification: A Right for Forced Migrants?” Refugee Studies Centre, Working Paper No. 51, November 2008 at pp.6-11.

<sup>28</sup> Commissioner for Human Rights “Refugees must be able to reunite with their family members” August 4, 2008 (available at

Similarly, Jastram and Newland refer to the increasing tendency to use DNA testing to confirm family relationships among refugees and the people with whom they seek reunification, commenting:

“DNA testing is expensive, and many potential receiving states expect refugees to pay for the tests themselves. The requirement for DNA testing is also a source of considerable delay in processing applications. A better approach would be to carry out scientific testing only in exceptional circumstances with the consent of the refugee and family member, in the context of an interview process. The results should remain confidential, and costs should be borne by the entity requesting the test, at least in those cases where the tests confirm the relationship alleged by the refugee. Refusal to submit to testing should not automatically result in a denial of reunification.”<sup>29</sup>

Provided such concerns are addressed, it is submitted that DNA testing may be used in appropriate cases as a means of establishing family relationships for the purposes of family reunification applications. However, at present there is no formalised system by which such tests may be obtained in order to satisfy the Minister of a family relationship; it is submitted that in some cases, in order to fully respect the right to family reunification, the Minister may be required to put in place arrangements for such testing to be undertaken, particularly where the application for family reunification is likely to be refused absent such evidence. Whilst the Irish courts have been notoriously reticent in the imposition of positive obligations on the executive branch,<sup>30</sup> it is worth noting that Article 8 of the European Convention on Human Rights encompasses not only negative obligations, but in some cases also positive obligations on states to take action to ensure that the right to family life is protected.<sup>31</sup>

[http://www.coe.int/t/commissioner/Viewpoints/080804\\_en.asp](http://www.coe.int/t/commissioner/Viewpoints/080804_en.asp)

<sup>29</sup> Jastram and Newland “Family unity and refugee protection” in Feller, Turk & Nicholson (eds) *Refugee Protection in International Law* (Cambridge University Press 2003) at p.601.

<sup>30</sup> See *Sinnott v Minister for Education* [2001] 2 IR 545 and *TD v Minister for Education*[2001] 4 IR 259.

<sup>31</sup> See Mowbray *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart 2004), Chapter 6. See also Conclusions of UNHCR Global Consultations on International Protection, Geneva Expert Roundtable, 8-9 November 2001, which concluded that “Respect for the right to family unity requires not only that States refrain from action which would result in family separations, but also that they

### Definition of “dependency”

As noted above, section 18(4) of the Refugee Act 1996 confers upon the Minister a discretion to grant family reunification to “a dependent member of the family of a refugee”, with this class of family members defined in section 18(4)(b) as “any grandparent, parent, brother, sister, child, grandchild, ward or guardian of the refugee who is dependent on the refugee or is suffering from a mental or physical disability to such extent that it is not reasonable for him or her to maintain himself or herself fully.” Whilst the second limb of the definition, based on mental or physical disability, is sufficiently clear, difficulties arise in relation to the first limb of the test – what constitutes “dependency”, and how is it defined?

Many commentators note that “a useful limiting factor recognised by many States in determining whether more distant family members should be reunited is dependency.”<sup>32</sup> While there is no consensus in international human rights law instruments, UNHCR offer the following definition:

“a dependent person is someone who relies for his or her existence substantially and directly on another person, in particular for economic reasons, but also taking emotional dependency into consideration”<sup>33</sup>

The definition of dependency under European Union law would seem to broadly accord with this approach; in *Lebon*<sup>34</sup> the European Court of Justice held that:

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take measures to maintain the unity of the family and reunite family members who have been separated”.

<sup>32</sup> Jastram and Newland “Family unity and refugee protection” in Feller, Turk & Nicholson (eds) *Refugee Protection in International Law* (Cambridge University Press 2003) at p.585.

<sup>33</sup> UNHCR Division of International Protection *Resettlement Handbook* (revised ed. Geneva, 1998) at ch.4.6.7(b) cited in Jastram and Newland “Family unity and refugee protection” in Feller, Turk & Nicholson (eds) *Refugee Protection in International Law* (Cambridge University Press 2003) at p.585.

<sup>34</sup> *Case 316/85 Centre public d'aide sociale de Courcelles v Marie-Christine Lebon* [1987] ECR 2811. See also *Case C-1/05 Jia v Migrationsverket* [2007] ECR I-1 where it was held that “[i]n order to determine whether the relatives in the ascending line of the spouse of a Community national are dependent on the latter, the host Member State must assess whether, having regard to their financial and social conditions, they are not in a position to support themselves. The need for material support must exist in the State of origin of those relatives or the State whence they came at the time when they apply to join the Community national.”

“the status of dependent member of a worker’s family is the result of a factual situation. The person having that status is a member of the family who is supported by the worker and there is no need to determine the reasons for recourse to the worker’s support or to raise the question whether the person concerned is able to support himself by taking up paid employment.”<sup>35</sup>

In particular, the ECJ held that the fact that a family member had applied for social welfare did not prevent that person being regarded as a dependent family member.<sup>36</sup>

It would appear that in some cases at least, the practice is to assess dependency for the purposes of section 18(4) on the basis of strictly financial support, without proper regard to the broader circumstances of the relationship between the refugee and the family member concerned. This can also cause difficulties in terms of proving the financial relationship; while many refugees support their family members by way of remittances, depending on the circumstances in the country where the family members reside, such remittances may be disbursed via informal channels in the absence of organised banking or financial services.<sup>37</sup> In a number of cases, the Department of Justice has furthermore determined that family members cannot be regarded as dependents where the refugee is him or herself dependent on social welfare. There is no basis for this requirement, and it is at least arguable that the imposition of such an additional requirement is *ultra vires* the provisions of section 18 of the Refugee Act 1996.

### Conclusions

This article seeks to highlight only some of the issues currently arising in relation to family reunification. Further litigation is anticipated in the coming months on a range of issues in the family reunification process, and it is hoped that this will give rise to clarification as to the obligations on all parties in the family reunification process and the elimination of those practices which impede the right to family reunification and its lawful enjoyment by those who have been recognised as refugees in the State. As Staver notes, many of the difficulties in the family reunification process arise as a result of the location of the process within the “immigration control” sphere, instead of the adoption of the more appropriate “rights based

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<sup>35</sup> *Ibid* at para.22.

<sup>36</sup> See Van der Mei *Free Movement of Persons within the European Community* (Hart 2003) at p.39.

<sup>37</sup> See Crepeau and Nakache *Forced Migration and Global Processes* (Lexington 2006) at pp.135-138.

perspective”.<sup>38</sup> It is worth stating that rather than imposing additional burdens, family reunification in fact benefits the host State; as noted by UNHCR, “maintaining and facilitating family unity helps to ensure the physical care, protection, emotional well-being and economic support of individual refugees and their communities. The protection that family members can give to one another multiplies the efforts of external actors. In host countries, family unity enhances refugee self-sufficiency, and lowers social and economic costs in the long term”.<sup>39</sup> Notwithstanding such benefits to the host State, it is submitted that the ultimate goal of all actors should be the achievement of a system which recognises the profound importance of the right to family reunification and the fact that:

“We are bound to our family members through a more richly complex web of relationships, and mixture of love and dependence, than we share with any other people. To deprive someone of these relationships is to deprive him of his richest and most significant bonds with other human beings. That is something we should do only in rare circumstances indeed”<sup>40</sup>



### Directory of Migrant Led Organisations

The second edition of the Immigrant Council of Ireland’s *Directory of Migrant Led Organisations* has recently been published. Since the Directory was published in May 2006 a number of the groups in the first edition have ceased to exist and new groups have emerged. The second edition of the directory features 61 organisations. Each entry includes information provided by the groups themselves on their goals, services or activities and relevant contact details.

The Directory can be accessed online at [http://www.immigrantcouncil.ie/images/9108\\_MLODirectory0509.pdf](http://www.immigrantcouncil.ie/images/9108_MLODirectory0509.pdf)



<sup>38</sup> Staver “Family Reunification: A Right for Forced Migrants?” Refugee Studies Centre, Working Paper No. 51, November 2008 at pp.19-25.

<sup>39</sup> Conclusions of UNHCR Global Consultations on International Protection, Geneva Expert Roundtable, 8-9 November 2001, para.6.

<sup>40</sup> Meilaender *Toward a Theory of Immigration* (Palgrave 2001) at p.182.

### UNHCR Guidance Note on Refugee Claims Relating to Female Genital Mutilation



*From Manuel Jordão, UNHCR Representative in Ireland*

The *Guidance Note on Refugee Claims relating to Female Genital Mutilation* was issued by UNHCR Headquarters in Geneva on 18 May 2009. It is a public domain document intended for use by staff of UNHCR, governments, legal practitioners, decision-makers, the judiciary, non-governmental organizations and other external partners who may be involved in refugee status determination.

It provides guidance on the elements to be considered in deciding on refugee claims made by a girl or woman who has been compelled to undergo, or is likely to be subjected to female genital mutilation (FGM). It is also relevant for examining claims made by a parent who fear that his or her child will be exposed to the risk of FGM, or who risk persecution for being opposed to the practice.

The Note examines the forms and consequences of FGM, provides a brief overview of the relevant human rights and refugee legal framework and builds on legislative as well as jurisprudential developments. It analyses the applicable criteria set out in the 1951 Convention relating to the Status of Refugees and identifies FGM as a form of gender-based and child-specific persecution, as well as, in certain circumstances, a form of continuing harm.

Interested readers may wish to bear in mind that the Guidance Note supplements and should be read in conjunction with UNHCR’s *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (<http://www.unhcr.org/refworld/docid/3ae6b3314.html>), as well as relevant Guidelines on International Protection, including *Guidelines on International Protection: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees* (<http://www.unhcr.org/refworld/docid/3d36f1c64.html>).

The *Guidance Note on Refugee Claims relating to Female Genital Mutilation* has been published on the UNHCR Refworld website and is available at <http://www.unhcr.org/refworld/docid/4a0c28492.html>.



## An Analysis of Recent Caselaw on the Assessment of Documentation and Country of Origin Information in the Asylum Process



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This paper has been adapted from a presentation which was given to the Refugee and Immigration Practitioners' Network Meeting on 30 April 2009.

Immigration and Asylum Practitioners are often presented with a copious volume of supporting documentation in respect of clients they are representing within the asylum process. They are faced with the unenviable and difficult task of having foreign documentation such as birth/marriage/death certificates, identity cards, correspondence and other documentation translated and establishing its authenticity and value in supporting a client's asylum claim. With the development of information technology, an endless volume of Country of Origin Information is freely available on the Internet and through other sources and include both Government-based and Non-governmental Organisation (NGO) reports from human rights bodies such as Amnesty International, Human Rights Watch and the UNHCR. Practitioners often have to wade through reams of paper in an effort to decipher credible sources of relevant current information in support of asylum claimants. The use of documentation and Country of Origin Information is often central to the success of asylum claims. As a result, the manner in which it is treated and assessed by the Refugee Applications Commissioner (hereinafter 'RAC') and Refugee Appeals Tribunal (hereinafter 'RAT') is regularly subjected to challenge by Judicial Review, giving rise to a growing body of case law. This article seeks to identify the main principles elucidated in recent Judicial Review Judgments in Ireland, which may be of assistance in the often mammoth task of preparing and presenting documentation and Country of Origin Information within the asylum process. Arising from this case law, it also outlines some practical pointers which may be of assistance for practitioners in the preparation of asylum claims.

### The Assessment of Documentation in the Asylum Process

In Ireland, aside from the appeals process from the RAC to the RAT, the only mechanism of challenging the State's assessment of the authenticity of personal or other documentation submitted by asylum applicants is by way of Judicial Review. The findings from these

bodies in relation to the manner in which documentation and Country of Origin Information is assessed are commonly challenged on the grounds of failing to consider relevant documentation, failing to put issues regarding the authenticity of documentation to the asylum applicant, failing to take into account relevant considerations such as his/her explanations for any issues arising, having no basis and/or giving no reasons for a finding that documentation was unreliable and/or a breach of fair procedures, natural and constitutional justice. However in the United Kingdom, Section 108 of the Nationality, Immigration and Asylum Act 2002, provides a specific procedure for testing the evidence for an assertion made by the Home Office that documentation submitted in support of asylum and immigration claims are forged or lacking authenticity in some way. An Immigration Judge adjudicates upon the admissibility and reliability of such evidence before admission to the hearing proper.

Appeals to the Asylum and Immigration Tribunal from such decisions of Immigration Judges have elucidated important principles regarding their conduct in accordance with fair procedures particularly regarding the burden and standard of proof. In RP (Proof of Forgery) Nigeria [2006] UKIAT 00086, the Tribunal emphasised that any allegation of forgery must be proved by the person making the allegation. In finding that the Immigration Judge had made a serious material error in law in relying merely upon the assertion of an Entry Clearance Officer that a document provided by the appellant was forged as being wholly inadequate evidence, it stated: "*In judicial proceedings an allegation of forgery needs to be established to a high degree of proof, by the person making the allegation. It is therefore a matter which the respondent bears the burden of proof.*" (Page 5) The Tribunal cited this case in a later case of OA (Alleged Forgery; Section 108 Procedure) Nigeria [2007] UKIAT 00096, and confirmed that "*The standard to which the allegation must be proved is the civil standard of a balance of probabilities but, due to the seriousness of the matter in issue, it is at the upper end of the scale.*" (Page 6) In upholding the appeal, the Tribunal went on to hold that there was a necessity for appropriate expert evidence upon which the Immigration Judge could find that a document was in fact a forgery as follows: "*We find that the Immigration Judge Field materially erred in law in finding himself satisfied, in respect of each bank statement, that the respondent had shown that the bank statement was not genuine. He did not have any expert evidence before him on which he could reach such a conclusion. He was relying on evidence from the forgery officer, who was himself purporting to give expert evidence on a matter outside his knowledge of expertise.*" (Page 9)

The aforesaid Judgments were followed in the recent Judgment of Ms Harding Clarke in (EN) N -v- RAT (Unreported High Court Judgment, 5<sup>th</sup> February 2009). She granted Judicial Review quashing a decision of the RAT, in circumstances where the Tribunal Member had found key documents to be forgeries in breach of fair procedures without referring the issue back to the Applicant to enable him to address the issue and/or without any evidence/basis/reasons. The documents related to an asylum applicant from Cameroon who claimed that he had been arbitrarily arrested, imprisoned and tortured owing to his participation in protests against his brother's disappearance which was documented in Country of Origin Information. He submitted both his and his brother's birth certificates, thereby providing an evidential nexus to his brother's documented disappearance. The Tribunal Member found that the birth certificates were forgeries without giving any reasoning. Ms Justice Harding Clarke held: *"I have carefully examined the decisions of the U.K. Immigration Appeal Tribunal submitted by counsel for the applicant and I am satisfied that the principles set out in those decisions are particularly apposite to the present case where documents of a relatively minor nature and role produced negative results to an asylum applicant... I am satisfied that although these cases relate in part to the procedures under S. 108 of the U.K. legislation, of which there is no Irish equivalent, the general principles set out in relation to the evidentiary obligations of decision-makers in cases where documents are alleged by the decision-makers to be forged are equally applicable in this jurisdiction. I accept that in the vast majority of cases where documents of dubious authenticity and provenance are produced, the cases are invariably determined on a multifaceted credibility assessment and rarely rely on the acceptance or rejection of a single document. The situation in the present case is quite different: the story told is of an applicant who had no political affiliations but who became embroiled in expressing concern in demonstrations with other family members to determine what had become of a group of young suspects arrested and held in police custody and who had disappeared. While I accept the reasoning in the authority opened by the respondent in Tanveer Ahmed -v- Secretary of State for the Home Department [2002] UKAIT 00439, it is my view that the present case bears more similarities to the cases opened by the applicant as the present is a case where the RAT asserted and held that the birth certificates were both forgeries."*

Likewise in granting leave to apply for Judicial Review in the case of (G) Y -v- RAT (Unreported High Court Judgment, 18<sup>th</sup> December 2008), Mr Justice Edwards held that *"... the applicant is prima facie right in stating that the Tribunal member does not seem to have attached any weight to the substantive contents of the*

*medical report. The Tribunal Member was obliged to consider the applicant's story in its own terms in the first instance and then in light of what is known about the Country of Origin. One of the central pillars of the applicant's story is that he was subjected to male rape. In support of his claim that he was raped, he has produced a medical report which prima facie confirms that he was hospitalised at the material time in the Cameroon with injuries to his anal region and that he gave a history of being subjected to sodomy. In the absence of any good reason to doubt the authenticity of this medical report, it could only be regarded as providing support to this pillar of the applicant's claim. Yet it is not alluded to at all by the Tribunal Member."* This Judgment appears to suggest that relevant and material supporting documentation should be considered and taken at face value in the absence of any evidence indicating that it is lacking authenticity in any way.

The issue of whether the Tribunal Member has the necessary expertise in the absence of any other expert evidence to determine the authenticity of documentation was also considered in the N case cited above, where Ms Justice Harding Clarke found: *"In the present case, the only evidence upon which the Tribunal Member made his findings on the birth certificates was a submission made by the Presenting Officer at the oral hearing that the character of one of the documents had been altered, and the Tribunal Member's own examination of the documents. The assertion or declaration of forgery contained in the Tribunal Member's decision is so strong that the Court felt constrained to carefully examine the photocopies of the two birth certificates that were before the Court. The documents have the appearance of genuine documents in form and content. No obvious signs of tampering, alteration or forgery were discernible from the relative poor quality photocopies. No alteration of the character or print of the certificates is immediately evident. No issue was raised as to the authenticity of the applicant's birth certificate at the ORAC stage, and the note of the oral hearing indicates that the Presenting Officer's submission on forgery seemed to relate only to one of the certificates, albeit that it is unclear which one he was referring to. The only inference that can be drawn, therefore, that the Tribunal Member's finding that the second certificate was also forged was not based on any evidence other than his own inspection of the original documents. It may well be that the documents are forged. This Court cannot tell whether they are genuine or fake but fair procedures require that if the Tribunal Member makes findings pertinent to the authenticity of key documents, that finding should be based on something more than the Tribunal Member's own opinion. If the falsity of the documents was patently obvious, he ought at the least to have explained in his*

*decision how and where the documents were found to be falsified, fake or contrived. There is no indication that the Tribunal Member conducted any further enquiry into the alleged forgery. If contrary to appearances, he did carry out an enquiry and if he relied on the result of such an enquiry, it was incumbent upon him, in the light of the potential materiality of the birth certificates, to put those results to the applicant and to allow him an opportunity to make submissions on the evidence. Certainly, he had to set out in his decision the nature of any enquiry and the basis for the conclusion that the documents were forged. He did not do so, other than to say that he had inspected them and was satisfied that they were tampered with. In the circumstances, I am satisfied that the process by which the Tribunal Member reached his decision on the authenticity of the birth certificates was unsatisfactory and inadequate. It is wholly unsatisfactory for an applicant or for this Court to have to speculate or guess what part of a document was found to have been forged, or by what means the forgery was found to have taken place. Such findings, and the process by which they are reached, ought to be clear from the RAT decision.”*

Arising from this Judgment, it appears that more than the mere opinion of the decision-maker is required to support a finding that documentation is forged or otherwise inauthentic. Decisions-makers are required to set out the specific evidence/basis/reasons for a finding that documentation is deemed not to be authentic along with the nature of the enquiries undertaken to determine same. Furthermore, fair procedures also dictate that such evidence should be put to the Applicant to afford him/her an opportunity to make submissions in respect of same. Finally, it should also be noted that this Judgment carried a cautionary proviso that the aforesaid principles only apply to cases where the authenticity of documentation is essential to determining credibility and where there is no obvious tampering, alteration or forgery of same.

