ISSUE 3

The Researcher

The Refugee Documentation Centre Newsletter

September 2006

Welcome to our third issue of *The Researcher*.

Summer 2006 has been a time of change for us here in Montague Court with the arrival of the Legal Aid Board Library from Cahirciveen and the appointment of Isabel Duggan as our new librarian. We wish Isabel every success in her new position. Isabel writes in this issue about the two libraries which Montague Court now houses.

RDC hosted a two week study visit in May/June for the Refugee Affairs Department (RAD), Latvia. Dace Zvarte, Deputy Head and Ligita Geidane, Senior Researcher in the RAD have written an account of their experiences in Dublin for this issue. Dace and Ligita visited a number of agencies and NGOs including the Irish Refugee Council. We are delighted that Louise Moor from the Irish Refugee Council has written an article for this issue regarding the Dublin II Regulation.

RDC also hosted a legal intern from Tulsa University, Gursunny Singh Koonjul (or Sunny as he preferred to be called) for four weeks work and study experience. We include Sunny's summary of one of the Published Decisions of the Refugee Appeals Tribunal.

The first issue of *The Researcher* in March of this year featured a summary of the High Court case, Atanasov and others v Refugee Appeals Tribunal. This judgment was appealed by the Refugee Appeals Tribunal to the Supreme Court and the resulting Supreme Court judgment is the occasion of an article by John Stanley BL in this issue: *The Refugee Appeals Tribunal and the Publication of Previous Decisions*.

As usual, we have a graph of RDC statistics showing the top five countries for RDC research.

Part 2 of our *Know Your Sources* series features a highly informative article by Andrea Jakober from ACCORD on the indispensable ecoi.net portal, which has recently been relaunched.

David Goggins continues his series of Country of Origin Information investigations. In this issue he addresses the question, Is Human Sacrifice still Performed at Traditional Religious Shrines in Nigeria?

Finally, Paul Daly has written an article on The Internal Flight Alternative, UNHCR and Somalia.

Articles and summaries contained herein do not necessarily reflect the views of the Management of the RDC and the Legal Aid Board.

The Refugee Appeals Tribunal and the Publication of Previous Decisions

John Stanley B.L.

Introduction

On 7th July 2006 the Supreme Court handed down judgment in the case of A, O and F v The Refugee Appeals Tribunal, a decision of great significance for Irish refugee law. The judgment recognises the right of appellants before the Refugee Appeals Tribunal to access the Tribunal's previous decisions. This article summarises the Court's decision and discusses some of the arising issues.

Three applicants for asylum who received negative decisions from the Refugee Applications Commissioner, and who had appealed these decisions to the Refugee Appeals Tribunal, made requests to the Tribunal for copies of previous decisions they claimed were relevant to their appeals. The first Applicant sought decisions on sexual orientation as a particular social group, and on the standard and burden of proof. The second Applicant requested two decisions that counsel for the appellant had specific knowledge of, one of

which concluded with a finding that widows may constitute a particular social group, while the other included a finding that a fear of female circumcision could give rise to a well-founded fear of persecution. The third Applicant had requested decisions regarding whether the forced marriage of young girls could constitute persecution. In requesting the previous decisions, all three Applicants cited section 19(4A) of the Refugee Act, 1996, as amended by the Immigration Act, 2003, which states as follows:

> (a) The chairperson of the Tribunal may, at his or her discretion, decide not to publish (other than to the persons referred to in section 16(17))[1] a decision of the Tribunal which in his or her opinion is not of legal importance.
>
> (b) Any decision published shall exclude any matters which would tend to identify a person as an applicant under the Act or otherwise breach the requirement that the identity of applicants be kept confidential.

The Refugee Appeals Tribunal refused to give the appellants access to any previous decisions on the basis that there was no mandatory requirement under section 19(4A), or otherwise, and particularly for reasons of confidentiality.

The Decision of the High Court

The High Court[2] found that although the statutory provision, by its express terms, authorised the chairman of the Tribunal not to publish decisions that are not of legal importance, there was by reason of that very wording an implied positive statutory obligation to publish decisions that are of legal importance. MacMenamin J. also found that the provisions of the amended Act could apply only prospectively, and thus while the second and third-named Applicants' appeals post-dated that amendment, as the first-named Applicant's appeal pre-dated the 2003 Act's amendment, the implied statutory obligation to publish did not apply to that Applicant. MacMenamin J., however, proceeded to find that the Tribunal's refusal to furnish the first named Applicant with previous relevant decisions was a breach of his rights under article 40(3) of the Constitution, and that the rights of the second and third-named Applicants were also breached in this regard.

The Appeal to the Supreme Court

On appeal, the Tribunal argued that there was no legal basis for the entitlement claimed by the appellants to access previous decisions, and that the Tribunal's decision not to allow access was made to protect the position of asylum seekers who expected the process to be confidential. It was also averred that the Tribunal did not intend to publish decisions made prior to the coming into force of section 19(4A), that the Tribunal was making enquiries in other jurisdictions regarding publication, and that the Chairman had set up a committee to decide which decisions should and should not be published in light of international best practice.

The Supreme Court's decision was given by Mr Justice Geoghegan, with, Denham J., Hardiman J., McGuinness J. and Murray CJ all concurring. The Court rejected the Tribunal's argument that access was not permitted to maintain confidentiality, and found that the Tribunal's "secret system" was manifestly unfair. It further found that this unfairness was compounded by the fact that the Tribunal forwarded copies of all decisions to the Commissioner, which raised an equality of arms issue as the presenting officers from the Commissioner's office, whom the Court recognised as advocates against the Applicants, had full access to previous decisions. In connection with the Tribunal's position that it was looking into the systems in place in other jurisdictions vis-à-vis the publication of decisions, the Supreme Court found that the systems in operation elsewhere were of very little relevance in considering the Constitutional requirements of fair procedures in this jurisdiction.

The Supreme Court noted that certain cases were relied on by the State, specifically Pop v Refugee Appeals Tribunal[3], and Raiu v Refugee Appeals Tribunal[4], wherein Smyth J held that applicants before the Tribunal were not entitled to access previous decisions, but agreed with MacMenamin J. that neither of these cases could be regarded as worthwhile on the issues. The reasons the Court gave for this were that only statutory arguments were made in them, both predated the 2003 Act, and they were viewed without the consideration of a number of persuasive authorities. The Court preferred the review of the relevant case law provided by MacMenamin J, and adopted his analysis in this regard.[5]

As noted above, the High Court had found that the Tribunal's obligation to publish was based on both the Constitution and on section 19(4A) of the Refugee Act, 1996. That court's rationale in the latter regard was that reading subsections (a) and (b) of section 19(4A) together, it was clear that there must be vested in the Chairman of the

Tribunal a positive discretion to publish decisions which are of legal importance, as otherwise the section would have no meaning. The Supreme Court rejected this interpretation, and instead found that the purpose of section 19(4A) was regarding the protection of the identity of applicants and confidentiality, and that it did not impose any mandatory duty on the Tribunal to publish decisions of legal importance. The Supreme Court found that the jurisprudential basis for the obligation to provide reasonable access was not based on any statutory provision, but on the general Constitutional requirement of fair procedures, and that the High Court judgment was in fact firmly based on the Constitutional entitlement to natural justice and fair procedures and not on the statute.

The Supreme Court acknowledged that the Tribunal had a statutory discretion, pursuant to section 19(4A), not to publish decisions that are not of legal importance, and proceeded to consider the meaning of the criterion "legal importance".[6] The Court held that "legal importance" should not be given too narrow a definition, and that the term did not have to be understood in terms of a narrow point of law in the technical sense. The Court considered it to be of the nature of refugee cases that the problem for an appellant is typically of a kind generic to his country of origin, and cited with approval the dicta of Lord Woolf in Manzeka v Secretary of State for the Home Department[7] that it would be beneficial to the general administration of asylum appeals for decision makers to have the benefit of views of a tribunal in other cases of a general situation in a particular part of the world, as long as that situation has not changed in the meantime, and that it is important to be consistent vis-à-vis objective considerations.

The Supreme Court's appreciation of the nature of country and region-specific matters common to refugee law is extremely helpful. Country of origin research has long been a useful means of enabling decision makers in refugee status determinations to maintain consistency in this regard. Without consistent legal interpretation, however, the usefulness of country of origin information as evidence is greatly reduced.

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The Court's judgment clearly emphasises the importance of consistency in the interpretation of country of origin information. The refocusing of this crucial matter in asylum appeals should lead to greater consistency in decision making, as well as useful dicta on the quality and reliability of specific sources of country of origin information.

Issues Arising

The right of appellants to access previous decisions has been confirmed, but further questions now arise. How will access be provided? Who will be able to access these decisions? Do claimants before the Refugee Applications Commissioner have a similar right to previous decisions of that body? What will be the consequences of the reported abolishing of the Tribunal? And what are matters of legal importance in refugee status determination, and how does this matter relate to the right to access decisions?

System of Access

The Supreme Court decided that it was not its role to order the Tribunal to provide an open library containing redacted previous decisions, as the Court was concerned only with the personal rights of the specific applicants appearing before it. Accordingly, the Court found that provided that the Tribunal granted reasonable access to previous decisions reasonably required for legal relevance within the meaning outlined by the Court, then the Tribunal will have satisfied its obligation. The Tribunal must now put such a system in place. Precisely what this system will be will become clear in due course. If appellants feel disadvantaged by the access provided by the new system, or by any unnecessary constraints placed upon access, further judicial review proceedings may arise.

Appellants without an oral hearing

The Court clarified that its judgment related only to the rights of people who, in advance of a hearing by the Tribunal, have requested access to relevant precedents and have been refused. The Court emphasised that the decision did not apply to applicants for leave to remain. The Court limited the applicability of the decision to appellants who have requested access in advance of a hearing. It should be noted that applicants before the Tribunal broadly fall into two categories: those who have the option of an oral hearing, and those do not. The right of access to decisions of the latter type of appellant is unclear. It might be assumed that such appellants have the same right to decisions as those

with a hearing but, as noted above, the Court found that the unfairness of the Tribunal's secret system was compounded by the adversarial aspect of the hearing and the concomitant inequality of arms. As there is typically no adversarial aspect when an appeal is determined without an oral hearing, the position of appellants without an oral hearing is not identical to that of the applicants in the instant case. Nonetheless, it would seem that the secret system adopted by the Tribunal was at the core of the Tribunal's breach of fair procedures, and this procedural difficulty affects all appellants before the Tribunal.

Applicants for complementary protection

It has been reported in the Irish media that the proposed Scheme for an Immigration, Residence and Protection Bill will abolish the Refugee Appeals Tribunal, and replace it with a body to be known as the Protection Review Tribunal.[8] Head 54 of the new Bill provides that this body will consider matters of both asylum and complementary protection on appeal. While the Supreme Court expressly distinguished between applicants for asylum and applicants for leave to remain, who do not have a right to access previous decisions, it is hard to see how this distinction will stand once both asylum and complementary protection are dealt with on a statutory footing by a quasi-judicial body.

Published decisions

Simultaneously with the appeal in this matter, the Tribunal was arranging to publish a selection of its decisions. Shortly after the Supreme Court hearing, the Tribunal published twenty-two decisions with appellants' names and personal details removed. These decisions are available from the Refugee Appeals Tribunal and from the Refugee Documentation Centre. The Department of Justice, Equality and Law Reform has said that the Tribunal will publish further decisions on an ongoing basis in the future.[9] These decisions have a hermetic quality unlike decisions in other areas of Irish law in that they are published without clear citations. Accordingly, it is not possible, for example, to determine whether a decision was or is the subject of judicial review. This may undermine their persuasiveness.

Access under the proposed new scheme

It is worth laying out here the basic provisions of the scheme for access provided for in the proposed Immigration, Residency and Protection Bill. Head 60A, Subsection 1 allows an appellant to request the chairperson of the Tribunal to make available to him or her decisions of the Tribunal that are of legal importance/legally relevant to the appeal. Such a request must contain details to show that the request is reasonable, and to enable the chairperson to determine what decisions are of legal importance. The chairperson must make such decisions available to an appellant in such manner as the chairperson considers reasonable.[10] Section 2 provides that where the chairman considers that a decision is both of legal importance and likely to be of legal relevance to a significant number of appellants, the chairperson may publish such a decision in such manner as he considers reasonable. Section 3 provides that personal details of applicants be excluded from decisions accessed or published. The proposed legislation thus clearly distinguishes between access and publication, a distinction which the Supreme Court judgment elegantly clarified. While the Tribunal chairperson is thus obliged to give appellants access to previous decisions under the proposed scheme, any other publication of any Tribunal decisions is a matter for the chairperson's discretion.

Legal importance

The Court's judgment, in recognising the statutory discretion under section 19(4A), also states that there may be cases that are based on such particular facts that their decisions would be of no legal importance to other applicants' cases. It is submitted that technical legal issues are also of great importance, and decisions predicated on unusual factual situations are often the very decisions that best yield legal clarification.[11] Despite the considerable efforts of the Irish superior courts to clarify aspects of Irish refugee law in the context of judicial review, many of the principles of Irish refugee law still require much elucidation. The Tribunal, as the Supreme Court heard in the case here considered, had refused to publish its decisions. The Commissioner still does not publish its decisions, or any legal guidelines. The relevant jurisprudence of the superior courts is in the context of judicial review, and thus tends to pronounce on matters concerning the principles of refugee law as such only in the context of reviews predicated on errors of law.[12] Moreover, when the High Court on review clarifies a point of refugee law, it tends to do so, out of necessity, with reference to non-Irish jurisprudence.[13] As a result, we have the curious situation whereby Irish refugee law principles are currently clarified

predominantly by the Superior Courts on review of specific determinations by the Commissioner or Tribunal on the basis of jurisprudence arising from refugee status determinations from other jurisdictions.