In another recent Judgment refusing Judicial Review, the Tribunal Member's expertise apparently acquired at a Conference was deemed sufficient for her to determine that an Iranian Identity Card was altered or falsified in some way and/or had not established that the applicant was a national from Iran. (O) S -v- RAT, Unreported High Court Judgment, 4<sup>th</sup> November 2008) Mr Justice Hedigan found: *“There can be no objection to a decision-maker relying on knowledge acquired in the course of their experience and training. This must particularly be so in circumstances where the applicant was thereafter afforded an opportunity to make written submissions on the subject. It would be irrational if decision-makers were precluded from relying on objective information with which they gain familiarity through their work.”* It therefore appears that decision-makers are permitted some latitude to rely upon their

own personal experience without the necessity for expert evidence. However, it is difficult to know where the line should be drawn before the decision-maker impedes on the role of the expert and therefore, each case is very likely to turn on its own particular facts and circumstances.

### **Practical Pointers for Submission and Presentation of Documentation to ORAC/RAT**

- Check the documentation carefully against the client's other papers and bio-data and obtain explanations from the client for any apparent inconsistencies between them.
- Avail of other means of confirming the authenticity of documentation including checks against Country of Origin Information, assistance from interpreters and independent expert advice.
- Always retain and include the original packaging and courier/post information when submitting documentation to the RAC/RAT so that its source may be determined and verified.
- Always list and identify in writing, documentation being submitted and insist on written confirmation of receipt from the relevant body.
- If an issue is raised at the interview (RAC) stage as to the authenticity of documentation, ensure that it is addressed and explained as fully as possible in the Notice of Appeal.
- If the authenticity of documentation is still in issue at the appeal hearing, request that the original documentation be considered by the Tribunal as quite often, it will only have a copy.
- If the authenticity of documentation has not been resolved at the hearing, request that the documentation in issue be referred back to the ORAC for further investigation, examination and/or expert forensic opinion under Section 16(6) of the Refugee Act 1996.
- Alternatively, seek an adjournment to have the original document/s independently examined by the applicant's own expert and a period of time to make submissions in relation to same.

### **The Assessment of Country of Origin Information in the Asylum Process**

The UNHCR Handbook on Procedures and Criteria for determining Asylum Status has always imposed an obligation upon decision-makers to use all available means to establish the facts surrounding a claim for asylum. This obligation was put on a statutory basis with the introduction of the European Communities (Eligibility for Protection) Regulations 2006 (bringing the Qualification Directive into effect). Pursuant to

Regulation 5(1), when assessing the facts and circumstances of an application for asylum, the decision-maker shall take account of the following: “(a) *all relevant facts as they relate to the country of origin at the time of taking a decision on the application for protection, including laws and regulations of the country of origin and the manner in which they are applied and (b) the relevant statements and documentation presented by the protection applicant including information on whether he or she has been or may be subject to persecution or serious harm;*” (For further reading on the application of the Quality Directive on evidentiary assessment in the asylum process, see an interesting article entitled ‘Evidentiary Assessment in Refugee Status Determination and the EU Qualification Directive’ by Gregor Noll, European Public Law, Volume 12, Issue 2.) Many asylum seekers who have fled their countries arrive in Ireland without any independent corroborating documentation so supporting Country of Origin Information can play a critical role in the success of their asylum claims in a number of ways. Firstly, Country of Origin Information may be essential in assessing the background and circumstances giving rise to a claim for asylum. Secondly, it is central to determining whether or not the applicant would be at risk of future persecution if he/she were to return to their country of flight and/or whether internal relocation would be available. As of yet, there are no published guidelines for the assessment of Country of Origin Information by decision-makers in Ireland. Owing to its important role in asylum decisions, there is an ever growing body of case law relating to the manner in which Country of Origin Information has been assessed by the RAC/RAT.

The importance of the decision-maker considering the most current and reliable source of Country of Origin Information available was considered by Mr Justice Birmingham in (FA) A -v- RAT, where he stated: “...it seems to me to be particularly important that decisions be based on the most up-to-date and authoritative information possible”. (Unreported High Court Judgment, 24<sup>th</sup> June 2008) and affirmed in (G) S -v- RAC (Unreported High Court Judgment of Ms Justice Irvine, 21<sup>st</sup> November 2008). In both cases, leave to apply for Judicial Review was granted owing to the failure by the decision-makers in question to properly consider relevant and current Country of Origin Information.

The level of analysis of Country of Origin Information required by decision-makers is also regularly subject to challenge. In (N) E -v- RAT, Mr Justice Edwards granted leave to apply for Judicial Review in circumstances where the Tribunal Member had not received and therefore not considered material documentation and Country of Origin Information submitted to the RAT on behalf of the applicant.

(Unreported High Court Judgment, 28<sup>th</sup> October 2008). However, most cases are not as clear-cut and Mr Justice Feeney refused Judicial Review in (GM) B -v- RAT, where it was argued that Country of Origin Information had not been properly considered, stating: “...the fact that only certain documents are quoted in the decision does not and cannot lead to a determination that all the documents were not considered.” He also accepted that it is a correct statement of the law that “...there is no obligation on a decision-maker to refer to every aspect of evidence or to identify all documents within its written decision.” (Unreported High Court Judgment, 18<sup>th</sup> January 2007) He also adopted this principle in (J) S -v- RAT and confirmed that in such cases where a dispute arose in relation to Country of Origin Information, it was appropriate for the Court to read the entire of that Country of Origin Information such as was available to the Tribunal in order to determine the fairness of the Tribunal’s assessment. (Unreported High Court Judgment, 16<sup>th</sup> July 2008) In these cases, he did not uphold the applicant’s complaints regarding the manner in which Country of Origin Information was assessed. Other recent Judgments have endorsed this principle and confirmed that there is no obligation upon a decision-maker to set out every piece of Country of Origin Information in support of every proposition. In particular, in (J) A -v- RAT, Mr Justice Hedigan held: “It is of course necessary for a Tribunal Member to take account of all relevant statements and documentation presented by an applicant. This obligation is now set out in Regulation 5(1) of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006). It does not follow, however, from the absence of an express reference in a decision to a document that account was not taken of that document. It is for the Tribunal Member to decide whether or not a document merits specific reference, depending on his or her assessment of its probative or corroborative value.” (Unreported High Court Judgment, 15<sup>th</sup> October 2008, affirmed in his Unreported High Court Judgment in (K) O -v- RAT, 16<sup>th</sup> October 2008) According to Mr Justice Clarke in (G) A -v- RAT: “There is a very clear line of decisions from this Court that there is no absolute obligation on a Tribunal Member to expressly consider each and every document or piece of information adduced by or on behalf of an applicant and that the absence of an express reference to a document does not mean that the document was not considered. The degree to which it may be argued that a decision-maker should have had express reference to a document must depend on the nature and quality of the document and the degree to which it is relevant to an applicant’s claim and the determination of his or her asylum application and / or appeal.” (Unreported High Court Judgment, 31<sup>st</sup> March 2009). Although Ms Justice Dunne also endorsed this principle in (AW) S -v- RAT, she also held: “There

*may be cases in which it could be inferred from the omission of a reference to a significant fact or document in the course of a Tribunal decision that the same had not been properly considered or evaluated.*" (Unreported High Court Judgment, 12<sup>th</sup> June 2008) This important exception to the general rule that a decision-maker is not obliged to refer to every document or piece of evidence is also in keeping with (G) K -v- RAT, where Mr Justice Hardiman held: "A person claiming that a decision-making authority has, contrary to its express statement, ignored representations which it has received must produce some evidence, direct or inferential, of that proposition before he can be said to have an arguable case." [(2002) 2 IR 418 at Page 426] (For other related Judgments, see in (E) M -v- RAT, Unreported High Court Judgment of Mr Justice Birmingham, 27<sup>th</sup> June 2008, (I) U -v- RAT, Unreported High Court Judgment of Mr Justice Edwards, 29<sup>th</sup> October 2008 & (V) M -v- RAT, Unreported High Court Judgment of Mr Justice MacMenamin, 8<sup>th</sup> May 2008)

The manner in which Country of Information has been interpreted by the decision-maker has also been subject to Judicial Review. In (RY) T -v- RAT (Unreported High Court Judgment, 23<sup>rd</sup> January 2007), where it was asserted that a UK Home Office Report had been distorted, misconstrued and/or not quoted in full, Mr Justice Herbert granted leave holding that: *...it was not incumbent on the Member of the Refugee Appeals Tribunal to cite the entire of any particular document to which he made reference or from which he chose to quote. It is however essential that any passage so quoted should not be taken out of context and, that the quotation should be sufficiently extensive to accurately reflect what was intended by the author.*" A similar finding was also made in (P) S -v- RAC, where the applicant was a minor who had been raped in South Africa and subsequently applied for refugee status in Ireland but her application was refused. It was not disputed that she had been raped but RAC quoted from a UK Home Office Report to find that there was effective state protection available to her in South Africa. In granting leave to apply for Judicial Review, Mr Justice McMahon found that ORAC had been selective in the use of Country of Origin Information. (Unreported High Court Judgment, 11<sup>th</sup> July 2008) These Judgments elaborated on the principles set out in Z -v- RAT (Unreported High Court Judgment of Justice Clarke, 26<sup>th</sup> November 2004) and affirmed in I -v- RAT (Unreported High Court Judgment of Justice Clarke, 10<sup>th</sup> May 2005), all of the above cases affirmed in A -v- MJELR (Unreported High Court Judgment of Mr Justice Charleton, 12<sup>th</sup> February 2009).

However, in other recent cases, the High Court has qualified this obligation and held that the manner in which Country of Origin Information is assessed is within the remit of the decision-maker and not for the Court unless there is some glaring and manifest flaw. In (H) O -v- RAT, Mr Justice Hedigan stated: *"The applicants further argued that the Tribunal relied on selected passages from the country of origin information put forward by the applicant. It is clear that the Tribunal must take into account COI (country of origin information) that is submitted to it. The manner in which it balances that COI it seems to me is a matter for the Tribunal of fact. Absent some glaring and manifest flaw, I cannot see how the court could intervene in such an assessment of the facts without becoming in effect a Court of Appeal on the facts. This is something it must avoid."* (Unreported High Court Judgments, 19<sup>th</sup> July 2007 & see also (O) O -v- RAT, 11<sup>th</sup> December 2007 & (BN) N -v- RAT, 9<sup>th</sup> October 2008)

In cases where there are conflicting Country of Origin Information, the High Court has held that the decision-maker is obliged to engage in a rational analysis of the Country of Origin Information and provide a basis for its preference of one piece of Country of Origin Information over another. This issue was raised in (DVT) S -v- RAC, where Mr Justice Edwards held: *"While this court accepts that it was entirely up to the Refugee Appeals Tribunal to determine the weight (if any) to be attached to any particular piece of country of origin information it was not up to the Tribunal to arbitrarily prefer one piece of country of origin information over another. In the case of conflicting information it was incumbent on the Tribunal to engage in a rational analysis of the conflict and to justify its preferment of one view over another on the basis of that analysis."* [(2008) 3 IR, 476, see also (G) B -v- RAT, Unreported High Court Judgment of Mr Justice Edwards, 25<sup>th</sup> June 2008] Likewise in (MI) A -v- RAT, Mr Justice Herbert confirmed that this obligation only arose *"...where there is a major conflict and where the status of one piece of 'country of origin information' versus another piece of 'country of origin information' is an issue of very significant importance in the case"* (Unreported High Court Judgment, 29<sup>th</sup> October 2009) This principle was also qualified in (I) K -v- RAT, where there was conflicting Country of Origin Information as to whether MASSOB Identity Cards were still being issued in Nigeria. In granting leave on this ground, Mr Justice Birmingham held: *"In the situation where ORAC had relied upon Country of Origin Information and that reliance was addressed in the Notice of Appeal and alternative country of origin information referred to, I am of the view that it was arguably appropriate and necessary that the Tribunal Member should refer to the existence of the two sources*

*of information and indicate at a minimum whether he regarded them as consistent or in conflict and if in conflict, why he was preferring one over the other.*" (Unreported High Court Judgment, 12<sup>th</sup> June 2008) He endorsed the finding in (GM) B -v- RAT cited above, that there is no obligation on a decision-maker to refer to every aspect of evidence or identify all of the documents considered within a decision to qualify this obligation: *"I completely agree with that line of authority and it is only in the context where a notice of appeal specifically challenged reliance on Country of Origin Information and submitted an alternative source of information that a decision-maker must go further."* He also referred to his Judgment in (T) G v RAT (Unreported High Court Judgment, 7<sup>th</sup> October 2007), where he found that there can be circumstances that impose an obligation upon a decision-maker to provide a more specific and transparent consideration of conflicting Country of Origin Information. These Judgments elaborated on the principle elucidated in previous Judgments which found that the decision-maker should conduct a weighing exercise in cases of conflicting Country of Origin Information. [(D) S -v- RAT, Unreported High Court Judgment of Mr Justice Clarke, 9<sup>th</sup> July 2004 & I -v- RAT, Unreported High Court Judgment of Mr Justice Peart, 24<sup>th</sup> June 2005].

There are also a number of cases confirming the general duty of the decision-maker to assess the circumstances giving rise to the applicant's claim for asylum in the context of Country of Origin Information. In particular, in (N) K -v- RAT (Unreported High Court Judgment, 2<sup>nd</sup> April 2004), it was submitted that the Tribunal Member was obliged to assess the credibility of the applicant in the context of available Country of Origin Information and that he had failed to do so. Ms Justice Finlay Geoghegan relied upon Milan Horvath -v- Secretary of State for the Home Department (1999) INLR 7 to effectively find that more than a mere bald statement that the credibility of the Applicant was assessed in the context of the Country of Origin Information is required by the Tribunal Member. In Howarth, His Honour Judge Pearl states as follows: *"It is our view that credibility findings can only really be made on the basis of a complete understanding of the entire picture. It is our view that one cannot assess a claim without placing that claim in the context of the background information of country of origin. In other words, the probative value of the evidence must be evaluated in the light of what is known about the conditions in the claimant's country of origin."* In (AM) T -v- RAT (Unreported High Court Judgment, 2<sup>nd</sup> April 2004), Ms Justice Finlay Geoghegan refers to her Judgment in (N) K to confirm that: *"...there are substantial grounds for asserting that there is an obligation to assess the credibility of the applicant in the context of country of origin information."*

However, this principle has been watered down in a number of subsequent High Court Judgements which have found that where an applicant is found to be personally unbelievable and Country of Origin Information would not have assisted the applicant, it is not always necessary to examine his/her evidence in the context of the Country of Origin Information. [(O) O -v- RAT, Unreported High Court Judgment of Mr Justice Peart, 28<sup>th</sup> February 2005 & I -v- RAT, Unreported High Court Judgment of Mr Justice Peart, 9<sup>th</sup> December 2005] This principle has been endorsed in more recent Judgments including that of Mr Justice Clarke in (V) O -v- RAT, where he stated as follows: *"While prior to the transposition of Council Directive 2004/83/EC into domestic law through the Regulations of 2006, the best practice in the assessment of credibility in asylum claims was to consult country of origin information to establish whether the applicant's story, as outlined, could be true in the context of the situation prevailing in his country of origin, this was not a hard or invariable rule. There are always circumstances where a decision on credibility can be arrived at without consulting country information."* (Unreported High Court Judgment, 23<sup>rd</sup> January 2009) Similarly, Mr Justice Hedigan in (PI) E -v- RAT, held: *"In the great majority of cases, it is incumbent on a decision-maker to adhere to the Horvath principles and to assess credibility in the light of country of origin information. Exceptional cases do arise, however, and it is my view that this is one such case: the circumstances of the present case compare to those of I [2005] IEHC 416 and (B) F [2008] IEHC 126, rather than those of K [2004] IEHC 101 and such cases. This is because such doubts were cast on the applicant's personal credibility by the inconsistencies in his account of events that no matter how much objective evidence the Tribunal Member could have considered, it was open to him to disbelieve the subjective impact upon the applicant. There would be "no possible benefit to be derived" - to use the words of Peart J. in I. - from seeing whether the applicant's story fitted into a factual context in his country of origin."* (Unreported High Court Judgment, 30<sup>th</sup> October 2008)

Finally it is worth noting that under the proposed Single Protection Procedure due to be introduced shortly under the Immigration Residence and Protection Bill 2008, decision-makers of asylum claims will be obliged to consult a range of independent, reliable and current sources of Country of Origin Information pursuant to Article 8(1)(b) of Council Directive 2005/85/EC on Minimum Standards on Procedures, which requires that: *"precise and up-to-date information is obtained from various sources, such as the United Nations High Commissioner for Refugees (UNHCR), as to the general situation prevailing in countries of origin of applicants for asylum and, where necessary, in*

countries through which they have transited, and that such information is made available to the personnel responsible for examining applications and taking decisions.” It remains to be seen whether interpretation of this provision will add to the ever-evolving body of case law on the assessment of documentation and Country of Origin Information by decision-makers within the asylum process.

### **Practical Pointers for Submission and Presentation of COI to ORAC/RAT**

- Ensure that all Country of Origin Information is relevant, accurate, current and from a reputable and independent source i.e. from a recognised human rights organisation or UNHCR as opposed to an organisation with a bias, personal interest or agenda. For guidance on sourcing of Country of Origin Information, James O’Sullivan of the RDC has an excellent article in *The Researcher*, Volume 4, Issue 1, March 2009, entitled ‘Source Assessment in COI Research’. A COI Network Booklet entitled ‘Country Information in Asylum Procedures: Quality as a Legal Requirement in the EU’ (2007) by Gábor Gyulai provides useful guidelines for determining the relevance, reliability & balance, accuracy and currency and transparency and retrievability of Country of Origin Information for the purpose of asylum applications. Another useful resource is a Report entitled ‘Use of Country of Origin Information in Refugee Status Determination: Critical Perspectives’ (May 2009) by the Immigration Advisory Service. It should also be noted that the RDC operate an independent and objective COI service available to all of the key asylum agencies.
- List and/or identify each piece of Country of Origin Information clearly in writing to the RAC/RAT in the Form 1/Form 2 - Notice of Appeal to the RAT.
- Highlight/underline the relevant paragraphs in Country of Origin Information and refer to them in any legal submissions to the RAC/RAT, stating how they are of relevance to the client’s claim for asylum. They are much easier to present and more likely to be considered.
- If an issue is raised at the interview (RAC) stage regarding the assessment of Country of Origin Information, ensure that it is addressed as fully as possible in the Notice of Appeal.
- Finally, remember quality is better than quantity.



## **Recent Developments in Refugee and Immigration Law**

### **DEPORTATION, RIGHTS OF THE CHILD AND DRIP FEEDING INFORMATION**

*E.E.E. & Ors v The Minister for Justice, Equality and Law Reform, High Court, Clark J., 2<sup>nd</sup> April 2009 ([2009] IEHC 160)*

*DEPORTATION – INTERLOCUTORY INJUNCTION – REFUGEE LAW – MINOR ASYLUM APPLICANT – ACCOMPANIED MINOR – RIGHT OF CHILD TO APPLY FOR ASYLUM – CANDOUR – DRIP FEEDING OF INFORMATION – DEPORTATION OF PARENT OF MINOR ASYLUM APPLICANT*

#### **Facts**

The applicants sought an interlocutory injunction preventing the deportation of the first named applicant (wife of the second named applicant and mother of the remaining applicants), pending the determination of the asylum applications of her two youngest children. The applicant was a native of Nigeria. At the time of seeking the injunction she had four children. The eldest was born in Nigeria and was included in the applicant’s asylum claim. The second eldest was born shortly after arriving in the State and she had her own asylum claim. The asylum claims of both parents and these two eldest children were all refused. They received proposals to deport in the usual way and applied for leave to remain.

The applicant made no mention of the fact that she was pregnant with twins in her application for leave to remain. Neither did the applicant inform the Minister that she gave birth to twins in August 2008. The first named applicant was issued with a deportation order, and presented herself at the offices of the Garda National Immigration Bureau, as requested, but again made no reference to the fact that he now had twin babies. The first named applicant then made applications for asylum on behalf of her twin children. Shortly thereafter the applicant obtained an interim injunction restraining her deportation on the basis that the twins would be left unaccompanied in the State if she were to be deported, and that this would cause them to abandon their asylum applications. No mention was made of the fact that the children’s father was in the State.

#### **Held**

The Court refused the injunctive relief and all other relief sought. The Court stated that it did not make for the orderly application of a lawful immigration policy for a failed asylum seeker to conceal the fact of the birth of a child until the eve of his or her deportation, and thereby gain an advantage over those who act with candour or do not have children. The Court stated that an applicant who seeks to delay a deportation order in such a case must be in a position to show that the

Minister was informed of the changed circumstances relating to the pregnancy and the birth of the child and any proposed asylum application on behalf of that child. The appropriate path would have been for the first named applicant to notify the Minister of the pregnancy or the birth and seek a revocation of the deportation order on the basis of new information. It was apparent that the interim injunction was secured on the basis of a false averment that the twins had no other parent or guardian in the State, when their father was in the State. It seemed to the Court that the first named applicant deliberately withheld information from the Minister until the last minute in an effort to frustrate the legal process.

### **Obiter**

While the best interests of children are always of paramount importance, their best interests cannot be manipulated to trump the rights of the Minister to enforce a valid deportation order. It is not appropriate to provide information at the last minute on a “drip feed” basis. If applicants are genuine asylum seekers there is every benefit to having all family members considered on the same application.

### **Cases Cited**

Agbonlahor v The Minister for Justice, Equality and Law Reform [2007] IEHC 166

Akujobi v The Minister for Justice, Equality and Law Reform [2007] IEHC 19

AO & DL v The Minister for Justice, Equality and Law Reform [2003] 1 IR 1

Dada, Unreported, High Court, O’Neill J

Mamyko, Unreported, High Court, Peart J

N v Secretary of State for the Home Department [2005] 2 AC 296

Nwole v The Minister for Justice, Equality and Law Reform [2003] IEHC 72

P, B & L v The Minister for Justice, Equality and Law Reform [2002] 1 IR 164

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## **CREDIBILITY FINDINGS IN REFUGEE STATUS DETERMINATION**

***M.G.U. v The Refugee Appeals Tribunal & Ors, High Court, Clark J., 22<sup>nd</sup> January 2009 ([2009] IEHC 36)***

*JUDICIAL REVIEW – LEAVE – CERTIORARI – REFUGEE LAW – REFUGEE APPEALS TRIBUNAL – FAIR PROCEDURES – FAILURE TO PUT – COUNTRY INFORMATION – CREDIBILITY – SECTION 11B REFUGEE ACT 1995 – MEDICAL REPORT – BANGLADESH*

### **Facts**

The applicant claimed to fear persecution in Bangladesh because of his membership of the Bangladesh Awami League. The applicant claimed that his family was financially comfortable causing it to be targeted for corrupt prosecution, that his father had refused to pay a “ransom” and that, as a result of trumped up murder charges, the applicant, his father and his brother had been unfairly tried for murder, and sentenced to imprisonment. The Commissioner found that there was no evidence that the applicant’s conviction was unjust and found that the applicant was fleeing prosecution rather than persecution, and that the applicant lacked credibility as he had little knowledge about the Bangladesh Awami League. Also, adverse inferences were drawn from the fact that the applicant did not seek asylum on arrival in the State. The applicant did not seek asylum until he was arrested for a separate matter, claiming that he had been advised that no one from Bangladesh got refugee status in Ireland.

The Tribunal affirmed the Commissioner’s recommendation, finding that the applicant’s knowledge of the League was very poor, that a letter purported to be from the President of the League contradicted the applicant’s own evidence; that the applicant’s reason for not seeking asylum immediately on arrival in the State was not credible, and that the applicant was fleeing prosecution rather than persecution. The applicant challenged the decision on the bases (a) that there was a breach of fair procedures in that he should have been alerted to the fact that the letter from the League’s President was in doubt; (b) that there was a flawed and selective treatment of the country information; (c) that the Tribunal had failed to consider the medical evidence and gave no explanation why a medical report was being discounted; (d) that the Tribunal made errors of fact, particularly in relation to the finding that the applicant fled Bangladesh before the trial when he in fact merely left his home town; and (e) that the Tribunal failed to take account of the applicant’s past mistreatment.



**Held**

The Court refused leave, holding that every opportunity had been afforded to the applicant to make his case that he was a victim of persecution rather than prosecution. With regard to the first argument, in the Court's view as the Tribunal did not rely on any new or undisclosed document to arrive at its conclusions, there was nothing unfair or improper in assessing the appeal on the basis of the documents before it, and there was no provision under the appeal process for the Tribunal to enter into correspondence with the applicant. With regard to the medical report matter, the Court held that the Tribunal's decision was based on many different pieces of evidence and did not centre on the contents of the medical report. The Court held that the Tribunal was obliged to consider the applicant's explanation for why he didn't apply for asylum sooner and that there was ample evidence for the Tribunal's finding that the applicant was not a refugee.

**Obiter**

It is doubtful whether the argument that the Tribunal is obliged to warn an applicant that his appeal might fail on a particular point is an argument that could legitimately be made in the context of a paper based appeal under Section 13(6) of the Refugee Act 1996.

**Cases Cited**

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

*Khazadi v The Minister for Justice, Equality and Law Reform & Ors*, Unreported High Court, Gilligan J, 19<sup>th</sup> April 2008

*Kikumbi v The Refugee Applications Commissioner & Anor* [2007] IEHC 11

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

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***O.A.O. v The Minister for Justice, Equality and Law Reform & Anor*, High Court, Clark J., 13<sup>th</sup> February 2009 ([2009] IEHC 82)**

*JUDICIAL REVIEW – CERTIORARI – LEAVE - REFUGEE STATUS DETERMINATION – REFUGEE APPEALS TRIBUNAL – GENDER RELATED PERSECUTION – CREDIBILITY – ACCOMPANIED MINOR – FAILURE TO CONSIDER CHILD'S APPLICATION*

**Facts**

The Nigerian applicant claimed to fear being forced to marry an elderly Muslim Imam and that she and her baby would be at risk of being killed by her father, who believed in honour killings, or by the influential Imam. The applicant claimed that her boyfriend was kidnapped, after which she fled to the State. The Refugee Applications Commissioner refused the application for reasons of credibility. The Refugee Appeals Tribunal affirmed this decision, finding that

credibility issues arose in relation to (a) the applicant's knowledge of the Muslim faith, (b) the period between her boyfriend's arrest and her departure, and (c) the applicant's travel to Ireland.

The applicant challenged the Tribunal's decision on the grounds (i) that there was a flawed treatment of credibility; (ii) that the Tribunal made a bald finding under Section 11B(c) of the Refugee Act 1996; (iii) that the Tribunal failed to consult country information; and (iv) that the Tribunal failed to consider the risk to the applicant's child.

**Held**

The Court refused leave, finding (a) that the paucity of the applicant's knowledge of the Muslim faith had to be assessed in light of the fact that her religion and conversion were central to her claim, and that it was not necessary for the Tribunal to explicitly state that it found the applicant's account of the period after her boyfriend's arrest to be implausible as it was clear from a holistic reading of the decision that this was one of the credibility issues; (b) that there was not a bald Section 11B finding as such as the decision maker had regard to a specific subsection, and the finding had a clear nexus to the findings in relation to the applicant's travel to the State (Ajoke distinguished); (iii) that while it is a matter of good practice to assess credibility in light of the objective evidence, it would have been an exercise in futility for the Tribunal to have gone on to consider and assess the country information in the instant case as her claim fell at the first hurdle; and (d) there was no merit in the complaint that the daughter had not been considered as the child's case was treated as being subsumed by the mother's case, and was precisely the same claim as the mother's.

**Cases Cited**

*A.N. & Ors v The Minister for Justice, Equality and Law Reform & Anor* [2004] IEHC 433

*Ajoke v The Refugee Appeals Tribunal*, Unreported, High Court, Hanna J, 30<sup>th</sup> May 2009

*B.V.E. & Anor v The Minister for Justice, Equality and Law Reform* [2008] IEHC 230

*Imafu v The Refugee Appeals Tribunal* [2005] IEHC 416

*Ojuade v The Refugee Appeals Tribunal*, Unreported, High Court, Peart J, 2nd May 2008

*S.M. v The Refugee Appeals Tribunal* [2005] IEHC 216

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## JUDICIAL REVIEW OF THE REFUGEE APPLICATIONS COMMISSION AND THE AVAILABILITY OF AN ALTERNATIVE REMEDY

*A.K. v The Refugee Applications Commissioner, Unreported, Supreme Court, 28<sup>th</sup> January 2009*

*JUDICIAL REVIEW – APPEAL – CERTIORARI – POINT OF LAW OF EXCEPTIONAL IMPORTANCE IN THE PUBLIC INTEREST – ALTERNATIVE REMEDY – REFUGEE APPLICATIONS COMMISSIONER - PRIOR EXISTENCE OF APPEAL TO THE REFUGEE APPEALS TRIBUNAL – FAIR PROCEDURES*

### Facts

The applicant appealed pursuant to Section 5(3)(A) of the Illegal Immigrants (Trafficking) Act 2000 and the High Court granted leave to appeal having certified that its decision involved a point of law of exceptional public importance and that it was desirable in the public interest that an appeal should be taken to the Supreme Court. The point of law certified was whether “In judicial review proceedings under s. 5 of the Illegal Immigrants (Trafficking) Act 2000 where an appeal against the decision of the respondent has also been taken by the applicant, ought the High Court, following a consideration of all the facts of the case, exercise its discretion to hold that the appeal is the more appropriate remedy where the issues raised by the applicant principally (but not exclusively) relate to the quality of the decision under review itself rather than a defective application of legal principles?”

### Held

The Court dismissed the appeal, holding that the trial judge was entitled in law to exercise his discretion to refuse the application in a case such as that at issue, and hold that the appeal available was a more appropriate remedy, where the issue raised by the applicant principally (but not exclusively) related to the quality of the decision. The Court stated that a point of law certified under s. 5 was not to be considered in the abstract but had to be interpreted and applied with respect to the facts and circumstances of the case. The Court stated that whether an order for certiorari should be made will depend on the consideration of the factors referred to by Denham J in *Stefan*, those factors being (a) the existence of an alternative remedy, (b) the conduct of the applicant, (c) the merits of the application, (d) the consequences to the applicant if an order of certiorari is not granted, and (e) the degree of fairness of procedures. The Court also stated that the following statement of O’Higgins CJ in *The State v Dublin Corporation* [1984] IR 381 was an important statement of the law:

“...there may be cases where the decision exhibits an error of law and a perfectly simple appeal can rectify the complaint, or where administrative legislation provides adequate appeal machinery which is particularly suitable for dealing with errors in the application of the code in question. In such cases, while retaining or with the power to quash, a Court should be slow to do so unless satisfied that, for some particular reason, the appeal or alternative remedy is not adequate.”

The Court found that while the claimed breach of fair procedures in *Stefan* – a failure to translate a key document - was self evidently a serious matter as it would undermine the integrity of the appeal system if the State could gloss over the failure to translate key documents, the basis on which the appellant in the instant case claimed there was a want of fair procedures was the claim that the Commissioner did not take sufficient account of the fact that the appellant’s mother had been granted refugee status, and what weight ought to be attached to the mother’s case was a matter for the Commissioner. The Court noted that the appellant had not in fact made this case to the Commissioner.

### Cases Cited

*Stefan v The Minister for Justice* [2001] 4 IR 203  
*The State v Dublin Corporation* [1984] IR 381  
*AMT v The Refugee Appeals Tribunal*

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***A.D. v The Refugee Applications Commissioner & Ors, Unreported, High Court, Cooke J, 27<sup>th</sup> January 2009***

*JUDICIAL REVIEW – CERTIORARI – LEAVE – ALTERNATIVE REMEDY – REFUGEE APPLICATIONS COMMISSIONER – FAIR PROCEDURES*

**Facts**

The applicant sought leave to apply for certiorari quashing the decision of the Refugee Applications Commissioner recommending that she not be declared a refugee. The Applicant had also lodged an appeal to the Refugee Appeals Tribunal. The applicant claimed that there were the following errors of law/infringements of the right to fair procedures: (1) that the wrong test was applied in respect of credibility; (2) that the Commissioner failed to apply part of the UNHCR Handbook; (3) that the Commissioner failed to properly consider the medical evidence; (4) an improper standard of proof was applied; (5) that adverse credibility inferences were drawn from minor inconsistencies; (6) that adverse credibility findings were made that were speculative; (7) that no proper regard was had to a corroborating affidavit of the applicant's sister; and (8) that the Commissioner failed to assess the claim in respect of race/ethnicity.

**Held**

The Court refused leave, finding that the alternative appeal to the Refugee Appeals Tribunal was manifestly the more suitable remedy. The Court found that each of the alleged flaws went to the quality of the Commissioner's decision, to his approach to the assessment of credibility, and to the interpretation and balancing of the evidence before him, that the grounds did not allege any fundamental mistake of law vitiating the Commissioner's exercise of jurisdiction, and that no legal principle or right had been infringed that was incapable of being cured by a rehearing on appeal.

**Obiter**

The Court surveyed the case law, and set out the following points in relation to deciding on the availability of an appropriate remedy:

- (a) Where the legislature has put in place an administrative and quasi-judicial scheme postulating only limited recourse to the courts, certiorari should not issue if that statutory procedure is adequate and more suitable to meet the complaints upon which the application for judicial review is based.
- (b) The fact that an appeal against the impugned decision or measure is available to an applicant is not of itself a bar to the issue of certiorari by the High Court.
- (c) The Court should not exercise its discretion to refuse certiorari to quash a bad decision if its

continued existence may produce damaging legal effects.

- (d) For the High Court to intervene in a statutory two-stage procedure such as is provided in planning and asylum matters, it is not sufficient to point to an error within jurisdiction on the part of the decision maker at first instance. Some extra flaw in the decision must be shown such as to indicate that the decision maker has acted out of jurisdiction and in disregard of one of the principles of natural or constitutional justice.
- (e) The essential question is whether the available remedy by appeal is the more appropriate remedy.
- (f) A variety of factors fall to be considered in assessing the appropriateness of the remedies including; the nature and scope of the appeal and the stage in the statutory scheme at which it arises; whether it includes an oral hearing; the type of error sought to be challenged in the decision and whether it can be remedied on appeal.
- (g) The fact that an appeal does not provide for an oral hearing, while relevant, is not itself a ground for granting relief. An oral hearing is not always an essential ingredient of a fair appeal.