It is submitted that matters of legal importance in refugee status determination decisions are, firstly, the core legal principles of refugee law itself. What is the test for well-founded fear? Does it have both subjective and objective elements, or is there a single objective test? What is persecution?[14] How are particular social groups identified?[15] What are the relevant tests to clarify whether an applicant is unable or unwilling to avail of state protection?[16] What is the appropriate test for the internal flight alternative? Indeed, is there an internal flight alternative? How should the exclusion clauses be applied? We know what the jurisprudence is on these and other matters in the UK, Canada, the US, and other jurisdictions, but we often do not know how these principles are applied in Irish refugee status decisions. Access to refugee status determination precedents will thus enable not only consistency vis-à-vis the interpretation of country of origin information, but also clarify the relevant principles of Irish refugee law.

Decisions of the Refugee Application Commissioner

A remaining issue is whether the Refuge Applications Commissioner is also obliged to furnish previous decisions or guidelines to applicants who request them prior to their interview. Like the Tribunal, the Commissioner's office is arguably a quasi-judicial body whose decisions have profound importance with regard to the rights of those appearing before it. Unlike the Tribunal, there is no ostensible adversarial element to the Commissioner's interview. Nonetheless, the Commissioner's office has access to all of its previous decisions, while an Applicant has access to none. It should also be noted that there is no statutory provision comparable to section 19(4A) giving the Commissioner discretion not to publish decisions.[17] In the circumstances, and as the standard of proof is more stringent on appeal [18], it would seem important for an Applicant before the Commissioner to know the principles she has to satisfy in order to make her case.[19] No doubt this matter will be clarified in due course, whether by the Commissioner's office granting applicants access to its decisions or guidelines, or by means of judicial review.

Conclusion

The Supreme Court decision in A, O and F v The Refugee Appeals Tribunal confirms that applicants for asylum have a Constitutional right to relevant previous decisions of the Tribunal. The judgment elegantly disentangled this Constitutional right of access from the Tribunal's statutory discretion not to publish decisions that are not of legal importance. This marks a turning point in the development of Irish refugee law. From now on, substantive refugee status determination jurisprudence will be available to appellants before the Tribunal, thus facilitating consistency and transparency in the Tribunal's decision making process. The judgment also gives rise to various matters requiring clarification, and these matters will no doubt be attended to as this area of law continues to mature.

1. Ultimately, the Supreme Court did not consider section 16(17) to have any bearing on the issues, seeing it simply as dealing with procedures in relation to appeals.
2. Unreported, 7 July 2005, MacMenamin J
3. Unreported, 2 November 2004, High Court, Peart J.
4. [2003] 2 IR 63
5. In particular, the Supreme Court found the observations of Lord Woolf MR in *Manzeka v The Secretary of State for the Home Department* [1997] Imm AR 524 to be of considerable significance.
6. The Court clarified that "legal importance" is the criterion applicable in determining whether a decision need not be published. The Constitutional requirement that previous decisions be made available to appellants is itself not predicated on the matter of legal importance but on *relevance*.
7. 1997] Imm AR 524
8. *Irish Independent*, Friday 25 August 2006, p. 1; *Irish Times*, Thursday 7 September 2006, p. 1
9. Press Release, Department of Justice, Equality and Law Reform, 30 March 2006
10. The proposed subsection 4 allows for access to previous decisions to be satisfied by the provision of representative samples where the chairperson is of the opinion either that the requirements of fairness would be sufficiently served by making available a representative sample of such decisions in lieu of providing all such decisions, or that a representative sample of such decisions sufficient to meet the requirements of fairness has already been made available under subsection 2 (i.e., published).
11. E.g., in *Matter of Acosta*, Interim Decision of the US Board of Immigration Appeals 2986, March 1, 1985 the respondent argued, *inter alia*, that the persecution he feared at the hands of guerrillas was on account of his membership of the particular

social group comprised of COTAXI drivers and persons engaged in the transportation industry of El Salvador. These very particular facts generated considerable fruitful refugee law jurisprudence via the doctrine of *ejusdem generis*.

12. The dicta of Henchy J. in *The State (Abenglen) v. Dublin Corporation* [1984] IR 381, though arising from the review of a planning decision, are apposite: certiorari proceedings are generally inapt for the resolution of matters of substantive legal and factual complexity, based as they are on affidavit evidence and in that they tend to result in decisions to quash or not to quash. Proceedings of the Tribunal, by contrast, before which all factual and legal issues are aired, yield decisions that invariably clarify points of legal importance. It is unusual in a common law jurisdiction for certiorari proceedings to be the only means whereby the principles of an area of law can be illuminated.

13. E.g., the thorough review of the concept of persecution undertaken by Gilligan J. in *Rostas v Refugee Appeals Tribunal*, Unreported, High Court, 31 July 2003.

14. See the judgment of Gilligan J. in *Rostas*. The requests in the instant case regarding whether FGM and forced marriage amount to persecution are also cases in point in this regard.

15. The requests in the instant case regarding whether (a) people with a certain sexual orientation or (b) widows can constitute particular social groups are cases in point in this context.

16. The leave judgments of Clarke J. in *Idiakheua v. Minister for Justice Equality and Law Reform and Another* (Unreported, High Court, Clarke J., 5 May, 2005) and *Imoh v Refugee Appeals Tribunal*, have illuminated this issue considerably.

17. The new bill has no such provision. Head 60A of the bill only envisages access to, and publication of, *Tribunal* decisions.

18. Section 11A(3) of the Refuge Act, 1996, as inserted by section 7(f) of the Immigration Act 2003 provides that where an applicant appeals against a recommendation of the Commissioner under section 13, it shall be for him or her to show that he or she is a refugee.

19. Under section 13(6)(a) of the Refugee Act, 1996, as amended, if the Commissioner finds that an applicant's claim showed no basis or a minimal basis for the contention that the applicant is a refugee, such an applicant is permitted ten days, rather than the usual fifteen, in which to appeal, and will not be permitted to have an oral hearing. Such stringent consequences for not being able to disclose a minimal basis for a claim would tend to suggest that, as a matter of fairness, an applicant should know the legal principles in light of which her claim will be considered.