**Cases Cited**

*BNN v Minister for Justice*, Unreported, High Court, Hedigan J, 9<sup>th</sup> October 2008  
*Buckley v Kirby* [2000] 3 IR 431  
*Gill v Connellan* [1988] ILRM 488  
*Kayode v RAC* [2005] IEHC 172  
*McGoldrick v An Bord Pleanala* [1997] 1 IR 497  
*Stefan v The Minister for Justice* [2001] 4 IR 203  
*The State (Abenglen Properties Ltd) v Dublin Corporation* [1984] IR 381  
*VZ v Minister for Justice* [2002] 2 IR 135

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***J.M. v The Refugee Applications Commissioner & Anor, Unreported, High Court, Cooke J, 27<sup>th</sup> January 2009***

*JUDICIAL REVIEW – CERTIORARI – LEAVE – ALTERNATIVE REMEDY – REFUGEE APPLICATIONS COMMISSIONER – FAIR PROCEDURES*

**Facts**

The applicant sought leave to apply to quash by way of judicial review the Commissioner's recommendation against declaring him to be a refugee. The applicant claimed to be a national of Zimbabwe and a member of the MDC. The Commissioner's decision turned on a finding that the applicant was entitled to Mozambique citizenship because his father was born in Mozambique, and that the applicant could therefore seek the protection in this second country. As the applicant had sought asylum in the UK before seeking asylum in Ireland, Section 13(5) and (6) of the Refugee Act 1996 as amended applied with the result that the applicant would not have an oral hearing on appeal. The applicant appealed to the Tribunal as well as seeking judicial review.

The applicant sought to challenge the Commissioner's decision on three grounds: (1) that the Commissioner breached fair procedures in not disclosing documentary information, and that in particular an extract from a document entitled Citizenship Laws of the World, was not disclosed, the accuracy of which would have been challenged and rebutted; (2) that the Commissioner breached fair procedures in proceeding to finalise the decision without waiting for original documents to arrive from the UK; and (3) that the Commissioner breached fair procedures in failing to put to the applicant a number of matters fundamental to the finding in respect of dual nationality. The Commissioner's interviewer asked the applicant only one question in relation to his father's being from Mozambique.

**Held**

The Court granted leave, agreeing with Hedigan J in the *B.N.N.* case that it is only in rare and limited circumstances that it should be necessary and appropriate for the High Court to intervene in the asylum statutory scheme by the issue of certiorari, but finding that the case may, on balance, come within the category of cases where it may transpire to be justifiable to grant relief by way of judicial review. The Court noted the following factors: (a) the appeal to the Tribunal would be without an oral hearing; (b) there was a major discrepancy between the significance of the dual nationality finding in the Commissioner's decision on the one hand, and the almost total absence of any significance attributed to the question of the applicant's father's ability to reacquire Mozambique nationality for the benefit of the applicant in the course of the

Commissioner's investigation and interview; and (c) it was arguable that reliance on a documentary source such as the Citizenship Laws of the World document, without that being put to or disclosed to the applicant, where the availability of Mozambique nationality was being considered as a possible reason to reject the claim, brought the complaint within the realm of a serious breach of fair procedures akin to the non-translation of a material document in the Stefan case.

The Court did not grant leave in relation to the claim that the Commissioner breached fair procedures in proceeding to finalise the decision without waiting for original documents to arrive from the UK as the Commissioner's decision did not turn on the documents in question.

**Cases Cited**

*BNN v Minister for Justice*, Unreported, High Court, Hedigan J, 9<sup>th</sup> October 2008  
*Buckley v Kirby* [2000] 3 IR 431  
*Gill v Connellan* [1988] ILRM 488  
*Kayode v RAC* [2005] IEHC 172  
*McGoldrick v An Bord Pleanala* [1997] 1 IR 497  
*Stefan v The Minister for Justice* [2001] 4 IR 203  
*The State (Abenglen Properties Ltd) v Dublin Corporation* [1984] IR 381  
*VZ v Minister for Justice* [2002] 2 IR 135

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## THE REFUGEE APPEALS TRIBUNAL'S JURISDICTION TO CONSIDER REFOULEMENT & THE RETURN OF FAILED ASYLUM SEEKERS

***F.V. v The Refugee Appeals Tribunal & Anor, High Court, Birmingham J., 21<sup>st</sup> January 2009 ([2009] IEHC 185)***

*JUDICIAL REVIEW – CERTIORARI – LEAVE – REFUGEE STATUS DETERMINATION – REFUGEE APPEALS TRIBUNAL – JURISDICTION – REFOULEMENT – FAILED ASYLUM SEEKER – FAILURE TO CONSIDER CLAIM – CREDIBILITY – SPECULATION – MEDICO-LEGAL REPORT – SPIRASI – TORTURE - TOGO*

### Facts

The applicant, a national of Togo, claimed to be a member of the UFC and a political activist with a well founded fear of persecution in his country of origin. He claimed that he had been subjected to beatings and abuse, including electric shocks to the genital area. The applicant had not made the latter claim in his initial application, or before the Commissioner, but mentioned it for the first time in his appeal. The Refugee Appeals Tribunal refused the applicant's appeal against the Commissioner's recommendation that he not be declared a refugee. The Tribunal found that the applicant lacked knowledge about political matters, that there were discrepancies in his evidence, that he had failed to mention that he was subjected to electric shocks in the initial stages of the process, that other aspects of his evidence were implausible, that details in his account of his journey to Ireland were implausible (the Tribunal Member referred to his own experiences of air travel), and that his SPIRASI report did not corroborate his evidence. The applicant challenged the Tribunal's decision essentially on four grounds, claiming (1) that the Tribunal failed to adequately consider the SPIRASI report, (2) that the Tribunal erred in determining that it had no jurisdiction to deal with *refoulement*, (3) that the Tribunal failed to consider credibility in the context of the country information., and (4) that the Tribunal engaged in speculation and conjecture.

### Held

The Court granted leave on one ground, i.e., that it was arguable that the Tribunal was in error in not having considered at all the matter of *refoulement* in the context of the applicant as a failed asylum seeker, and that having advanced the case (though the Court noted that the case made to the Tribunal was not a particularly strong one) the applicant was entitled to have it considered.

Otherwise, the Court held that the Tribunal was entitled to adopt the approach it did to the medical evidence, stating that a medical report cannot offer any assistance as to the circumstances in which an applicant has come by his injuries; that the Tribunal member stated specifically he considered country information, and that there was an onus on the applicant to overcome that assertion, which he failed to do, and that notwithstanding the prevalence of corruption, the point made by the Tribunal about the risks being undertaken by someone accepting a bribe to facilitate the release of a prisoner of interest to the authorities, remains valid; and that the Tribunal Member was fully entitled to draw inference and make deductions, and was entitled to draw on his own experience of travelling by air, and that the conclusion reached by the Tribunal that the applicant's non disclosure was explainable by virtue of the applicant's reticence or shyness was a conclusion open to the Tribunal.

### Case Cited

*Kiuni v MJELR & Anor*; Unreported, Cooke J., 13<sup>th</sup> January 2009

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## COUNTRY OF ORIGIN INFORMATION IN REFUGEE STATUS DETERMINATION

***T. v The Refugee Appeals Tribunal & Ors, High Court, Clark J., 11<sup>th</sup> February 2009 ([2009] IEHC 51)***

*JUDICIAL REVIEW – CERTIORARI - REFUGEE STATUS DETERMINATION – REFUGEE APPEALS TRIBUNAL – FAILURE TO CONSIDER ORAL EVIDENCE – FAILURE TO CONSIDER COUNTRY INFORMATION – CHANGE OF CIRCUMSTANCES IN COUNTRY OF ORIGIN – STATE PROTECTION*

### Facts

The applicant claimed to be a professional tennis player from Nigeria, with a fear of persecution by a "Mrs Rose" who had attempted to force her into prostitution. The applicant had not in fact worked as a prostitute, but claimed that Mrs Rose harassed her and continually beat her. The Commissioner had found against the applicant on credibility grounds, and the Tribunal upheld the recommendation against declaring her to be a refugee, finding that the applicant had not demonstrated that Nigeria was unable or unwilling to protect her. The applicant argued that in arriving at this decision the Tribunal used the country information selectively and had failed to consider conflicting country information from the West Africa Review that highlighted the problems of corruption and human trafficking in Nigeria.

**Held**

The Court refused to grant the relief sought, finding that the thrust of the country reports was overwhelmingly to the effect that trafficking remains a problem in Nigeria and that there is evidence of corruption and complicity on the part of individual members of the Nigerian police, but that human trafficking is not tolerated or condoned by the State and that, increasingly, efforts are being made to combat the practice and to support victims of trafficking. The Court said that there was no suggestion of a complete breakdown of state institutions in Nigeria or that it is a failed state. As the applicant had not provided cogent evidence of the Nigerian State's inability to protect her, the Court viewed the information in accordance with the well established principle that states are not obliged to provide perfect protection. The Court stated that there was no doubt there was evidence before the Tribunal upon which it could have reached the conclusion reached, that the reports were not in direct contradiction, and that it was not incumbent upon the Tribunal to make an express reference to the West Africa Review report.

**Obiter**

In obtaining leave the applicant had relied upon the UK Home Office Report for Nigeria. This document had been referred to in the Commissioner's report, but it was not in fact appended to that report, and, it appeared, had not otherwise been put to the Tribunal. The Court stated that it was unsatisfactory that a document that was not used at the Tribunal's oral hearing was opened to the Court at the leave stage, and consequently the Court did not have any further regard to the document.

**Cases Cited**

*A.B.O. v The Refugee Appeals Tribunal & Anor* [2008] IEHC 191  
*Canada (AG) v Ward* [1993] 2 SCR 689  
*H.O. v The Refugee Appeals Tribunal* [2007] IEHC 299  
*O.A.A. v The Minister for Justice, Equality and Law Reform* [2007] IEHC 169

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***M.B.H. v The Minister for Justice, Equality and Law Reform & Anor*, High Court, Clark J., 24<sup>th</sup> March 2009 ([2009] IEHC 138)**

*JUDICIAL REVIEW – CERTIORARI – LEAVE - REFUGEE STATUS DETERMINATION – REFUGEE APPEALS TRIBUNAL – SUDAN – DARFUR – NON ARAB - UK HOME OFFICE OPERATIONAL GUIDANCE NOTE – MEMBERSHIP OF A PARTICULAR SOCIAL GROUP*

**Facts**

The applicant claimed to be a national of Sudan, a Muslim and a member of the Fur tribe. His asylum claim was based on his claimed fear of persecution due to his membership of the Sudanese Liberation Movement. The Commissioner turned down his application on credibility grounds. The Tribunal affirmed the Commissioner's decision, but on different grounds, finding, *inter alia*, that the UK Operational Guidance Note on Sudan indicated that low or mid level activists would be able to relocate in Sudan, and that the applicant could therefore internally relocate. The applicant argued that the Tribunal failed to have regard to the full country information report from the UK and relied on selective passages of the information cited, and argued that being a non Arab and intellectual he fell within categories of people at risk as set out by the Operational Guidance Note. The applicant was relatively well-educated and had been a part time student in 1990.

**Held**

The Court found the Tribunal's decision to be reasonable and rational and refused leave. The Court stated that there was no obligation on a decision maker to make express reference to each and every piece of information, that no inference could be drawn from the Tribunal's reliance on passages deemed irrelevant, and that the issue was whether that reliance was fair. The Court noted that the applicant's partisan activity was clandestine and not indicative of a high profile or prominent position in the SLM. The Court did not accept that the evidence indicated that the applicant could be equated with an "intellectual". The Court stated that it was open to the applicant and his legal representatives to argue in his appeal that he was more than a low level member of the SLM but they did not do so.

**Cases Cited**

*HGMO (Sudan) CG* [2006] UKAIT 00062  
*LM (Sudan)* UKIAT 00114

**Country Information Cited**

UK Home Office Operational Guidance Note on Sudan

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***O.A. & Anor v The Refugee Appeals Tribunal & Ors, High Court, Clark J., 4<sup>th</sup> February 2009 ([2009] IEHC 60)***

*JUDICIAL REVIEW – LEAVE – CERTIORARI – REFUGEE LAW – REFUGEE APPEALS TRIBUNAL – CREDIBILITY – ERROR OF FACT – FAILURE TO CONSIDER COUNTRY INFORMATION – FAILURE TO CONSIDER EVIDENCE – VAGUENESS – FAILURE TO GIVE REASONS*

**Facts**

The applicants, a mother and son, sought asylum on the basis of a claimed well founded fear of persecution in Nigeria. The first named applicant claimed that her husband, a political activist for the ruling party, had been kidnapped, and that his enemies had threatened her. The Refugee Applications Commissioner found the applicant to be lacking in credibility, and this decision was upheld on appeal. The Tribunal gave four reasons for so holding: (1) the applicant had never sought state protection; (2) the applicant had given conflicting evidence; (3) the applicant's persecutors, if they were intent on targeting her, could have done so between April and September when she remained in the locality; and (4) the applicant's travel arrangements were implausible. There were discrepancies in the descriptions given by the applicant of where she spent a period following her husband's abduction, and with regard to when and if she had contact with him.

The applicant sought leave to review the latter decision essentially on five grounds: (i) that no reasons were given for a finding that the applicant was vague and hesitant; (ii) that the Tribunal made errors of fact with regard to the applicant's evidence; (iii) that the Tribunal's findings included conjecture; (iv) that country of origin information confirmed that the police were often corrupt; and (v) that the Tribunal had given no consideration to the new event that had occurred since of the hearing with the Commissioner, that being that the Applicant's father had been beaten by people looking for her and had died.

**Held**

The Court refused to grant leave, finding that the discrepancies in the applicant's narrative were clearly brought to the applicant's attention by the Commissioner, that there was no error of fact as asserted, that the fact that the decision did not refer to the new information relating to her father's death was not extraordinary considering that this new information was presented at the appeal hearing but then ignored by the applicant's own counsel, to whom this new information may well have come as a surprise. The Court held that the decision was rational and did not involve conjecture. The Court stated that the correct approach which a Court must take in reviewing a decision is to look at the decision as a whole rather than at isolated findings unless it can be shown that materially incorrect findings were the basis of a negative credibility finding.

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***V.O. v The Minister for Justice, Equality and Law Reform & Anor, High Court, Clark J., 23<sup>rd</sup> January 2009 ([2009] IEHC 21)***

*JUDICIAL REVIEW – LEAVE – CERTIORARI – REFUGEE LAW – REFUGEE APPLICATIONS COMMISSIONER – WHETHER THERE IS A MANDATORY OBLIGATION TO CONSIDER COUNTRY INFORMATION – WHETHER IT IS MANDATORY TO APPLY THE PROVISIONS OF S.I. 518 OF 2006*

**Facts**

The applicant applied for leave to seek judicial review of the decision of the Refugee Applications Commissioner recommending that he not be declared a refugee. The applicant came from Nigeria and claimed a well founded fear of persecution because of a death sentence he said had been passed on him by the Ogboni Aborigines for his failure to sacrifice his daughter. The Commissioner found the applicant to lack credibility, and cited various aspects of his story which he considered implausible. The applicant argued that (a) that it was mandatory for the Commissioner to consult country of origin information and that the Commissioner had erred in law in failing to do so, and (b) that it was mandatory for the Commissioner to take into account the provisions of the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2008) (by, for example, considering the applicant's entitlement to subsidiary protection), and that the Commissioner had erred in failing to do so.

**Held**

The Court refused leave, holding that the matter should be brought before the Refugee Appeals Tribunal and was not appropriate for judicial review. The Court stated that the argument that the respondent was obliged to take into account the provisions of S.I. No. 518 of 2006 was based on a confusion of Council Directive 2004/83/EC as incorporated into domestic law. The Court stated that there can be no doubt that the Regulations of 2006 apply to all stages of the assessment of whether a person qualifies for refugee status or is otherwise in need of international protection, an application for subsidiary protection can be assessed only after a person has been refused a declaration of refugee status. The Court stated that while best practice in credibility assessment was to consult country information to establish whether an applicant's story could be true, this was not an invariable rule, and there were always circumstances where a decision on credibility can be arrived at without consulting country information. The Court held that in the instant case consulting country information could not assist in making the applicant's story more credible. The assessment of the applicant's story was not in the instant case founded on a rejection of the experience of secret or cult, but on the denial of the applicant's story.

### Obiter

It is inappropriate for the Commissioner to state that it is considering relevant country information when no such country information is presented or consulted as to do so suggests a formulaic style that is not adapted to the particular case.

### Cases Cited

*B.F. v The Minister for Justice, Equality and Law Reform* [2008] IEHC 126

*C.M.*, Unreported, High Court, Clark J., 26<sup>th</sup> November 2007

*Horvath v Secretary of State for the Home Department* [1999] INLR 7

*Idiekheua v Minister for Justice, Equality and Law Reform*, Unreported, High Court, Clarke J, 10<sup>th</sup> May 2005

*Imafu v The Refugee Appeals Tribunal* [2005] IEHC 416, High Court, Peart J

*Kramarenko v The Refugee Appeals Tribunal* [2005] 4 IR 321

*P.I.E. v The Refugee Appeals Tribunal* [2008] IEHC 339

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### ***D.V.T.S. v The Minister for Justice, Equality and Law Reform & Anor, High Court, Edwards J., 30<sup>th</sup> November 2007 ([2007] IEHC 451)***

*JUDICIAL REVIEW – REFUGEE STATUS DETERMINATION - REFUGEE APPEALS TRIBUNAL - APPEAL TO THE SUPREME COURT – POINT OF LAW OF EXCEPTIONAL IMPORTANCE AND IN THE PUBLIC INTEREST – COUNTRY INFORMATION – SELECTIVE USE OF COUNTRY INFORMATION*

### Facts

The applicant had been granted an order of Certiorari quashing the Tribunal's decision. The Minister for Justice sought to appeal the Court's decision to the Supreme Court on a point of law of exceptional public importance in the public interest, the question the Court was asked to certify being: "whether a tribunal member is obliged, when he has indicated that he has considered all the documentation submitted and perused same, to set out on the face of the decision the reason for preferring certain 'country of origin information' over others"

### Held

The Court refused the certificate to appeal, stating that while there may be a point of law of public importance, there was not a point of law of such exceptional public importance that it was desirable in the public interest that an appeal should be taken to the Supreme Court. The Court stated that it had not decided anything particularly new, but had sought to apply well established principles.

### Obiter

A Tribunal, having considered all the material put before it, is entitled to prefer certain material over other material, but it must do so for good, substantial and

reasonable and rational reasons. Such reasons include the view that certain information is more up to date than other information, or that information is produced by an agency pursuing a particular agenda and might not be entirely impartial. A Tribunal does not have to allude to every piece of country information in a judgment, but where there is a major conflict and where the status of one piece of country information versus another is an issue of significant importance, then the judgment should deal with that and preferment of one piece of information should be justified so that the Tribunal can be seen not to have acted reasonably rather than arbitrarily. The Court cited with approval the following text from Guy Goodwin-Gill (page 547 of the *The Refugee in International Law* 3<sup>rd</sup> Edition):

"The hearing rarely provides enough information and although nowadays there are few limits to the sources that might be consulted, extensive searches often raise rather than answer questions. Credible and trustworthy information is nevertheless increasingly recognised as the essential foundation for good decisions. States and decision makers have long maintained document collections of newspaper items, foreign broadcast reports, Governmental and non-Governmental human rights assessments, analyses from embassies in countries of origin and so forth."

The Court endorsed the following quote from Guy Goodwin-Gill (*Ibidem*), stating that it correctly identified the infirmities of 'country of origin information' and the need for caution in approaching such information:

"Documentary evidence, particularly electronically accessible country reports, has a seductive air, often seeming sufficient to decide the case, but like any other material documentary evidence must still be assessed and put in context, whether it relates personally to the claimant or to conditions in the country of origin. Information of the latter kind often gives only a general impression, more or less detailed of what is going on. The refugee determination process itself has an artificial quality of freezing time in a way which can lead to single events requiring greater significance than is their due. Situations remain fluid. However, recognising that and drawing the right sorts of inference from evidence acknowledged as credible and trustworthy are nevertheless the hallmarks of sound decisions."

### Cases Cited

*Kenny v An Bord Pleanala*

*Irish Asphalt Ltd v An Bord Pleanala*

*Raiu v Refugee Appeals Tribunal* 2003 2 IR 63

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## Mapping Integration: UNHCR's Age, Gender and Mainstreaming Project on Refugee Integration in Ireland



*Emilie Wiinblad Mathez, Protection Officer, UNHCR Ireland*

The full report can be accessed at <http://www.unhcr.ie/pdf/mappingintegration.pdf>

### Executive Summary

This report is the outcome of UNHCR Ireland's Age, Gender and Diversity Mainstreaming project 2008/2009. It provides a tool for those involved in refugee integration, by mapping the prevailing integration definitions of UNHCR, the European Union (EU), 12 European countries and Ireland. The countries reviewed, in addition to Ireland, are Austria, Denmark, Belgium, Finland, France, Germany, the Netherlands, Norway, Slovenia, Spain, Switzerland, and the UK (England).

The report also gives an overview of UNHCR's recommendations in relation to integration, as well as an overview of how integration is understood and supported both in law and policy in the selected countries. But most importantly it explores how refugee themselves experience integration in Ireland.

### Main Findings

#### Use of the term "integration"

Integration can be understood both as the end result of a process and as the process itself. We have found that most countries have the definition of integration in their policies or in strategies rather than in law and that the definition is often formulated in broad terms describing the aim of integration, the indicators of integration and the means by which the government sets out to achieve integration. These integration aims mainly concern persons of foreign origin who have long-term legal stay, including refugees, and are often formulated using terms such as "having equal opportunities", "reaching full potential", "having full participation" or "are statistically equal to host population". Some of the typical indicators that a foreigner has integrated and that integration in society has been achieved are:

- \_ the newcomer speaks one or more of the country's official languages;
- \_ the newcomer has found employment;
- \_ the newcomer has adapted to the culture of the host country;

- \_ the newcomer is participating in civic life;
- \_ there is no ghettoisation of foreigners or persons of foreign origin.

#### Two integration trends

There are two prevailing trends in the countries reviewed. In both trends the overarching principle is that integration is reached through a two-way process, within a framework of equality legislation and policy. The two-way process notion has been expressed in different ways in the countries reviewed, however, as a general pattern, countries interpret the government's part of the two-way process to be one of ensuring a welcoming environment, where there are mutual tolerance, equal treatment and opportunities. Many also include the government's responsibility to give support to integration. Some countries have made specific mention of responsibilities for society as a whole or of specific actors in society. In the trend followed by the majority of countries examined, there is targeted support for the persons who are required to integrate and there are often clearly identified obligations or expectations for them.

In the other trend, the focus is on ensuring integration through mainstream services from the beginning and there is therefore little or no initial direct support to integrate. Integration expectations are not clearly formulated, although they may be implicit. The integration aims are mainly formulated through equality legislation.

#### Trends in countries with targeted support

Typical characteristics of the approach of targeted support are the individualised assessment of integration needs and the agreement between the authorities and the individual on what steps are needed on both sides to reach the integration goals.

These individualised needs assessments form the basis of an integration contract or plan, in which the government makes a number of support services available, matched by an obligation for the individual to participate in the agreed activities. There are typically some consequences for not complying with the plan or contract, which vary from financial consequences to residence permit related issues. The countries with this approach are: Austria, Denmark, parts of Belgium, Finland, France, Germany, the Netherlands, Norway, Slovenia, Switzerland and the UK (England).

In all the countries with targeted integration support, such support is time-limited. After the completion of the integration programme, integration aims are pursued through mainstream services as well as through targeted integration projects.

### Trends in countries with mainstreamed support

Typical characteristics of the mainstreamed approach are that integration aims are pursued mainly through broad anti-discrimination legislation, support to the existing mainstream services and funding to projects. Such projects may target the integration needs of a particular group or a social inclusion issue. An example of the former would be a project in which an organisation is funded to provide accompanying services to refugees when they contact health services. An example of the latter could be a project to improve integration of foreigners through sports and culture. In these countries there is however no individual and targeted integration support. Countries found to follow this integration model are Spain, Ireland and the Wallonia part of Belgium.

### Persons included in integration programmes

In some countries, such as Austria, Denmark, Norway and Slovenia, integration programmes have been designed mainly with refugees in mind, while in other countries, such as France and Germany, integration programmes have mainly focused on integration of immigrants in general. In all countries however, the integration programmes in place are available for refugees and others with protection status irrespective of whether the programmes were designed with this group in mind. While integration programmes are available for refugees and beneficiaries of subsidiary protection other rights and entitlements may vary depending on whether the person is a refugee, a beneficiary of subsidiary protection or an immigrant. In some countries the consequences of non-compliance with integration expectations also have different consequences for different groups of foreigners.

Although countries following both trends may recognise that reception conditions and the asylum procedures could impact refugees' integration prospects, the general trend is not to include asylum seekers in integration efforts. In some countries however, some of the support given to asylum seekers may positively impact integration, and in those countries where the Reception Directive is in place asylum seekers are allowed to work after a specified period and under certain conditions. UNHCR has recommended that national asylum procedures are implemented with integration in mind.

### Integration and the EU

National integration strategies in EU Member States are supported and encouraged by policy, coordination and funding from the EU. A number of policy decisions and initiatives have been taken to support Member States in their integration efforts, but also to ensure some consistency among countries. It is however still left mainly to countries themselves to decide on and adopt the necessary national strategies. The *EU Common*

*Basic Principles on Integration* adopted November 2004 have played a significant role and are often referenced or reflected in national integration policies.

### UNHCR

UNHCR's definition of integration flows from the *1951 Refugee Convention* and a number of ExCom conclusions on durable solutions and local integration. There are common features in the integration approach between UNHCR, the EU and the Member States considered. UNHCR has made clear that it views integration as a two-way process, but stresses that it is the host State that must take the lead role and that communication of the integration expectations is an important factor. UNHCR defines integration as having three key elements:

- \_ a legal aspect;
- \_ an economic or self-reliance aspect;
- \_ a social and cultural aspect.

For successful integration, all three aspects must be supported by the host State. The recommendations made by UNHCR in relation to integration in the European context are mainly in relation to ensuring that refugees and beneficiaries of subsidiary protection are included in integration programmes; that the special needs of refugees and beneficiaries of subsidiary protection are recognised in the integration support; that issues such as lack of documentation, potential trauma and the impact of the asylum process are addressed; that family reunification is facilitated in a timely manner and that there is access to a secure legal status as early as possible, with the potential for obtaining facilitated naturalisation.

We have found that there is clearly less emphasis on ensuring the legal aspects of integration in the current EU and national trends and that no country researched emphasized facilitation of family reunification as part of their integration efforts.

### Ireland

Ireland is found to be at an integration crossroad. In the past there was a clear emphasis in Irish integration policy on the government's role to ensure equal opportunities and take adequate anti-discrimination measures. There was no emphasis on, or targeted support for, the individual's role in the process and little on society's role as a whole outside the anti-discrimination dimension. Support for integration has thus so far been pursued through boosting mainstream services to tackle a more diverse society, as well as making funds available for projects with an integration aim.

The new policy document *Migration Nation* and the proposed *Immigration, Residence and Protection Bill 2008* are including more focus on placing expectations on the individual to integrate. In the Bill it is foreseen that to get long-term residence, a person must show that s/he has integrated, can speak the language and is economically independent. This focus is in line with the main trend of countries in Europe, who pursue a more targeted approach.

The means to support this new focus are not spelled out in *Migration Nation*, nor is it clear from the proposed Bill how the expectations will be supported. From looking at other countries' practices, it would seem that countries with this approach have included a "layer" of targeted integration support before relying on mainstreamed services to tackle the challenge. This is often in the form of an individualised integration plan for each newcomer.

### Outcome of the refugee survey

Through the questionnaire, it was found that refugees participating in the survey generally agreed with the integration points outlined in the *EU Common Basic Principles*. Most participants felt that they were responsible for their own integration, but that the government was also responsible and that the host society had to be welcoming and supportive. Nearly all participants agreed that speaking the language, having employment and knowing the values of society were important for their integration.

A significant number of participants felt that they had not been sufficiently supported in their efforts to integrate. In relation to language, many felt that the available language courses were not well enough adapted to meet the different levels of English that refugees have. Many had stopped attending classes because the English level provided was below their personal ability.

In relation to work, all participants felt that this was important, but many said that they felt disadvantaged in the Irish job market because of lack of Irish work experience and general discrimination. Some felt they had been clearly discriminated against because of their colour, but many indicated that they felt that employers preferred immigrants from within EU or simply did not understand what it meant to be a refugee and were therefore reluctant to give employment or only willing to give low paid temporary work.

In relation to understanding and respecting Irish and EU values, most felt this was important. Despite feeling they should respect the values of Irish society, most of the refugees interviewed were not easily able to explain what exactly these values are. The interviewees also felt there was little or no support or information about such values.

Many indicators of integration such as links to support groups, access to the labour market and perceptions of Irish values were varied and often depended on the refugees' own initiative.

Some of the main recommendations from refugee men and women on how integration could be better supported were in relation to:

- \_ improving access to education and employment;
- \_ improving public knowledge about refugees;
- \_ better English classes;
- \_ clearer information about government policy;
- \_ family reunification.

The recommendations from the group of young people participating in the survey included encouraging foreigners to integrate by showing them the advantages, having a legal process, which is not long and stressful, as well as having the same access to third level education as Irish citizens.



## The Italian asylum procedure - some problematic aspects



by Maria Cristina Romano

**Maria Cristina Romano works as a lawyer in Milan. She is a member of ASGI (Association of Juridical Studies on Immigration) and is also the ELENA co-ordinator for Italy.**

First I will try to give a general overview of the asylum procedure in Italy and then I will examine some of its problematic aspects.

The Italian asylum system is, since 2008, modelled on the European Asylum system.

The main legislative instruments ruling the field are:

- Art. 10 of the Italian constitution which provides the right of asylum for “*foreigners who, in their Country, are prevented from exercising the democratic liberties granted by the Italian Constitution*”; it gives a broader definition of a person entitled to protection compared to the Geneva Convention one<sup>41</sup>.
- Decreto legislativo n. 251 of 2007 in force since 19 January 2008 by which Directive 2004/83/CE, the “Qualification Directive” has been implemented;
- Decreto legislativo n. 25 of 2008 in force since 3<sup>rd</sup> March 2008 by which Directive 2005/85/CE, the “Procedures Directive”, has been implemented;
- Decreto legislativo n. 140 of 2005 which came into force on 19 October 2005 by which Directive 2003/9/CE, the “Reception Directive”, has been implemented.

### Grounds for the recognition of international protection

The “Qualification Directive” has been transposed almost literally in legislative decree n. 251/2007 so I will focus on the provisions that have not been adopted or for which there is a substantial difference compared to the Directive.

The first two chapters of the Directive have been transposed literally. The implementation of art. 4 of the Directive constitutes a great step forward for Italy, which, being a civil law country, until the entry into

<sup>41</sup> The role and effectiveness of art. 10 of Constitution is controversial and a subject of discussion both by academics and in jurisprudence. The right of protection deriving from art. 10 of the Constitution then will not constitute the subject of these notes. However, it has quite a marginal role and cannot be obtained through administrative proceedings but only by judicial means.

force of the Directive placed all the burden of proof in judicial proceedings on the applicant. For this reason, the duty of co-operation of the state authorities constitutes an important innovation in the system<sup>42</sup>.

Italy has not transposed art. 8 of the Directive on internal protection, and there are not other provisions on this point. However, as a matter of fact, the existence of a safe region within the applicant country can be determinant for the refusal of protection.

Art. 12 par 2b of the Directive excludes from refugee status people who have “*committed serious non political crimes outside the country*”. Italian law<sup>43</sup> defines as serious crimes, for the purpose of exclusion from refugee status, all those crimes for which the Italian criminal code provides a minimum sentence of not less than 4 years or a maximum sentence of not less than 10 years<sup>44</sup>. In this way a large number of crimes will constitute a reason for excluding protection.

Chapter 4 of the Directive has been transposed almost literally and the law states, with reference to criminal code provisions, which cases of conviction constitute grounds to revoke or deny the refugee status.

In relation to subsidiary protection, the implementation of the Directive was a great step forward in the protection of people in need. Until the coming into force of the new law, in fact, people in need of protection who did not have all the requirements for the recognition of refugee status could only obtain humanitarian protection at the discretion of the authorities or sometimes by judicial proceedings they could obtain asylum under art. 10 of the Constitution.

Chapter V of the Directive has been transposed almost literally.

In relation to art. 21, regarding the *non-refoulement* principle, under Italian law it is specified what constitutes a serious crime for the purpose of art. 21 par.2b (possibility of expelling the person): those crimes for which the criminal code provides a minimum sentence of not less than 4 years or a maximum sentence of not less than 10 years.

The residence permit issued to people who have been granted refugee status lasts 5 years, the one issued to people who have been granted subsidiary protection lasts 3 years. Both refugee and subsidiary protection

<sup>42</sup> A very interesting decision (n.27310) of the Sezioni Unite of Court of Cassazione (Grand Chamber of the high Court) was held on 17<sup>th</sup> of November 2008 on the application of the Qualification Directive, the burden of proof and the duty of co-operation of the State.

<sup>43</sup> Art. 10 d.lvo 251/2007

<sup>44</sup> The Italian criminal code provides for each crime the minimum and the maximum sentence applicable by the judge.

holders have access to work, schools and universities. However, only refugees are treated as EU citizens regarding access to public jobs.

### **Procedure for the recognition of international protection**

The actual Italian law provides that the application must be submitted as soon as possible when the migrant arrives at the border or at the main police office (*Questura*) in the town where he or she is domiciled.

Detention in specific centres is provided under certain circumstances: if the asylum seeker has presented the application only after having been stopped in irregular conditions or if he or she entered irregularly with no documents. In both these cases temporary detention in specific centres is provided, although in the second case it will last only for the time necessary to identify the person.

If the asylum seeker applies for asylum only after having been expelled from the country, he or she will be detained in a detention centre for irregular migrants until the end of the procedure.<sup>45</sup>

Once the asylum request has been presented, the asylum seeker who is without means, will be sent to a reception centre if a place is available or will be given a small amount of money and will have to find his or her way. The prefect can fix an area of the territory where the asylum seeker must stay until the decision<sup>46</sup>. After 6 months from the date of application, the asylum seeker, if his or her request has not already been examined, will be entitled to work.

The asylum applications are examined by one of the 10 territorial commissions (the competence is determined on a geographical basis). There is a National Commission with competence for providing guidelines to the local ones and for the revocation of the protection (for the revocation of the protection a new interview is provided in front of the National Commission).

The territorial Commissions are of mixed composition and include: 1 member of the prefecture career (home office officer) as president, 1 officer of the state police, 1 member that represents territorial entities, 1 member designated by the UNHCR. On specific cases an officer of the foreign office can join the commissions. There are no medical or psychological experts to support the Commissions. The applicant must provide any medical evidence.

Each asylum application is examined individually by one of the commissions. Asylum seekers attend an

interview during which they must produce all the evidence that can support their application.

Even if there are differences from one area of the country to another, generally between the application and the communication of the interview results, it can take from 3 months to one year.

A lawyer can assist the asylum seeker during the interview, but no legal aid is provided at this stage. The commission provides an interpreter. The asylum seekers receive a copy of the interview report, which is written only in Italian.

Negative decisions can be appealed within 30 days at the civil court. The applicant is automatically entitled to stay in the territory until the court decision, except in some specific cases. Legal aid can be given if the case is considered well-founded by the legal aid board. Against a decision of the civil court an appeal must be filed at the appeal court within 10 days.

Applications presented by irregular migrants only after having been stopped in the country in irregular conditions or after an expulsion are examined with priority and the appeal against negative decisions must be filed within 15 days.

In these cases there is no automatic right to stay in the country pending the appeal but the Court can grant it.

### **Problematical aspects of the system**

The most problematical aspects in practice result from, on the one hand, access to the procedure, and on the other, the lack of reception measures.

Regarding the access to procedure, the first problem arises from the mixed fluxes of migrants that reach the Italian coasts by sea, as some of the migrants are asylum seekers in need of protection. However there is not much clarity on which kind of information is given to these people, especially when they reach the isle of Lampedusa. There, they are kept in a centre for the time necessary for their identification and are then sent back to their home countries<sup>47</sup>, unless they apply for international protection.

The situation became more worrying in the last few weeks. The Italian authorities, in application of an agreement with Libya, began to send back there migrants rescued in the sea between Libya and Sicily. The people are sent back without even identifying them, regardless of their nationality, without knowing if there are asylum seekers or others in need of protection.

<sup>45</sup> Law provides specific time limits for detention.

<sup>46</sup> This provision was introduced by legislative decree n. 159 of 2008, published on 21 October 2008, as amendment to legislative decree 25/2008 and for this reason there haven't been many applications until now.