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Know your Sources

ecoi.net – Your Gateway to Country of Origin Information www.ecoi.net

by Andrea Jakober, ACCORD

By securing easy and fast access to high-quality and up-to-date country of origin information (COI) for all actors involved, ecoi.net contributes to a fair, effective and efficient refugee status determination procedure.

ecoi.net gathers, structures and processes publicly available and up-to date country of origin information with a focus on the needs of asylum lawyers, refugee counsels and persons deciding on claims for asylum and other forms of international protection.

Since going online in 2001 ecoi.net became the most comprehensive public and free of charge COI portal, featuring more than 50,000 documents and covering more than 100 sources on a regular basis. Approximately 1,800 new documents are added each month. ecoi.net registers an average of 27,000 visitors each month.

For a set of 11 focus countries more detailed country of origin information is provided in Topics & Issues files, offering thematically structured information on different asylum-relevant topics and issues.

The constantly growing number of documents as well as increased demands to improve the presentation and searchability of information featured on ecoi.net were the reasons behind the decision to have an extensive re-launch of the system. Since late June 2006 the new version of ecoi.net is online, with a new design, new technologies and advanced search features.

Search Features

In order to facilitate access to information on ecoi.net several new search features were implemented. The full text of almost all documents is searchable. The search engine supports queries with single terms (eg *Taliban*) as well as phrases (e.g. *"domestic violence"*).

Multiple single terms may be combined together with Boolean operators (AND, OR, NOT) to form a more complex query. Parentheses may be used to group clauses to form sub-queries. This is useful to control the Boolean logic for a query (e.g. to search for documents containing either gay or lesbian and discrimination enter *(gay OR lesbian AND discrimination*).

A new soundex feature was developed, allowing users to find names by the way they sound rather than by the way they are spelled. While only documents containing the search term as spelled will be displayed as search results, alternative spellings are offered on top of the search result page, allowing users to perform a new search query by choosing one of the suggested spellings (e.g. *Karsai*; the search engine will find matching documents containing *Karsai*, but will also offer *Karzai* as alternative spelling).

ecoi.net's search engine supports fuzzy searches. Using the '~' symbol at the end of a single term permits one to find terms similar in spelling to the search term (e.g. *Bakuba*~; the search engine will find matching documents containing *Bakuba*, but also *Baquba* and *Baqubah*). Contrary to the soundex feature, not only documents containing the search term as spelled will be displayed as search results, but all documents containing terms similar to the search term.

ecoi.net's search tool supports single and multiple character wildcard searches, which can be used in the middle and at the end of single terms. Using the '?' symbol allows to perform a single character wildcard search (e.g. *Tal?ban*; the search engine will find matching documents containing *Taliban* as well as *Taleban*). Using the '*' symbol allows to perform a multiple character wildcard search (e.g. *homosex**; the search engine will find matching documents containing *homosexual*, *homosexuals* and *homosexuality* but also the German terms *homosexuell*, *Homosexuelle* and *Homosexualität*).

The advanced search allows one to further limit a search query to specific parameters. Queries may be restricted to documents of a specific source, type of document or language of document. Searches may further be limited to certain publication dates.

Personalisation

Users registering for MY ECOI.NET benefit from currently three additional features allowing them to adapt ecoi.net to their specific needs. Registration is free of charge.

A new alert service replaced the mailing list. Registered users may select one or more countries and add them to their alert list in order to receive weekly updates on the latest developments in the selected countries as well as information on newly added documents on ecoi.net. At any time one or more countries may be deleted from the list or additional countries may be added to the list.

The newly implemented research baskets aim to facilitate keeping track of researches on ecoi.net. If signed in, the research basket symbol is displayed with each document, allowing users to add documents to an already existing or a newly created research basket. Each document assigned to a research basket is featured with information on the source, original title, publication date and link as well as the date the document was accessed. Single documents as well as research baskets as a whole may be deleted.

Especially important and frequently used documents may be assigned to a personal file folder ('My Documents').

Note: Search and personalisation features require that JavaScript is enabled in your browser.

ecoi.net constantly strives to improve its services. Therefore, feedback and suggestions on how to develop the COI portal with regard to content or technical features are very welcome.

ecoi.net stands for European Country of Origin Network and is coordinated by ACCORD, the Austrian Centre of Country of Origin and Asylum Research and Documentation. We want to use this opportunity to warmly thank the Refugee Documentation Centre for the great cooperation in the field of COI and its support of ecoi.net.

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The Dublin II Regulation

A View by Louise Moor, IRC

In February 2003, the European Council adopted the Dublin II Regulation, replacing the earlier Dublin Convention. The impact this legislation has had on the European refugee landscape, is significant. Recently the Regulation has come under scrutiny as the European Commission prepares to review and report on it to the Parliament and the Council. As Dublin II has found its feet, certain challenges both in relation to substance and implementation have emerged. This article will briefly discuss some of these challenges, particularly in relation to Ireland, and seek to propose some ideas for the way forward.

There is no requirement in the 1951 Convention or 1967 Protocol that one must seek asylum in the first country one arrives in, or travel directly to where one wishes to seek asylum. Hathaway states that "[t]he universal scope of post-Protocol refugee law effectively allows most refugees to choose for themselves the country in which they will claim refugee status."[1] This is supported by Art 14(1) of the Universal Declaration of Human Rights and UNHCR ExCom Conclusion 15 (1979).[2] Despite these proclamations, EU States have opted for a "burden sharing" system in the form of Dublin II which serves to limit this choice.

It is now time[3] for the Commission to report on its application and ". . . where appropriate, [ ] propose the necessary amendments." This is expected later this year and accordingly organisations such as European Council on Refugees and Exiles (ECRE) and UNHCR have recently analysed its operation.

Serious concerns both regarding substance and operation have emerged from this research. Notably, the practice of disallowing re-entry to the process, including specific focus on this practice in Ireland,[4] came under sharp criticism. Research also *inter alia* highlighted its negative effects on vulnerable applicants; use of detention and the effect on separated children and families. The system was also found to be "inefficient, resource-intensive and an obstacle to genuine sharing of responsibility between European states."[5]

In Ireland, the most significant concern regarding the operation of Dublin II is the practice of not allowing returnees re-entry into the asylum process, resulting in no Refugee Status Determination in any Member State. Such a practice is clearly placing the State in a position of potential breach of *non refoulement*. Such practice has come under specific criticism in UNHCR and ECRE research. The Irish Refugee Council has requested that a standard policy of allowing automatic re-entry under 17(7) of the Refugee Act (as amended) for those who are returned and have not had their claim heard should be implemented, however, based on information provided to the IRC this approach has not been adopted. Automatic re-entry, it is proposed, is not only just, but also the most efficient form of ensuring protection to those who need and deserve it. Prior to any substantial moves to amend the text of the Regulation to ensure re-entry come into effect, as is proposed by UNHCR, it is asserted that the current practice in Ireland needs to be amended.