<sup>47</sup> Concern was expressed in the first months of 2009 by the UNHR for the repatriation of several migrants directly from Lampedusa  
<http://www.unhcr.it/news/dir/26/view/250/lunhcr-esprime-grave-preoccupazione-per-i-rinvii-forzati-da-lampedusa-25000.html>

There have been critics from several associations of this practice<sup>48</sup> even from the Catholic Church. UNHCR took a strong position<sup>49</sup> against these procedures with the result that the Italian Representative was attacked by exponents of the Government<sup>50</sup>. The High Commissioner Antonio Guterres, had to intervene in person asking the government to explain.<sup>51</sup>

In the meanwhile, there is a media campaign by TV and newspapers close to the government to sustain its policy. These media allege that asylum requests are just excuses to illegally enter the country, and even pretend that Libya is a safe country that will grant protection to the asylum seekers, which is at least improbable, considering that Libya has not signed the Geneva Convention. Some articles even openly attack UNHCR declaring that its members teach illegal migrants how to become asylum seekers<sup>52</sup>.

Access to the procedure is sometimes a problem also for asylum seekers who have entered the country and wish to apply at the central police office of the town where they live. Especially in big towns, such as Rome and Milan, it can happen that they have to wait several months before their application is formalised, and during that time they do not have any reception or other facilities for asylum seekers (such as healthcare). Of course this makes the people vulnerable and easily accessed by organised crime.

Another problem arises from the reception conditions: under Italian law reception facilities are provided only to asylum seekers during the procedure; no specific measures are provided for people who have obtained protection status, although they have access to all the social services granted to regular migrants.

Also, during the evaluation procedure, reception measures are not available for all the asylum seekers and there are big differences between different areas of the country, as the measures are mainly devolved to local authorities.

<sup>48</sup> The Italian Refugee Council in an official note speaks about an “Historic turn in violation of the right of asylum” <http://www.cir-onlus.org/cir%20Historic%20turn%20in%20violation%20of%20the%20right%20of%20asylum.htm>

<sup>49</sup> <http://www.unhcr.org/cgi-bin/texis/vtx/media?page=home&id=4a02d0ed2>; <http://www.unhcr.it/news/dir/26/view/555/riammettere-in-italia-le-persone-bisognose-di-protezione-respinte-in-libia-55500.html>;

<sup>50</sup> <http://www.repubblica.it/2009/05/sezioni/cronaca/immigrati-8/governo-compatto/governo-compatto.html>

<sup>51</sup> <http://www.unhcr.it/news/dir/26/view/561/dichiarazione-dellalto-commissario-delle-nazioni-unite-per-i-rifugiati-antonio-guterres-56100.html>

<sup>52</sup> <http://www.libero-news.it/webeditorials/view/1070>

From official numbers, it appears that for instance in 2007, less than half of the asylum seekers obtained reception<sup>53</sup>. Considering that in recent years there was an increase in asylum applications without a similar increase in the accommodation facilities, the number of asylum seekers who received accommodation has been even lower in percentage.

In recent weeks in the Milan area, there has been a movement of refugees and other people with subsidiary protection that first squatted in an abandoned building and, after the intervention of the police to free the building, began a movement of protest against the poor reception conditions<sup>54</sup>.

Four people who have been identified by police as the leaders of the protest have been immediately required to appear in front of the national Commission. Apparently, the intention is to withdraw protection from them.<sup>55</sup>

As regards healthcare, asylum seekers and refugees have access to public health services. They only need to register their name at the local ASL<sup>56</sup> to obtain a medical card that allows them to attend a GP free and access to all the necessary healthcare. We do not have specialised centres for post-traumatic disorders. Some NGOs try to help those people and give medical and psychological assistance in the main towns.

In relation to development of law in this area, a new law that is under discussion at the Parliament will make illegal entry into the country a crime, even for asylum seekers. For them however the criminal proceeding will be suspended until the decision on their protection request is taken. The law has not yet been approved, but apparently there is not serious opposition on the point.



<sup>53</sup> From the official report of the SPRAR (central agency responsible for co-ordinating the reception system) 6,287 asylum seekers have obtained reception in 2007. The report is available in Italian at the following link [http://www.interno.it/mininterno/export/sites/default/it/sezioni/sala\\_stampa/notizie/asilo/0676\\_2008\\_12\\_17\\_Rapporto\\_annuale\\_Sprar.html](http://www.interno.it/mininterno/export/sites/default/it/sezioni/sala_stampa/notizie/asilo/0676_2008_12_17_Rapporto_annuale_Sprar.html)

In the same year there were more than 14.000 applications. Official statistics are available on the following link: [http://www.interno.it/mininterno/export/sites/default/it/assets/files/15/0337\\_domande\\_asilo\\_2007.pdf](http://www.interno.it/mininterno/export/sites/default/it/assets/files/15/0337_domande_asilo_2007.pdf)

<sup>54</sup> <http://www.carta.org/campagne/migranti/17214> ; <http://www.cir-onlus.org/Primo%20piano.htm> <http://www.repubblica.it/ultimora/24ore/nazionale/news-dettaglio/3653540> The refugees constituted a committee and have a blog <http://rifugiati milano.blogspot.com/>

<sup>55</sup> It is not clear on which grounds at the time of writing.

<sup>56</sup> Local public health office

## Are there enough procedural safeguards foreseen in administrative limitation of movement?



by Vita Habjan  
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### A comparison between procedural safeguards provided for in detention of asylum seekers and custody of suspects in criminal proceedings in Slovenia

A lot has been said in legal science about the limitation of movement in criminal proceedings and safeguards foreseen by law to prevent arbitrary actions of a state with regard to withdrawal of a constitutional right, that is, the right to freedom of movement. In such cases both scholars as well as the judiciary allow for intervention in this human right in only very exceptional circumstances, legitimately of course. But we tend to forget that numerous persons are limited in their movement in administrative proceedings, which is not being addressed to the extent needed by the scholars and the media, as it concerns a group of marginalised persons. They are seekers of international protection whose movement has been limited on the basis of the Slovenian International Protection Act (hereinafter: IPA) as a *lex specialis* to the General Administrative Procedure Act. Nevertheless, when comparing these procedural safeguards with the ones in the criminal proceedings the first are fewer and weaker although, in my opinion, the equivalence between procedural safeguards in administrative proceedings and in criminal proceedings should be provided for.

In this article I would like to present major differences between limitation of movement when one is in custody as per the Criminal Procedure Act (hereinafter: CPA) and limitation of movement when one detained as per the IPA, focusing on procedural safeguards. My hypothesis is that the procedural safeguards are, despite the fact that limitation of movement has the same effect when one's movement is limited either per the CPA or the IPA, in the latter case much lower with regard to the level of protection which often results in violation of other, legally protected rights (i.e. a right to judicial protection).

The most severe intervention in one's constitutional rights is limitation of movement when one is in custody. Due to its severity such intervention is allowed only under exceptional circumstances: when a person is reasonably suspected of having committed a criminal

offence he or she may be detained only on the basis of a court order when absolutely necessary for the course of criminal proceedings or for reasons of public safety (article 20 of the Constitution of the Republic of Slovenia). At the same time when deciding on custody, the principles of subsidiarity and proportionality have to be applied. The CPA provides for less severe measures available to courts to comply with the principle of proportionality.

On the other hand the IPA provides only for limitation of one's movement, that is, only giving the possibility to either limit one's movement to a detention facility or to the area of the asylum home [a facility used for accommodating asylum seekers], which with its high fence constitutes a prison-like environment. The decision on detention is taken by the Ministry of Interior (hereinafter: MOI) and the law lists 14 grounds for detention, but enables even further application of this measure as the list is non-exhaustive and therefore such provision lacks one of the main legal principles, the principle of legal certainty.

Furthermore, the CPA provides for taking into custody a person who is reasonably suspected of having committed a criminal offence. The IPA provides for the MOI to issue a detention order when necessary to establish one's identity, when suspected of misleading or abusing procedure, or when one is a threat to lives or assets or to prevent the spread of disease. As the IPA lists examples of misleading or abuse of procedure, the nature of such grounds is very much similar to the one in the case of custody; the major difference is only that in the case of criminal proceedings a person has violated constitution or law which resulted in activation of the criminal justice system apparatus, while within proceedings for acquiring international protection a person has tried to activate the administrative apparatus to acquire rights given to persons enjoying international protection. Despite this similarity the standard of evidence for limiting one's movement is much lower in international protection proceedings as the law only demands "suspicion" while the CPA demands a higher standard, that is, "reasonable suspicion" which enables much higher protection of a person from intervention in his or her right to freedom of movement. Nevertheless, the consequences of both measures are the same as freedom of movement is limited in both cases.

Furthermore, one is placed in custody when a court issues an order on the basis of a prosecutor's motion while administrative detention is proposed and decided upon by the same subject, the MOI. Such lack of separation of different functions allows for abuse of this measure. For example, there have been several cases when the MOI detained a person for the maximum period set by the law for the purpose of establishing one's identity when in practice the identity could have

been established much sooner. On the other hand the CPA only allows for custody “for the shortest period necessary” and imposes obligation on all state authorities involved in criminal proceedings to act as quickly as possible, especially when one is in custody.

When an order for custody has been issued by an investigative judge it has to be served on the person when arrested within a maximum of 48 hours after one has been arrested or produced before the investigative judge. In case of a so-called “police custody” (when there are reasonable grounds that one has committed a criminal offence prosecuted *ex officio* and the police are lawfully empowered to arrest and hold that person in custody – the standard of proof is lower, only “reasonable grounds for suspicion”) a person may be apprehended for a maximum of 48 hours and has to be informed in writing of the grounds for arrest within six hours after the arrest itself. In both cases the person is informed on the grounds for arrest. In case of administrative detention the MOI informs the person about the grounds for detention orally and has to serve on the person a written copy of an order with a statement of grounds within 48 hours. But in practice the MOI tends to abuse this deadline provided by the law by arbitrarily extending it, giving the explanation that the deadline relates only to the fact of issuing and not serving the order. On most occasions the deadline is extended, sometimes even to five or six days, due to the reason that the order has not been translated into a language understandable to an asylum seeker yet. In the meantime the asylum seeker cannot appeal against the order as one has not been served yet. Incapability of the MOI to effectively organize its work therefore affects a constitutional right to an effective legal remedy. The deadline should limit actions of the MOI, as it should “force” it towards prompt issuing and serving of the order to prevent arbitrary intervention into the human rights of the individual.

A right to a defense counsel is given by the CPA. In case a person who has been arrested does not appoint one in 24 hours since he or she has been informed of the right, one shall be appointed to him or her. As per the IPA an asylum seeker does not have a right to a refugee counselor as well as a right to free legal aid – if the asylum seeker appoints one he or she has to pay for it which seldom happens, having in mind the financial situation of asylum seekers who usually spend all their money to pay for the trip from their countries of origin. Furthermore, at the second and the third instance a refugee counselor is appointed and the award for his or her service approved by the MOI which at the first instance reviews the application while at the second instance is a party in an administrative dispute.

An additional procedural safeguard provided by the CPA is an obligation of a panel of three judges at a

district court to regularly revise every two months whether legal conditions for custody still exist. As per the IPA no authority is bound to revise whether grounds for detention still exist. Therefore, if an asylum seeker does not file an appeal against a detention order on time, at the same time having in mind he or she is most likely without any legal aid, it is possible that the asylum seeker might face unlawful withdrawal of the right to freedom of movement.

To sum up, the following are the major differences between both measures:

- custody is ordered by a court while administrative detention is ordered by an administrative body;
- grounds for custody are listed exhaustively, while grounds for detention are in some part listed non-exhaustively;
- in the CPA the principles of proportionality and subsidiarity are applied, while the IPA does not apply the principle of subsidiarity as it does not foresee any other measures to achieve the same result;
- a higher standard of proof has to be fulfilled to allow intervention in the right to freedom of movement in the case of custody;
- in case of administrative detention separation of function of prosecution and judicial function is not respected while in criminal proceedings both functions are separated;
- when in custody one is informed of the grounds for limitation of movement immediately or within 6 hours at the latest (in case of the so-called “police custody”) while in the case of administrative detention it is within 48 hours or even later;
- a defense counsel must be appointed for the person in custody while free legal aid is provided for in case of administrative detention;
- a regular judicial review of lawfulness of custody is conducted while lawfulness of administrative detention can be reviewed only upon the detainee’s motion.

To conclude, although both measures are equivalent with regard to intervention in the right to freedom of movement, procedural safeguards are fewer and weaker in the case of administrative detention which enables more possibility for the arbitrary actions of a state.





## The Killing Fields: the plight of suicide among India's farmers



By Patrick Dowling RDC

### Introduction

The day after Shankara Mandaukar died there remained traces in the whirled dust, where he "...had writhed in agony".<sup>57</sup> He had lain on the ground, doubled up in pain, howling and vomiting as his life ebbed away; it took over an hour for him to die.<sup>58</sup> Shankara was an indebted farmer in India; Shankara became another Indian farmer to die by suicide after drinking a cupful of chemical insecticide. Annually in the past 10 years over 10,000 farmers in debt in India have resorted to suicide, even in spite of government financial intervention.<sup>59</sup> In Maharashtra state where Shankara died, there has been over a 100% increase in farmer suicides since 1997.<sup>60</sup> One quarter of all farmer suicides in 2007 occurred in Maharashtra, with part of this state once renowned for its propitious agrarian produce now labelled as "... 'suicide country'".<sup>61</sup> Maharashtra state is one of four states in India identified by the government as being particularly prone to farmer suicides: the others are Karnataka, Kerala and Andhra Pradesh.<sup>62</sup>

The wave of farmer suicides in India has been called the most sustained outbreak of such deaths ever recorded in history.<sup>63</sup> Since 2002 it has been estimated that a farmer

<sup>57</sup> Andrew Malone,(7 November 2008), "The GM Genocide", *The Daily Mail*  
<http://www.dailymail.co.uk/news/worldnews/article-1082559/The-GM-genocide-Thousands-Indian-farmers-committing-suicide-using-genetically-modified-crops.html>

<sup>58</sup> *Ibid*  
<sup>59</sup> BBC,(22 April 2008), *India rules out new farm debt aid*  
[http://news.bbc.co.uk/2/hi/south\\_asia/7360027.stm](http://news.bbc.co.uk/2/hi/south_asia/7360027.stm)

<sup>60</sup> Asian Centre for Human Rights,(December 2008), *India Human Rights Report 2008*  
<http://www.achrweb.org/reports/india/AR08/AR2008.pdf>

<sup>61</sup> Anuj Chopra,(20 January 2009), "Debt drives farmers to suicide", *The National*  
<http://www.thenational.ae/article/20090120/FOREIGN/850376237/1103>

The previous year Maharashtra had the most farmer suicides since recording of such deaths begun by the NCRB.  
 P Sainath,(31 March 2008), "17,060 farm suicides in one year", *The Hindu*  
<http://www.hinduonnet.com/2008/01/31/stories/2008013160930100.htm>

<sup>62</sup> Empower poor,(1 August 2006), *31 'farmer-suicide-prone' districts identified*  
<http://www.empowerpoor.com/relatednewsarchivist.asp?report=335&month=8&year=2006#>

<sup>63</sup> P.Sainath,(12 February 2009), "Neo-Liberal Terrorism in India: The Largest Wave of Suicides in History", *Counter Punch*

in India took their life on average every 30 minutes.<sup>64</sup> The National Crime Records Bureau of India (NCRB) reports that since 1997 there has been 1,82,936 farmers' dying by suicide.<sup>65</sup> In May 2008 the UN Economic and Social Council expressed their concern over the prevalence of farmer suicides in India.<sup>66</sup>

### Why suicide

" 'Please tell the world what is happening here...' " espouses a brother of a farmer suicide in India.<sup>67</sup> The number of Indians taking their lives rose between 1997 and 2005 with a concurrent rise in farmer suicides.<sup>68</sup>

<http://www.counterpunch.org/sainath02122009.html>

<sup>64</sup> P Sainath,(31 March 2008), *The Hindu*, "17,060 farm suicides in one year", *The Hindu*

<http://www.hinduonnet.com/2008/01/31/stories/2008013160930100.htm>

<sup>65</sup> *Hindustian Times*,(14 December 2008), "46 farmers commit suicide every day in India; Maha tops list"

<http://www.hindustantimes.com/StoryPage/StoryPage.aspx?id=9923ad6a-3766-4337-a4f5-040b79027533>

This news story also notes how farmers' deaths by suicide consisted of just over 14% of total suicides for the year 2007 in India, the latest available year for such figures.

Elsewhere the Indian Journal of Psychiatry outlining the provisions of Section 309 of the Indian Penal Code notes how any attempt to suicide is a punishable offence. Lakshmi Vijaykumar,(2007), *Suicide and its prevention: The urgent need in India*, Indian Journal of Psychiatry Volume:49, Issue:2

<http://www.indianjpsychiatry.org/article.asp?issn=0019-5545;year=2007;volume=49;issue=2;spage=81;epage=84;aulast=Vijaykumar>

The paper also notes how this legislation is counter-productive in addressing suicide by legal means as medical care can be denied to those who attempt suicide as authorities and practitioners are wary of the law and therefore applicable statistics for attempted suicide are not kept.

<sup>66</sup> The UN Economic and Social Council,(May 2008), *Committee On Economic, Social And Cultural Rights, Fortieth session, 28 April - 16 May 2008, Consideration Of Reports Submitted By States Parties Under Articles 16 And 17 Of The Covenant, Concluding Observations of the Committee on Economic, Social and Cultural Rights, India*  
[http://www.hic-sarp.org/news\\_show\\_user.php?id=112](http://www.hic-sarp.org/news_show_user.php?id=112)

<sup>67</sup> Andrew Malone, *op.cit.*,  
<http://www.dailymail.co.uk/news/worldnews/article-1082559/The-GM-genocide-Thousands-Indian-farmers-committing-suicide-using-genetically-modified-crops.html>

<sup>68</sup> P.Sainath,(12 November 2007), "Farm suicides rising, most intense in 4 States", *The Hindu*  
<http://www.hinduonnet.com/2007/11/12/stories/2007111253911100.htm>

See also the following comment: "More than...one hundred thousand...lives are lost every year to suicide in our country. In the last two decades, the suicide rate has increased from 7.9 to 10.3 per 100,000".