The practice of not allowing re-entry in for e.g. Greece has resulted in successful court challenges against transfer in a number of countries (e.g. Austria, Finland, France, Italy, the Netherlands, Norway and Sweden). This has also led Norway and Sweden to suspend Dublin transfers to Greece as a matter of policy. These measures highlight the recognition by other Member States of current differing standards, and the need for interim measures to ensure protection obligations are met. The reality of burden sharing stands as one of the most serious challenges to the Dublin system at

present. With increasing reports on the situation in Malta, Greece, Italy and Spain, the illusion that standards are equal in all Member States is quickly fading. With harmonisation not yet achieved, care needs to be taken to understand the actual conditions and not to allow transfer when a comparable system is not in place. In this context the value of using country of origin information stands as an excellent tool. Through an analysis of COI, the reality of reception and processing standards can be known and a decision made in light of this. While COI analysis may not appear commonly in transfer decisions, the fact that it has been seen in e.g. RAT appeals in relation to Italy[6], shows its potential. In these decisions, country of origin information[7], was explicitly acknowledged as a permissible piece of evidence in making a decision[8] . The COI was found to support the assertion that ". . . incomplete and superficial treatment of asylum claims alluded to in the documentation in the Grounds of Appeal.. . [and that] the Tribunal consider it cannot be maintained that the Applicant's application in Italy was considered and examined by the Italian authorities" and as such the appeal was allowed. Such an approach, works to ensure that the Regulation operates in an appropriate manner in line with its purpose and if more formally adopted (e.g. policy guidelines stemming from decisions), Dublin II may better serve its purpose of responsibility sharing.

Acknowledging that situations may in fact differ within a burden sharing arrangement does not mean the downfall of such a mechanism. In the US-Canada equivalent, the Safe Third Country Agreement includes an exception for nationals from countries where removals are temporarily suspended allowing them to make a claim in Canada. Such an approach is an acknowledgement of differing standards and shows that a managed system of exceptions is appropriate and possible.

A further area of challenge can be seen in the way the Regulation works with other human rights protections, including Constitutional and European Convention on Human Rights obligations. Despite its direct effect, Dublin II cannot usurp other protections. If the transfer itself stands as a risk to ones life, or as cruel, inhuman or degrading treatment, legal obligations require that the transfer does not take place. However, in Makumbi v Minister for Justice Equality and Law Reform [2005 No. 98 JR], (unreported, 15th November 2005) the argument was made by the Minister that once a transfer order was made there was no discretion to amend it, despite medical reports specifying that serious risk to life would ensue. In the judgment, by F Geoghegan J the duty of the State to exercise its powers in implementing transfer orders to uphold the right to life of the person in line with the Constitution and the ECHR was upheld. As such, it must be remembered that if these issues are raised at any point prior to transfer, whether at ORAC or later on, if properly supported by medical evidence, they must be taken into consideration. To do so, a thorough understanding of human rights protections at all levels, including operations is required. Training can facilitate this process and again ensure legal obligations are met. Adopting any policy position, which cuts out considerations indicating suicidal ideations, would be failing to take into account mandatory relevant considerations.

The practice of detaining asylum seekers is highly controversial and criticised by many. While in some circumstances it may be deemed necessary to ascertain identity prior to allowing free movement, in the case of Dublin transfers there appears to be a practice of detaining applicants prior to transfer for excessive periods of time. In line with a commitment to effect transfers in a "humane and sympathetic way", holding someone in prison for two weeks, or when pregnant, when flights to the UK depart many times daily, it is suggested, is not in line with this objective. Detention should only be used as a last resort and not for the sake of convenience.

Certain measures at the initial stage of the Dublin Unit, ORAC can serve to bolster protection standards. It is important to understand that often applicants are very confused about the process, do not understand the leaflets and whether an exception is relevant to them, and may have been influenced by erroneous information fed from smugglers. To ensure that correct decisions are made by the Dublin Unit with all relevant information available, it is necessary to allow for a proper opportunity to make submissions prior to the Notice of Determination. If a positive Eurodac hit is made, in every case ORAC should tell the client and legal representative and thus allow for submissions to be made. Following this, a written response from ORAC on consideration of written submissions and an intention to make recommendation either to transfer or not (such as

the US asylum system intention to deny asylum approach), would protect against judicial review and also ensure real humanitarian concerns and exceptions issues are uncovered.
As we move towards the time for review it is a perfect opportunity to seek to understand the challenges posed by the Regulation and find ways to remedy these to ensure protection standards are maintained. At a political level the time is ripe for significant amendment to the text to ensure that protection gaps can be remedied. It can, and has, even been argued that if the Regulation cannot achieve its aims it ". . . should be replaced altogether."[9]

At a practical level, some measures can be easily implemented that will reduce criticism, ensure protection for those who need it, and facilitate legal obligations are met. To this end, the Irish Refugee Council would suggest the following:
-Automatic re-entry of persons returned under the Regulation who have not had their claim heard to ensure protection against refoulement;
-Policy decisions / positions taken regarding transfers to particular Dublin II countries based on both RAT analysis of situations and broader research analysing the reality of reception and processing standards. Such positions should be communicated to ORAC Dublin Unit and allow for consideration of such from the start;
-Advising legal representatives and applicants of positive Eurodac hits on every occasion to ensure a fair opportunity is provided to make submissions to ORAC;
-Written response on consideration of submissions given to applicant and legal representative with indication of intention to transfer or not;
-ECHR and Constitutional considerations to form a standard part of any Dublin II decision and humanitarian considerations to be given full consideration at any point in the process. Training on such protections to be provided to all involved.
-Detention to be used as a last resort and for minimal periods.

[1] JC Hathaway, Law of Refugee Status (1991, Butterworths) p 46
[2] With minor qualification
[3] As per Art. 28 of the Regulation
[4] While it may be permissible for some applicants to gain re-entry to the process by way of Section 17(7) Refugee Act 1996 (as amended), current practice has shown this is not automatic and no policy to allow re-entry for Dublin II returnees, even if they have never had their claim heard anywhere, breaching the principle of non refoulement
[5] ECRE, Public letter to Justice, Freedom and Security Commissioner Franco Frattini (27 June 2006)
[6] RAT appeals from 2005 by Patrick Hurley, Member of the RAT
[7] ANSA Rome May 6 2005 by the Italian National Council of Refugees "to the effect that half of the 10,000-15,000 refugee applications made in Italy "are not even examined" and the statement from the same source form a former foreign minister in the Italian Government to the effect that Refugees must be treated the same regardless of the Member state they end up in. . " and ". . .the contents of the Statewatch article, 20th January 2005, which details a complaint by ten organisations to the European commission against Italy's treatment of asylum seekers who arrived in Lampedusa in Italy in October 2004."
[8] Under the terms of (List B) Indicative Evidence in Annexe 11 to the Commission Regulation 1560/2003.
[9] ECRE, Public letter to Justice, Freedom and Security Commissioner Franco Frattini (27 June 2006).