Lakshmi Vijaykumar,(2007), *Suicide and its prevention: The urgent need in India*, Indian Journal of Psychiatry Volume:49, Issue:2  
<http://www.indianjpsychiatry.org/article.asp?issn=0019-5545;year=2007;volume=49;issue=2;spage=81;epage=84;aulast=Vijaykumar>

See furthermore the following: "the phenomenon of farmer suicides is not new or recent. Based on the observed national trend from 1997 to 2006, one can clearly reject the assertion that the growth in suicides has accelerated in the last five years or so. The number of

The Indian Journal of Psychiatry reports that the "...effects of modernization, specifically in India, have led to sweeping changes in the socioeconomic, sociophilosophical and cultural arenas of people's lives, which have greatly added to the stress in life, leading to substantially higher rates of suicide. In India, the high rate of suicide among young adults can be associated with greater socioeconomic stressors that have followed the liberalization of the economy and privatization leading to the loss of job security, huge disparities in incomes and the inability to meet role obligations in the new socially changed environment. The breakdown of the joint family system that had previously provided emotional support and stability is also seen as an important causal factor in suicides in India".<sup>69</sup> For farmers the lack of support has reached a crisis: one in desperation mentions that farmers " '...want to escape from our problems...We just want help to stop any more of us dying' ".<sup>70</sup> Yet, on the other hand, an agricultural activist points out the pervasiveness of farmer suicides becoming normal. " 'Suicide has become so common that no one takes it seriously anymore' ".<sup>71</sup> The low economic status of farmers' who take their lives is seen as a factor for suicide.<sup>72</sup> But it is also pointed out that better off farmers are also dying by suicide.<sup>73</sup> Indeed, two of the more prone suicide states – Karnataka and Maharashtra – are themselves, relatively well off.<sup>74</sup>

Various sources mention the reasons why farmers in India are resorting to suicide, including: crop failure, effects of international trade, psychological issues,

farmer suicides is significant and tends to be growing over time, but so is the total number of suicides in the general population". International Food Policy Research Institute, (October 2008), *Bt Cotton and Farmer Suicides in India, Reviewing the Evidence* <http://www.ifpri.org/pubs/dp/IFPRIDP00808.pdf>

<sup>69</sup> Lakshmi Vijaykumar, (2007), *Suicide and its prevention: The urgent need in India*, Indian Journal of Psychiatry Volume:49, Issue:2

<http://www.indianjpsychiatry.org/article.asp?issn=0019-5545;year=2007;volume=49;issue=2;page=81;epage=84;aulast=Vijaykumar>

<sup>70</sup> Andrew Malone, *op.cit.*,

<sup>71</sup> Jason Motlagh, (22 March 2008), "India's debt-ridden farmers committing suicide", *San Francisco Chronicle* <http://www.pulitzercenter.org/openitem.cfm?id=834>

<sup>72</sup> Ashok B Sharma, (22 Dec 2008), "Increased indebtedness leads to farmer suicides: NCEUS", *The Financial Express* <http://www.financialexpress.com/news/increased-indebtedness-leads-to-farmer-suicides-nceus/401178/0#>

<sup>73</sup> BBC, (1 May 2006), Debt drives Indian farmers to suicide <http://news.bbc.co.uk/2/hi/business/4954426.stm>

<sup>74</sup> Vishwa Mohan, (16 December 2008), "Vishwa Mohan More men committed suicide in India than women: Report [India]", *The Times of India*

<http://timesofindia.indiatimes.com/articleshow/msid-3842361.prtpage-1.cms> This news story also notes that: "A definite trend is also noticed among different states which, perhaps, speaks volumes about the 'psychological state' of people than their actual difficulties which they might be facing before being prompted to take the extreme step". *Ibid*

domestic trade regulations, increased cost of local cultivation, clusters of suicides, loss of economic status.<sup>75</sup> One farmer's widow in 2008 mentions the

<sup>75</sup> See the following: Anitha Ramanna, (May 2006), *Farmers' Rights in India: A Case Study*, The Fridtjof Nansen Institute <http://www.fni.no/doc&pdf/FNI-R0606.pdf> ;

Jason Motlagh, (22 March 2008), "India's debt-ridden farmers committing suicide", *San Francisco Chronicle* <http://www.pulitzercenter.org/openitem.cfm?id=834> ;

BBC, (22 April 2008), *India rules out new farm debt aid* [http://news.bbc.co.uk/2/hi/south\\_asia/7360027.stm](http://news.bbc.co.uk/2/hi/south_asia/7360027.stm) ;

Srijit Mishra, (September 2007), *Risks, Farmers' Suicides and Agrarian Crisis in India: Is There A Way Out?*, Indira Gandhi Institute of Development Research

<http://www.igidr.ac.in/pdf/publication/WP-2007-014.pdf>

Specific to Maharashtra, a research institute proffered the following reasons for farmer suicides in that state:

"1. The major reason for the suicides is the heavy indebtedness that the cultivators find

themselves in today. This heavy indebtedness is not an overnight phenomenon that has occurred suddenly. It has its roots in the credit policy that has been followed over a number of years.

2. The indebtedness itself results from a mismatch in the cost of production and the support price and the market price that the cultivators are receiving at the end of every cropping cycle.

3. Field data suggests that there has been repeated crop failure in the last four years.<sup>48</sup>

This crop failure has resulted in a reduction in the productivity of the land due to a variety of reasons. These reasons could be due overuse of fertilisers, pesticides and reliance on HYV seeds and now to some extent on the genetically modified seeds such as the Bt. Cotton. Thus, the crop failure becomes a cyclical phenomena and not a one-time occurrence.

4. Heavy indebtedness is spreading across the landholding patterns. In that context, the small and the medium-sized cultivator is the most affected of the lot, though the large landholder in the rain-fed areas of the state, too, is coming under strain.

In the context of availability of credit, field data suggests that even after 55 years of

Independence, private moneylending remains the single largest source of credit to

small and marginal farmers. This is so because the banking sector is fast moving out of the credit delivery mechanism...

6. Cultivation in Maharashtra is primarily rain-fed in nature. Thus, the subsidy given on fertilisers and pesticides, irrigation and electricity does not touch the small/marginal and medium-sized landholder, as the cultivation is deprived of an assured irrigation source. Thus, those who are cultivating cash crops that requires irrigated water have to perforce rely on the rainfall that is fickle at the best of times. This puts the system under tremendous stress. The cash crop becomes a kind of a compulsion, as subsistence farming alone does not provide for the need of liquid capital that the cultivator needs for survival. More and more, the small and marginal farmers are pushed into compulsory cash crop cultivation that is having a spiral effect in terms of the debt crisis.

7. The access to information base that the cultivators have largely comes from the

agents of the fertiliser and seed companies. The government extension machinery is

death of her husband. “ ‘Our crop failed twice. My husband had become depressed. He went out to his field, lay down in the cotton and swallowed insecticide’ ”.<sup>76</sup>

The International Food Policy Research Institute in 2008 note the numerous studies undertaken on farmer suicides in India. They report the complexity of reasons for farmer suicides in India, that a “ ‘monocausal explanation for farmer suicides would be totally inadequate’. The institute concludes that there is no definitive explanation or invariable explanations for the reported cases of farmer suicides with the notable exception of debt. The report says there is ‘one leading factor seems to connect several causes particularly related to agriculture: the heavy indebtedness of farm households, particularly in the suicide-prone states’ ”.<sup>77</sup> Another survey reports that the “...main feature that emerged from a number of studies has been that, among the socio-economic factors which led to spurt in farmer suicides in various states, indebtedness was the most prominent.”<sup>78</sup> The Development Studies Institute in 2009 says that “...indebtedness was found to be the most common thread that ran through most of the reported suicides”.<sup>79</sup>

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not visible in the sense that it can provide an objective database in information to the cultivators.

8. The attitude of the government may be described as starkly apathetic. This is demonstrated by the fact that almost 80% of the victims have not received any kind of compensation from the government.

9. There is a total absence of safety net for the cultivators, especially the small and the medium ones”.

Tata Institute of Social Sciences,(15 March 2005),*Causes of Farmer Suicides*

*in Maharashtra: an enquiry*

<http://tiss.edu/Causes%20of%20Farmer%20Suicides%20in%20Maharashtra.pdf>

<sup>76</sup> Andrew Malone,*op.cit.*,

<sup>77</sup> International Food Policy Research Institute,(October 2008),*Bt Cotton and Farmer Suicides in India, Reviewing the Evidence*  
<http://www.ifpri.org/PUBS/dp/IFPRIDP00808.pdf>

<sup>78</sup> National Commission for Enterprises in the Unorganised Sector,(August 2007), *Report of Conditions of Work and Promotion of Livelihoods in the Unorganised Sector*  
[http://nceus.gov.in/Condition\\_of\\_workers\\_sep\\_2007.pdf](http://nceus.gov.in/Condition_of_workers_sep_2007.pdf)

<sup>79</sup> Balamuralidhar posani,(February 2009),*Crisis in the Countryside: Farmer Suicides and The Political Economy of Agrarian Distress in India*,Development Studies Institute  
<http://www.lse.ac.uk/collections/DESTIN/pdf/WP95.pdf>

The Tata Institute of Social Sciences adds the following caveat:  
“However, not all farmers facing these conditions have committed suicide. It is only those who have felt that they have exhausted all avenues of securing support to deal with debts have taken their lives. Tata Institute of Social Sciences,(15 March 2005),*Causes of Farmer Suicides*  
*in Maharashtra: an enquiry*  
<http://tiss.edu/Causes%20of%20Farmer%20Suicides%20in%20Maharashtra.pdf>

## Debt

The International Food Policy Research Institute report notes the following causes of farmers’ indebtedness: “...changes in cropping patterns, plant resistance to pesticides and hence increased spending on pesticides, a shift from low-cost food crops to high-cost cash crops, lack of access to institutional credit, and a shift of government policy focus away from agriculture.”<sup>80</sup> The report adds that indebtedness is not new among India’s farmers but that what is new “...is...the nature of the debts and the pattern of high-cost agriculture that farmers engage in with the hope of becoming debt-free if the harvest is sufficient. This phenomenon of “going for broke and losing out” is likely related to the increased instance of suicide among farm households”.<sup>81</sup> There is a lack of institutional credit available to farmers, which leads to borrowing from the unofficial sector.<sup>82</sup> Indian farmers have, in other words, been increasingly borrowing from money lenders. The need for credit encompasses both household consumption and costs of cultivation.<sup>83</sup> The Tata Institute of Social Sciences notes the increased dependency on the informal sector from the mid-nineties for indebted farmers seeking loans and how this increased in the absence of alternative support systems.<sup>84</sup> At the same time there was a change in what farmers cultivated and an increased productivity investment required.<sup>85</sup>

With however, the fluctuation of markets and crops failure for example, farmers were left with no means to repay loans.<sup>86</sup> Farmers “...do not have access to debt relief under any law. Being indebted to the private moneylenders they cannot go to public authorities to declare themselves insolvent or to get any kind of debt relief.”<sup>87</sup> Farmers who died by suicide are

<sup>80</sup> International Food Policy Research Institute,*op.cit.*,

<sup>81</sup> *Ibid.*,

<sup>82</sup> James Randerson,(5 November 2008),“Indian farmer suicides not GM related, says study”,*The Guardian*

<http://www.guardian.co.uk/environment/2008/nov/05/gmcrops-india>

<sup>83</sup> National Commission for Enterprises in the Unorganised Sector,*op.cit.*,

<sup>84</sup> Tata Institute of Social Sciences,(15 March 2005),*Causes of Farmer Suicides*

*in Maharashtra: an enquiry*

<http://tiss.edu/Causes%20of%20Farmer%20Suicides%20in%20Maharashtra.pdf>

<sup>85</sup> National Commission For Enterprises In The Unorganised Sector,(December 2008),*op.cit.*,

[http://nceus.gov.in/Special\\_Programme\\_for\\_Marginal\\_and\\_Small\\_Farmers.pdf](http://nceus.gov.in/Special_Programme_for_Marginal_and_Small_Farmers.pdf)

<sup>86</sup> *Ibid.*,

<sup>87</sup> *Ibid.*,

The Asian Centre for Human Rights adds that:“ Farmers, who are already in a debt trap, courtesy private money lending, are hankering for loans from Banks and other government institutions. In this situation the Banks, especially private one, are resorting violent methods to recover dues from the farmers which has driven the farmers to suicides. Globalization policies have forced the farmers to approach private Banks for finance, as Nationalised banks and Co

“...consistently been harassed for immediate repayment of loans even after a crop failure...In some cases they had to sell their land and other assets to repay some of the amount owed. This factor is seen to contribute significantly to the feeling of loss of economic standing among farmers, along with the fact that they were continually relying on credit to get out of debt...A loss of crops, whether cotton, high-yielding varieties of chilies, or oilseeds, pushed the farmers over the brink to committing suicide.”<sup>88</sup>

### Agriculture

The economic boom in India since the early 2000s has not benefited the agricultural sector; farming additionally has become increasingly unprofitable.<sup>89</sup> Moreover while over two-thirds of India's 1.15 billion population are employed in agriculture – the agrarian sector has a negligible contribution to GDP growth.<sup>90</sup> India since the 1960s has undergone “...a green revolution in favor of high-yield farming to counter acute food shortages. Plant breeding, irrigation development and the use of synthetic fertilizers ramped up production...The changes caused higher operating costs and production that created a market glut exceeding demand at home and abroad. To remain in business, many farmers were forced to take out loans at

operative banks are shirking from their responsibilities in implementing welfare schemes.”

Asian Centre for Human Rights,(2008),*India Human Rights Report 2008*

<http://www.achrweb.org/reports/india/AR08/AR2008.pdf>

<sup>88</sup> International Food Policy Research Institute,(October 2008),*op.cit.*,

The Economist adds the following example from Vidarbha where “farmers borrowed money at punitive rates, so they could sink wells and buy costly “biotech” cotton-seeds. But diesel for the pumps leapt in price, and the seeds proved ill-suited to small plots, fed mostly by rain.

The Economist, 20 – 26 January 2007, Cotton suicides, The Great Unravelling

Library copy

The debate on Biotech cotton-seeds or GM cotton mentioned above is covered more comprehensively at

International Food Policy Research Institute,(October 2008),*Bt Cotton and Farmer Suicides in India, Reviewing the Evidence*

<http://www.ifpri.org/pubs/dp/IFPRIDP00808.pdf> ;

James Randerson,(5 November 2008),“Indian farmer suicides not GM related, says study”,*The Guardian*

<http://www.guardian.co.uk/environment/2008/nov/05/gmcrops-india>

; Andrew Malone,(7 November 2008),“The GM Genocide”,*The Daily Mail*

<http://www.dailymail.co.uk/news/worldnews/article-1082559/The-GM-genocide-Thousands-Indian-farmers-committing-suicide-using-genetically-modified-crops.html> ;

Arindam Banik and Pradip K Bhaumik,(20 June 2006),“Farmer suicides: Beyond the obvious”,*The Hindu*

<http://www.hinduonnet.com/thehindu/thscrip/print.pl?file=2006062002021100.htm&date=2006/06/20/&pr=bl&> ;

<sup>89</sup> Anuj Chopra,*op.cit.*,

<sup>90</sup> *Ibid*

<http://www.thenational.ae/article/20090120/FOREIGN/850376237/1103>

high interest rates. Once credit had been exhausted, they turned to private lenders, who charged even more exorbitant interest rates. And that's when the suicides started, most activists say”.<sup>91</sup> The subsequent farmer suicides have been called a ‘humanitarian crisis’ and in 2008 official figures from the Indian Ministry of Agriculture confirm over 1,000 farmers monthly dying by suicide.<sup>92</sup> The suicides of farmers in India “...point to a greater crisis in the agrarian system as a whole where the suicide is a symptom of a greater malaise that threatens millions of farmers and the landless agricultural labourers in the sub-continent”.<sup>93</sup> Problems in agriculture include: rising costs, decreases in crop yield, decreases in state support for small and medium farmers. There are also limited “...opportunities in non-farm employment...[And it]...seems that in areas where suicides have occurred, non-farm options are getting limited.”<sup>94</sup> The declension in India's agricultural growth and the rise of global prices threatens the countries “...ability to feed itself...”<sup>95</sup>

Rural poverty in India is caused principally by a “...lack of access for both individuals and communities to productive assets and financial resources. [Additionally high]...levels of illiteracy, inadequate health care and extremely limited access to social services are common among poor rural people”.<sup>96</sup> Suicidal farmers in India have to content in a country “...with infectious diseases, malnutrition, infant and maternal mortality and other major health problems and hence, suicide is accorded low priority in the competition for meager resources. The mental health services are inadequate for the needs of the country. For a population of over a billion, there are only about

<sup>91</sup> Jason Motlagh,*op.cit.*,

<sup>92</sup> Andrew Malone,*op.cit.*,

An article in *The Hindu* comments on the difficulties in assembling statistics for farmer suicides.

“The data on suicides are complex, and sometimes misleading. And not just because of the flawed manner in which they are put together, or because of who puts them together. There are other problems, too. Farmers’ suicides as a percentage of total farmers is hard to calculate on a yearly basis. A clear national ‘farm suicide rate’ can be derived only for 2001. That is because we have the Census to tell us how many farmers there were in the country that year. For other years, that figure would be a conjecture, however plausible”.

P.Sainath,(12 November 2007),“Farm suicides rising, most intense in 4 States”,*The Hindu*

<http://www.hinduonnet.com/2007/11/12/stories/2007111253911100.htm>

<sup>93</sup> Tata Institute of Social Sciences,*op.cit.*,

<sup>94</sup> *Ibid.*,

<sup>95</sup> Rhys Blakely,(29 February 2008),“India's farmers struggling to keep food on the table”,*The Times*

<http://business.timesonline.co.uk/tol/business/economics/article3456226.ece>

<sup>96</sup> International Fund for Agricultural Development,(Undated),*Rural Poverty in*

*India*

<http://operations.ifad.org/web/guest/country/home/tags/india>

3,500 psychiatrists. Rapid urbanization, industrialization and emerging family systems are resulting in social upheaval and distress. The diminishing traditional support systems leave people vulnerable to suicidal behaviour".<sup>97</sup>

### Government help

A report in 2007 by the Comptroller and Auditor General of India notes the institutional failure of the state government in Maharashtra to follow up on a survey of farmers' in distress which meant there was no abatement to the farmers' suicides in that area.<sup>98</sup> A BBC article in 2006 notes the ongoing suicides among farmers in Maharashtra, illustrating an example of the limitations of this federal aid.<sup>99</sup> In 2008 the Asian Centre for Human Rights notes a criticism of state government's response to farmers in distress in Vidarbha which is an area of Maharashtra particularly hit by farmers dying by suicide.<sup>100</sup> Also reporting on the situation in Vidarbha the Hindustian Times in 2009 notes the closure of state centres which would have assisted stricken farmers in selling cotton.<sup>101</sup>

### Suicide states

Between 1997 and 2005 there were 150,000 farmer suicides in India of which most occurred in four states: "...Maharashtra, Andhra Pradesh, Karnataka, and Madhya Pradesh (including Chhattisgarh).<sup>102</sup> Over 20

<sup>97</sup> Lakshmi Vijaykumar, *op.cit.*,

<sup>98</sup> Comptroller and Auditor General of India, (2007), *Chapter 2, Conceptualisation of packages, Audit Report (Civil Performance), Maharashtra For the Year 2006-2007*  
[http://www.cag.gov.in/html/cag\\_reports/maharashtra/rep\\_2007/fp\\_civil\\_chap\\_2.pdf](http://www.cag.gov.in/html/cag_reports/maharashtra/rep_2007/fp_civil_chap_2.pdf)

The BBC commenting on the report says: "The report... says there have been "serious efficiency lapses in implementation of the relief schemes". "Considering the deficiencies noticed in the various components of the packages, underutilisation of available funds, important areas of agrarian distress not being covered under the packages, and coverage of only a fraction of distressed farmers, reduction in farmers' distress in Vidarbha region does not inspire confidence," the report says".