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Isabel Duggan is the new Librarian of the RDC and the LAB Libraries

I would like to introduce myself. My name is Isabel Duggan and I have recently been appointed to the position of librarian in the Refugee Documentation Centre and Legal Aid Board libraries. Prior to this, I spent six years working as assistant librarian in King's Inns library.

The aim of this piece is to provide a refresher of what the RDC library has to offer as well as an introduction to the Legal Aid Board library.

RDC library

Library Service

The RDC houses a growing collection of books, reports, news reports and journals on a number of relevant subject areas including asylum, immigration, law, politics, anthropology and country of origin information.

Main Journal Subscriptions RDC library

Business Monitor International
Butterworth's Human Rights Cases
European Human Rights Law Review
European Human Rights Reports
The Economist
Human Rights
Human Rights Case Digest
Immigration and Nationality Law Reports
International Journal on Minority and Group Rights
International Journal of Refugee Law
Internet Newsletter for Lawyers
Journal of Refugee Studies
Keesing's Record of World Events
Netherlands Quarterly of Human Rights
Newsweek
Refugee Survey Quarterly
The International Journal of Children's Rights
The International Journal of Human Rights
Time
Tolley's Immigration, Asylum and Nationality Law
Note that journal contents are available on the RDC Library Management System under serials/journals.

Electronic Subscriptions RDC library

BBC Monitoring Online- BBC Monitoring covers reports from radio, television, news agencies, press and new media in over 150 countries.

Electronic Immigration Network- immigration, refugee and nationality law in UK. This is a comprehensive electronic source of immigration case law in the UK, and the only online source of the full text of IAT Determinations. EIN incorporates **ICCID**: Immigration Consortium Country Information Database. This is a constantly updated library of country orientated human rights and news materials. At present it covers 52 countries with more countries under development. Over 5,400 individual reports.

Firstlaw- (Ireland- reported and unreported judgements, legislation and statutory instruments).

Human Rights on Justis- (European Court of Human Rights).

Irish Times Archive- archive service of the Irish Times.

Lexis- Nexis- comprehensive legal and newspaper database including access to Irish, Northern Irish, English and European case law. Worldwide coverage.

Refugee Legal Centre London - includes country of origin and legal information.

Refworld (UNHCR database)- country of origin and legal information.

Thomson Business Intelligence – Comprehensive business and news database.

Extensive use is made of the Internet for both country of origin and legal research. Reference works are also available. Those entitled to avail of the query and research service may also borrow materials from the library once they have registered with the RDC library service. Journals/serials may not be borrowed but articles may be photocopied subject to copyright regulations. The RDC has two intranet-based computerised systems to assist library users to locate material:

-The **RDC COI Database** (coi.lab.ie) contains country of origin information documents.

-The **RDC Library Management System** (LMS) http://lib.lab.ie contains the library catalogue, Journal/Serials information, published anonymised query responses and 'What's New' pages. You need to log in to this system using the username and password supplied to you by the RDC.

Query and Research Service

A query and research service is provided for the Refugee Legal Service and Legal Aid Board, Office of the Refugee Applications Commissioner, Refugee Appeals Tribunal, Ministerial Decision Unit and other agencies of the Department of Justice, Equality and Law Reform.

Research sources used include our in-house collections, Internet sources, subscription databases and national and international contacts. The research response will include a referenced list of sources used. Research responses are supplied electronically in most cases. Research responses are prepared in accordance with an in-house style guide. This guide is based on the review of research practice in similar agencies in other countries. The style guide is concerned with methodologies for the corroboration and referencing of sources consulted and used as well as the format and presentation of responses.

Legal Aid Board library

The Legal Aid Board library has been re-installed in Montague Street and is to be fully re-launched as a library and legal information resource in September 2006.

A full audit of stock has taken place and a new book initiative has begun in full consultation with each law centre around the country.

The library has a growing collection focusing on the law in Ireland with particular emphasis on family law, employment law, social welfare law, medical negligence, money laundering, mental health law, litigation (schools) and wards of court.

The majority of books are available for loan. Journal articles may be copied or supplied electronically in line with copyright regulations. Electronic resources include Firstlaw, Lexis and Ireland.com.

A wide range of legal information services are available from the Legal Aid Board library. These include a legal query service, inter-library loan service with TCD and the British library, a book ordering service and a Land Registry orders service.

Upcoming developments for the LAB library include greater coverage on the re-designed Legal Aid Board web site as well as increased input to the *Legal Information Bulletin*, a publication aiming to keep solicitors up to date with items relating to their day-to-day work. Further information will be issued on the Lab Library in due course.

Please address all requests for RDC or LAB library queries to:
refugee_documentation_centre@legalaidboard.ie
or LAB_library@legalaidboard.ie respectively (note underscore).

Please feel free to contact me at imduggan@legalaidboard.ie if you would like further information on the RDC or LAB libraries.

For information on the overall services of the RDC and LAB library please contact Fiona Morley, fmmorley@legalaidboard.ie

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Is human sacrifice still performed at traditional religious shrines in Nigeria?

David Goggins Investigates.
RDC Researcher.

Some asylum seekers from Nigeria have based their claim for refugee status on an alleged fear that they are at risk of becoming a victim of human sacrifice in a traditional religious ritual. Such claims are sometimes questioned by Europeans, who have difficulty in accepting that human sacrifice still exists in Nigeria. To assess the credibility of such claims we need to look at the tradition of sacrifice in Nigeria's indigenous religions.

Religious Context

The importance of religion to Nigerians is explained by Leo Igwe, head of the Nigerian Skeptics Society, who says that:

> "Nigeria is a deeply religious society. Most Nigerians believe in supernatural beings and that these entities can be influenced through ritual acts and sacrifices. Ritual making therefore constitutes part of the people's traditional religious practice and observance. Nigerians engage in ritual acts to appease the gods, seek supernatural favours or to ward off misfortune. Many do so out of fear of unpleasant spiritual consequences if they default"

A document published on the website of the Nigerian embassy in Chile describes the importance of shrines to Nigeria's traditional religion as follows:

> "Religion forms an important aspect of the everyday life of the Nigerian people. Every group possesses shrines dedicated to some gods to whom sacrifices, prayers and libations are regularly offered. The gods are supposed to exercise protective power over their worshippers."

Human Sacrifice vs. Ritual Murder

In pre-colonial times the sacrifices made to the traditional gods sometimes included human beings. In a response to the question of whether human

sacrifice still occurs in present-day Nigeria, the Immigration and Refugee Board of Canada quoted three professors at American universities who separately stated that they believed it unlikely that a human would be sacrificed to traditional gods in a public ceremony, and that if it did occur it would be an isolated and unusual occurrence. This response refers to a distinction between human sacrifices and ritual murders made by one of the professors, saying that:

> "The professor explained that human sacrifices involve the participation of the community in a formalized manner, while ritual murders are individual acts, often performed following consultation or with the participation of a shaman or witch doctor, and are designed to call the favour of the gods onto an individual"

Numerous reports of ritual murders have appeared in Nigerian newspapers. Leo Igwe comments on these murders as follows:

> "Generally, ritual killing is common practice in Nigeria. Every year, hundreds of Nigerians lose their lives to ritual murders, also known as head-hunters. These head hunters go in search of human parts – head, breast, tongue, sexual organs – at the behest of witchdoctors and traditional medicine men who require them for some sacrifices or for the preparation of assorted magical portions."

Human Sacrifice in Neke?

Ritual killings committed by individuals are regarded as murder by the Nigerian authorities, and there have been reported instances where suspected ritualists have been arrested by the police, have been brought to trial and in some cases sentenced to death. More problematic have been those cases where there have been accusations of human sacrifice in relation to religious practices associated with traditional shrines.

An article in the Lagos-based newspaper *This Day* states:

> "Some of these traditions except idol worshipping are still being practiced in various parts of the country. In some cases the friction between Christianity and the traditionalists have led to breakdown of law and order, bloody fighting and destruction of lives and properties."

In particular there have been accusations of human sacrifice practiced at traditional shrines in Igboland. The most highly-publicised of these accusations were in relation to events which occurred at shrines in the town of Neke in Enugu state, and in the so-called "Evil Forest" near the town of Okija in Anambra State.

Neke was the scene of a long-standing dispute between Christians and adherents of a traditional religion which worshipped deities called Odo and Ezugu. The Christians particularly resented restrictions placed on them during a festival known as the Odo Masquerade, when all economic, social and religious activity in the town was prohibited for a period of three days, with women and strangers being forced to remain indoors. The Christians alleged that during this festival humans were sacrificed to Ezugu, with their skulls been placed in the shrine dedicated to this god.

Historically, there had been a tradition of human sacrifice in Neke, which is described by the *Daily Champion* as follows:

> "It has been alleged that there are thousands of human skulls at the temple of "Ezugu". And for many males in Neke, to bring a human skull to "Ezugu" shrine is a test of manhood. And you cannot go and escavate [sic] the skull of someone who died naturally. It has to be the skull of someone you killed yourself….The most agonising part is that no Neke person can be killed and his skull taken to "Ezugu". It has to be the skull of a stranger, someone from another town hence over the years, the surrounding towns dreaded the town of Neke."

In May 2001 the Christians of Neke held a crusade to protest against what they regarded as the barbaric practices of the traditionalists. This crusade culminated in raids on many shrines in Neke. In the temple of Ezugu the Christians discovered 32 human skulls in the shrine's altar. The Christians reported their discovery to the police, who arrested about 30 traditionalists. These were later released after the police accepted their

explanation that the skulls were those of enemies killed during an ancient tribal war. Members of the Odo cult subsequently complained to the police that the Christians had attacked their shrines and had destroyed or stolen various sacred objects. As a result the police charged 21 Christians with maliciously damaging the shrines. Community leaders resolved this conflict by ordering the Christians to return the stolen artefacts and apologise to the victims of their attack. There has not been any report of conflict between the religious groups in Neke since 2002.

The Evil Forest of Okija

A much more serious instance of alleged human sacrifice came to light in August 2004 when Nigerian police, acting on a complaint by a local businessman named Chukwumezie Obed Igwe, raided shrines in a forest near the town of Okija in Anambra State where they discovered 50 mutilated bodies and 20 human skulls.

Agence France Presse reported that:

> "The grisly discoveries in Okija forest have become a sensation in Nigeria, where it is commonly believed that many of the rich and powerful secretly attend black magic ceremonies to strengthen their authority."

The Lagos-based newspaper *Vanguard* said that:

> "Though the priest of one of the shrines claimed that the skulls and the dead bodies were deposited by their owners because they were killed by the shrine by which name they swore to an oath, a native of Okija who tipped off the police said the people were actually killed by the priests."

Vanguard quoted the State Police Commissioner Felix Ogbaudu as saying:

> "We saw over 50 corpses in different stages of decomposition. People dying under questionable circumstances, they throw them into what I call evil forest. Some of the bodies did not decompose, they kept shrinking. We are all aware that Okija is notorious for this kind of evil shrines in Igboland."

A report in the *Sunday Mail* suggested that the police were treating the discovery of the bodies as a murder investigation. The police suspicions were reported as follows:

> "Police believe some of the victims – businessmen, civil servants and others – were poisoned. The cult is believed to practise a ritual in which people involved in disputes, often over business deals, are exhorted to settle them by drinking a potion they are told will kill only the guilty. The potion was likely harmless, police believe, but one of the parties would later be killed secretly by agents sent out by the priests, sometimes by poisoning their food."

A total of 40 priests were arrested on suspicion of been involved in ritual killing, two of whom later died of natural causes. In August 2005 the remaining 38 priests were released after all charges were dropped against them due to a lack of evidence that they had actually committed any murders.

A group called *Africans in America* has suggested that this case was never properly investigated and that there was a cover-up to protect senior politicians who were among the shrine's patrons. A list of questions raised by this group concluded by saying:

> "Unfortunately, in Nigeria as in most African countries, crimes involving the powerful and influential members of the society never get properly investigated, nor diligently prosecuted."

Conclusion

Reports of alleged instances of human sacrifice such as those described above frequently appear in the Nigerian media, and considering that there is a the tradition of such practices associated with Nigeria's indigenous religions, it is not surprising that some Nigerians believe these reports. However, although individuals have been arrested by the Nigerian police in connection with ritual murders there remains insufficient evidence that human sacrifice still forms part of traditional religious practice in present-day Nigeria.

Training Visit to Dublin

by Dace Zvarte and Ligita Geidane

The authors of this article, Ligita and Dace, work for the Refugee Affairs Department of Latvia. This Department is one of the structural units of the Ministry of the Interior and its main responsibility is to examine asylum cases and take a decision on granting or rejecting refugee or subsidiary form of protection for asylum seekers in Latvia. Our experience in the asylum field is quite small as the asylum system in Latvia is available only since 1998. For that reason we are very keen to get acquainted with other EU Member States' experience and best practice on all issues related to asylum.