BBC, (5 May 2008), *No let up in India farm suicides*

[http://news.bbc.co.uk/2/hi/south\\_asia/7383662.stm](http://news.bbc.co.uk/2/hi/south_asia/7383662.stm)

<sup>99</sup> BBC, (14 July 2006), *Indian farmer suicide toll rises*

[http://news.bbc.co.uk/2/hi/south\\_asia/5179540.stm](http://news.bbc.co.uk/2/hi/south_asia/5179540.stm)

<sup>100</sup> Asian Centre for Human Rights, *op.cit.*,

This report also criticizes the response of state aid in Gujarat, Rajasthan and Orissa.

It says "Rajasthan, Gujarat and Orissa are mainly drought-affected States but why none of their districts is included in the list of 30 districts. In Punjab and other States also a number of farmers have committed suicide. The Committee wonder whether the Government is waiting for farmers of these States to commit suicide in large numbers before announcing any package for them".

<sup>101</sup> Pradip Kumar Maitra, (8 January 2009), "12 more farmer suicides in Vidarbha", *Hindustian Times*

<http://www.hindustiantimes.com/StoryPage/StoryPage.aspx?id=31721f0a-20aa-4add-8179-c34c2262ce3f>

<sup>102</sup> Asian Centre for Human Rights, (December 2008), *India Human Rights Report 2008, Maharashtra*  
[http://www.achrweb.org/reports/india/AR08/maharashtra.html#\\_To\\_c216246114](http://www.achrweb.org/reports/india/AR08/maharashtra.html#_To_c216246114)

thousand farmers took their lives in Karnataka state between 1997 and 2005.<sup>103</sup> Andhra Pradesh state recorded 14,882 deaths by suicide among its farmers in 2007.<sup>104</sup>

Maharashtra state had the most farmer suicides in 2007, with 4,238 deaths.<sup>105</sup> This is a continuum of recent years where thousands of indebted farmers have died by suicide.<sup>106</sup> Daily 46 farmers took their lives in Maharashtra state "...even as packages were rolled out in a bid to bailout the debt-ridden community from crisis".<sup>107</sup> An example is Manohar Kelkar, an indebted cotton farmer, who ended his life by hanging, "...driven to...suicide by despair and hopelessness".<sup>108</sup> In 2005, the state government of Maharashtra "...announced a relief package for "farmers in distress" after the number of suicides went up from 146 in 2003-2004 to 455 the next year".<sup>109</sup> Yet by September 2006, over 200 farmers had died by suicide since the visit that July to Maharashtra state of the Indian Prime Minister. "August [2006] alone saw 110 despairing farmers in India's cotton belt take their lives - the highest monthly figure since the debt crisis began nine years ago. Activists put the rising deaths down to official apathy and farmers' despair".<sup>110</sup> Official records in 2006 declared more than 1.3 million farmers in Maharashtra state distressed with "...434,000...declared under "maximum distress".<sup>111</sup> This information however was not effectively utilized in alleviating farmers' distress as inefficient implementation of the project and poor co-operation between the respective government agencies and bodies led to its failure.<sup>112</sup> The suicide of farmers continued in

<sup>103</sup> Asian Centre for Human Rights, (December 2008), *India Human Rights Report 2008*

<http://www.achrweb.org/reports/india/AR08/AR2008.pdf>

<sup>104</sup> Vishwa Mohan, *op.cit.*,

<sup>105</sup> Hindustian Times, *op.cit.*,

Earlier in 2004 Maharashtra recorded four times the average rate of suicide

Muzaffar Assadi, (2006), *Farmers' Suicide in India: Agrarian Crisis, Path of*

*Development and Politics in Karnataka*

[http://viacampesina.net/downloads/PDF/Farmers\\_suicide\\_in\\_india\(3\).pdf](http://viacampesina.net/downloads/PDF/Farmers_suicide_in_india(3).pdf)

<sup>106</sup> BBC, (5 May 2008), *No let up in India farm suicides*

[http://news.bbc.co.uk/2/hi/south\\_asia/7383662.stm](http://news.bbc.co.uk/2/hi/south_asia/7383662.stm)

<sup>107</sup> Hindustian Times, *op.cit.*,

<sup>108</sup> BBC, (28 August 2006), *Sorry plight of India farm widows*

<http://news.bbc.co.uk/2/hi/business/5263462.stm>

<sup>109</sup> BBC, (5 May 2008), *No let up in India farm suicides*

[http://news.bbc.co.uk/2/hi/south\\_asia/7383662.stm](http://news.bbc.co.uk/2/hi/south_asia/7383662.stm)

<sup>110</sup> BBC, (4 September 2006), *India farm suicides hit new high*

<http://news.bbc.co.uk/2/hi/business/5312600.stm>

<sup>111</sup> BBC, (5 May 2008), *No let up in India farm suicides*

[http://news.bbc.co.uk/2/hi/south\\_asia/7383662.stm](http://news.bbc.co.uk/2/hi/south_asia/7383662.stm)

<sup>112</sup> BBC, *Ibid.*,

See also Comptroller and Auditor General of

India, (2007), *Overview, Audit Report (Civil Performance), Maharashtra For the Year 2006-2007*

[http://www.cag.gov.in/html/cag\\_reports/maharashtra/rep\\_2007/fp\\_civil\\_overview.pdf](http://www.cag.gov.in/html/cag_reports/maharashtra/rep_2007/fp_civil_overview.pdf)

Maharashtra state with six districts most affected.<sup>113</sup> Among the farmer suicides in Maharashtra, the Vidarbha area was the most prevalent.<sup>114</sup>

### Vidarbha

Vidarbha has been called the “ ‘...epicentre of farm suicides’ ”.<sup>115</sup> It is a cotton growing region within Maharashtra state and cotton farmers’ annual costs in Vidarbha have continued to rise while the concurrent price of cotton has fallen.<sup>116</sup> Cotton is the main cash crop in Vidarbha where farmers utilize moneylenders to meet their credit needs while paying exorbitant interest rates and getting increasingly into debt. “Many farmers have been driven to suicide”.<sup>117</sup> Over 600 farmers died by suicide between June 2005 and July 2006 in Vidarbha.<sup>118</sup> In July 2006 the government launched a rehabilitation package to assist distressed farmers including those in Vidarbha.<sup>119</sup> Between June and July 2006 655 farmers died by suicide.<sup>120</sup> Six more farmers crippled by debt took their lives on 29 September 2006.<sup>121</sup> Also in September 2006 it is reported that more than 90% of farmers in Vidarbha are heavily in debt.<sup>122</sup> In January 2007 1,200 farmer deaths by suicide were recorded since June 2005 due to the burden of debt.<sup>123</sup> The farmer suicides continued on in 2007 with 1414 noted.<sup>124</sup> In part of Vidarbha the Asian Centre for Human Rights noted over 75% of farmers living under acute distress in 2007.<sup>125</sup> Despite government aid 24

<sup>113</sup> Comptroller and Auditor General of India,(2007),Overview, Audit Report (Civil Performance),Maharashtra For the Year 2006-2007

[http://www.cag.gov.in/html/cag\\_reports/maharashtra/rep\\_2007/fp\\_civil\\_overview.pdf](http://www.cag.gov.in/html/cag_reports/maharashtra/rep_2007/fp_civil_overview.pdf)

<sup>114</sup> Vishwa Mohan,*op.cit.*,

<sup>115</sup> Anuj Chopra,*op.cit.*,

<sup>116</sup> *Ibid.*,

<http://www.thenational.ae/article/20090120/FOREIGN/850376237/1103>

<sup>117</sup> Empower Poor,(August 2005),*Maharashtra: Poverty amidst plenty*

<http://www.empowerpoor.com/backgrounder.asp?report=159>

<sup>118</sup> BBC,*op.cit.*,

[http://news.bbc.co.uk/2/hi/south\\_asia/5179540.stm](http://news.bbc.co.uk/2/hi/south_asia/5179540.stm)

<sup>119</sup> Comptroller and Auditor General of India,(2007),*Chapter 1.Introduction,Audit Report (Civil Performance),Maharashtra For the Year 2006-2007*

[http://www.cag.gov.in/html/cag\\_reports/maharashtra/rep\\_2007/fp\\_civil\\_chap\\_1.pdf](http://www.cag.gov.in/html/cag_reports/maharashtra/rep_2007/fp_civil_chap_1.pdf)

120 Paranjay Guha Thakurta,(27 July 2006),“Trade-India: Rare Unity Against West’s Farm Subsidies”.*Inter Press Service*

<http://www.ipsnews.net/news.asp?idnews=34116>

121 *The Times of India*,(30 September 2006),“All in a day: Six farmers commit suicide”

<http://timesofindia.indiatimes.com/articleshow/msid-2047898,prtpage-1.cms>

122 BBC,(4 September 2006),*India farm suicides hit new high*  
<http://news.bbc.co.uk/2/hi/business/5312600.stm>

123 *The Economist*, 20 – 26 January 2007, *Cotton suicides, The Great Unravelling*

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124 *Comptroller and Auditor General of India,op.cit*

125 *Asian Centre for Human Rights,(2007),India Human Rights Report 2007, Maharashtra*

farmers took their lives between the end of February 2008 and the middle of March 2008 in Vidarbha.<sup>126</sup> In the first week of April 2008 9 farmers over-burdened with debt died by suicide.<sup>127</sup> On 26 of October 2008 three more Vidarbha farmers took their lives leaving a total of 635 for the year.<sup>128</sup> 16 died by suicide in mid-December of 2008.<sup>129</sup> In the first week of January 2009 12 more Vidarbha farmers had taken their lives.<sup>130</sup> By the end of January 2009 64 Vidarbha farmers died by suicide with 38 dead by suicide towards the middle of February 2009.<sup>131</sup>

### World trade

Loans from the IMF assisted India’s economic development through to the 1990s.<sup>132</sup> This occurred due to India allowing multinational corporations access to its agricultural market, while at the same time the government increasingly withdrew from agricultural production. Local agricultural commerce became therefore interlinked with global markets and their inherent instability.<sup>133</sup> The example of the cotton market is illustrative where its high price “...on the international market caused many farmers in Punjab and elsewhere to switch to this crop. ‘What these farmers did not realise is that international prices for agricultural commodities are highly volatile and they tend to fluctuate...’ ”.<sup>134</sup> India competes with the United States in the cotton market but without that countries’ state assistance.<sup>135</sup> Developing countries like India “...are required to eliminate all agricultural subsidies and open their markets to imports under the World Trade Organisation regime...”.<sup>136</sup> And influenced by

[http://www.achrweb.org/reports/india/AR07/maharashtra.htm#\\_Toc167006972](http://www.achrweb.org/reports/india/AR07/maharashtra.htm#_Toc167006972)

126 *Empower Poor,(14 March 2008),Farmer suicides continue despite loan waiver*

<http://www.empowerpoor.com/relatednews.asp?report=730>

127 BBC,(7 April 2008),*More India farmers commit suicide*

[http://news.bbc.co.uk/2/hi/south\\_asia/7333911.stm](http://news.bbc.co.uk/2/hi/south_asia/7333911.stm)

<sup>128</sup> *United News of India*, 30 October 2008, “4,850 Farmers Commit Suicide In Last 4 Years In Vidarbha”

<sup>129</sup> Pradip Kumar Maitra,(25 December 2008),“16 more farmers commit suicide in Vidharba”, *Hindustian Times*

<http://www.hindustantimes.com/StoryPage/StoryPage.aspx?id=4b703775-26fb-49f4-b9e3-ce2c5c9a93a0>

<sup>130</sup> Pradip Kumar Maitra,(8 January 2009),“12 more farmer suicides in Vidarbha”, *Hindustian Times*

<http://www.hindustantimes.com/StoryPage/StoryPage.aspx?id=31721f0a-20aa-4add-8179-c34c2262ce3f>

<sup>131</sup> Pradip Kumar Maitra,(19 February 2009),“Eight more farmers commit suicide in Vidarbha”,*Hindustan Times*

<http://www.hindustantimes.com/StoryPage/StoryPage.aspx?id=96725e6a-6b53-44f7-8a72-5609e91468f6>

<sup>132</sup> Andrew Malone,*op.cit.*,

<sup>133</sup> *Tata Institute of Social Sciences,op.cit.*,

<sup>134</sup> *The Times of India*,(8 March 2009),“Price of suicide: Rs 2 lakh”

<http://www1.timesofindia.indiatimes.com/Sunday-TOI/Price-of-suicide-Rs-2-lakh/articleshow/4240120.cms>

<sup>135</sup> Jason Motlagh,*op.cit.*,

<sup>136</sup> Arindam Banik and Pradip K Bhaumik,(20 June 2006),“Farmer suicides: Beyond the obvious”,*The Hindu*

the IMF and World Bank, the government decreased expenditure on rural development.<sup>137</sup> Since the 1990s farmer suicides have risen in India with commentators suggesting it is one of the consequences of globalisation and outside the control of India's farmers.<sup>138</sup> The UN Economic and Social Council in 2008 notes their concern "...that the extreme poverty among small-hold farmers caused by the lack of land, access to credit and adequate rural infrastructures, has been exacerbated by the introduction of genetically modified seeds by multinational corporations and the ensuing escalation of prices of seeds, fertilisers and pesticides, particularly in the cotton industry".<sup>139</sup>

### Conclusion

The Economist reports that just "...one in 12 of India's farmers has ever heard of the World Trade Organisation (WTO)".<sup>140</sup> It is unknown whether Shankara Mandauker knew of the WTO and world trade machinations. The fact is that Shankara Mandauker chose suicide rather than carry on with the burden of debt.<sup>141</sup> His widow is left in a precarious position: still saddled with the debt she will lose the family's land unless she is able to pay it off. She and her children face a future either begging or working as slave labour for a pittance.<sup>142</sup> Seetabai Athre also would shortly become a widow after rushing to the sound of her husband's cry, finding him "...smoldering on the ground next to an empty can of kerosene. He had lit himself on fire and died three days later in a local hospital."<sup>143</sup> Another farmer suicide. Another, Anil Kondba Shende took his life by swallowing a bottle of pesticide, falling dead "...at the threshold of his small mud house".<sup>144</sup> Like Shankara Mandauker he left behind a wife and two sons.<sup>145</sup> And for every farmer who has taken their life, "...countless others face morale-sapping despair".<sup>146</sup>

<http://www.hinduonnet.com/thehindu/thscrip/print.pl?file=2006062002021100.htm&date=2006/06/20/&prd=bl&>

<sup>137</sup> Empower Poor, (Undated), *Poor information and credit channels lead to agricultural crisis in Vidarbha*

<http://www.empowerpoor.com/statestoriesdetail.asp?report=256&state=Maharashtra#>

<sup>138</sup> The Times of India, *op.cit.*,

<sup>139</sup> The UN Economic and Social Council, (May 2008), *op.cit.*,

<sup>140</sup> The Economist, *op.cit.*,

<sup>141</sup> Andrew Malone, *op.cit.*,

<sup>142</sup> *Ibid.*,

<sup>143</sup> Jason Motlagh, *op.cit.*,

<sup>144</sup> Somini Sengupta, (19 September 2006), "On India's Farms, a Plague of Suicide", *The New York Times*

[http://www.nytimes.com/2006/09/19/world/asia/19india.html?\\_r=1&partner=rssnyt&emc=rss&pagewanted=print](http://www.nytimes.com/2006/09/19/world/asia/19india.html?_r=1&partner=rssnyt&emc=rss&pagewanted=print)

<sup>145</sup> *ibid*

<sup>146</sup> P Sainath, (June 2004), *When farmers die*, India Together  
<http://www.indiatogether.org/2004/jun/psa-farmdie.htm>



## THE PROTECTION OF VULNERABLE MIGRANTS IN EUROPEAN LAW

Nuala Mole will be giving a lecture on 'The Protection of Vulnerable Migrants in European Law'. This will be hosted by the Refugee and Immigration Practitioners Network in Dublin.

The lecture takes place on Friday, 12th June, 2009 from 2.00pm – 5.30pm.

The venue for this event will be the President's Hall of the Law Society of Ireland, Blackhall Place, Dublin.

Registration Fee is €75 (€30 concession for unwaged)



### Sanctuary Newsletter

Sanctuary Newsletter is an invaluable resource for those working in the refugee and asylum area in Ireland. It describes itself as "a bi-monthly newsletter on asylum, refugee and migrant matters from a religious perspective". It is published by the Refugee & Migrant Project of the Irish Bishops' Conference.

Sanctuary generally runs to just two pages but these are packed with useful information. The Newsletter follows the same format for each issue but the content always holds surprises.

The 'Overview' section contains current statistics on Irish asylum applications, top countries of origin, family reunification, leave to remain, deportations, separated children and reception centres. These statistics are not readily available elsewhere.

The 'International, EU and National Issues' section gives updates on changes in legislation, significant caselaw and EU documents and developments.

The 'Resources' section contains information on new Irish reports, publications, seminars and conferences.

At the end of the Newsletter there is always a short excerpt from a current book which encapsulates a certain perspective on asylum or immigration that is worth thinking about.

Sanctuary Newsletter can be accessed at <http://www.catholicbishops.ie/publications/38-refugees/982-recent-issues-of-sanctuary->