In order to improve our skills in work with COI, we decided to apply for TAIEX (EU Technical Assistance Information Exchange Unit) financial help and our request was approved - so the last thing was to find a host country. We were very pleased to receive a quick and very welcome e-mail from the Refugee Documentation Centre (RDC) who were ready to host and teach us for two weeks. During these two weeks we had a chance to get in-depth theoretical as well as practical experience on COI from true experts. We had an excellent chance to improve our research skills, see the RDC library, the database of information requests and we learnt many things related to standards and sources of COI, the research cycle, criteria for source assessment, as well as doing practical exercises and case studies. We were really impressed by well organized work, nice atmosphere, and highly qualified employees working for RDC. All that we saw and learnt formed the basis for essential changes in work with COI in our Department.

Thanks to RDC personnel we had the possibility to meet people and visit many other authorities and NGOs dealing with asylum issues: Refugee Legal Services, Refugee Appeals Tribunal, Reception and Integration Agency, "Integrating Ireland", etc. We were much impressed by the serious involvement of NGOs in the asylum field as in Latvia this sector is very weak and has just started to develop. As a result of our fruitful meeting with representatives from NGO "Integrating Ireland", an exchange of experience visit to Ireland for five officials from different Latvia authorities will be organized at the end of September in order to get acquainted with integration issues management. We were glad to be received by so many people and the contacts we made are very valuable, not only for us but also for our colleagues who work in other units of the Ministry of the Interior.

At the very end we would like to say that we are very interested in keeping close contacts with our Irish colleagues and we are always happy to show how the asylum process is organized in Latvia.

The Internal Flight Alternative, UNHCR and Somalia

by Paul Daly, RDC

Internal Flight Alternative

The 1951 Refugee Convention does not address the issue of internal flight alternative or relocation in those terms. Black CJ in the Federal Court of Australia in *Randhawa v Minister for Immigration, Local Government and Ethnic Affairs* (1994) 52 FCR 437 stated:

"The focus of the Convention definition is not upon the protection that the country of nationality might be able to provide in some particular region but upon a more general notion of protection by that country"

Paragraph 91 of the UNHCR Handbook is often quoted in relation to the issue of internal flight alternative:

"91. The fear of being persecuted need not always extend to the *whole* territory of the refugee's country of nationality. Thus in ethnic clashes or in cases of grave disturbances involving civil war conditions, persecution of a specific ethnic or national group may occur in only one part of the country. In such situations, a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so."

UNHCR's 1999 Position Paper, *Relocating Internally as a Reasonable Alternative to Seeking Asylum*, can be said to unpack some of the meaning of Paragraph 91 above:

"11. As this paragraph indicates, in order for internal relocation to be relevant, the asylum-seeker must, in some localised part of his or her country of nationality, experience a serious

problem, or risk of serious harm, on Convention grounds, and there must be other places within the country to which the fear or risk does not extend. As is clear from the Handbook, this is essentially a factual, evidentiary question to be addressed when assessing the claim, not beforehand to preclude analysis of the substance of the claim. Furthermore, the viability of relocation as an alternative to flight depends also on the reasonableness of the proposed relocation in all the circumstances of the individual case.

"12. Clearly, therefore, there are two key points to be addressed in analysing when and how the internal relocation notion may usefully contribute to determining well-foundedness of fear in any particular case. These are its relevance in the individual case, and the reasonableness of the relocation for the person concerned.

"**The Relevance Analysis**

13. This analysis requires an objective assessment of the situation in the part or parts of the country proposed as alternative or safe locations. Evidence must be available to show that the risk giving rise to the asylum-seeker's fear of persecution does not extend to that part of the country, and that the area is generally habitable.

"14. Factors which will be relevant to consider include, among others:

• the actual existence of a risk free area, which must be established by evidence;

• the stability of the area and the likelihood that safety will be a durable feature;

• the accessibility of the area (both internally and from outside the country);

• its fitness for habitation, that is, persons living there must not have to endure undue hardship or risk."

"The Reasonableness Analysis

"15. It also has to be demonstrated that, in all the circumstances, it would be reasonable for this asylum-seeker to seek safety in that location, in order to overcome his or her well-founded fear of persecution. In assessing this question, there are probably as many considerations as there are different circumstances of asylum-seekers and of countries; thus it is not possible to define them all. However, it may be helpful to list some of the issues which may usefully be explored.

"16. The claimant's personal profile will be important. Factors to be considered might include, but are not limited to:

- age
- sex
- health
- family situation and relationships
- ethnic and cultural group
- political and social links and compatibility
- social or other vulnerabilities
- language abilities
- educational, professional and work background
- any past persecution suffered, and its psychological effects

"17. The country's particular political, ethnic, religious and other makeup will also be important. Elements which should be taken into account may include:

- the existence and legality of government-sponsored population transfer programmes
- government policies of segregation or other limitations on freedom of movement and choice of residence
- numbers, ethnicity, religion and related features of others already in the area in question, and the area's absorption capacity."

The concept of the reasonableness of relocation, as used in the Handbook and the UNHCR Position paper above, is also referred to in UK jurisprudence.

Sedley LJ in Karanakaran v Secretary of State for the Home Department [2000] Imm AR 271 links the concept of reasonableness to asking the question whether return for relocation is unduly harsh:

"It is common ground here and throughout the common law jurisdictions whose decisions we have seen that ability to return is not literal or absolute but a question of what it is reasonable to expect of a particular applicant in particular circumstances, and that what is reasonable in this field is best tested by asking whether return for relocation would be unduly harsh**.**"

Similarly, Lord Woolf MR in *R v Secretary of State for the Home Department and Immigration Appeal Tribunal, ex p Robinson* [1997] Imm AR 568 quotes Thirunavukkarasu, Linden JA, giving the judgment of the Federal Court of Canada:

' "Stated another way for clarity, would it be unduly harsh to expect this person, who is being persecuted in one part of his country, to move to another less hostile part of the country before seeking refugee status abroad?" '

"In the same judgment Lord Woolf MR listed some tests, which can be taken into account in assessing the question of relocation:

"In determining whether it would not be reasonable to expect the claimant to relocate internally, a decision-maker will have to consider all the circumstances of the case, against the backcloth that the issue is whether the claimant is entitled to the status of refugee. Various tests have been suggested. For example, (a) if as a practical matter (whether for financial, logistical or other good reason) the 'safe' part of the country is not reasonably accessible; (b) if the claimant is required to encounter great physical danger in travelling there or staying there; (c) if he or she is required to undergo undue hardship in travelling there or staying there; (d) if the quality of the internal protection fails to meet basic norms of civil, political and socio-economic human rights. So far as the last of these considerations is concerned, the preamble to the Convention shows that the contracting parties were concerned to uphold the principle that human beings should enjoy fundamental rights and freedoms without discrimination."

In assessing whether the asylum seeker has access to meaningful internal protection, the Michigan Guidelines on the Internal Protection Alternative proposes asking three questions:

"(a) Does the proposed site of internal protection afford the asylum-seeker a meaningful 'antidote' to the identified risk of persecution?

(b) Is the proposed site of internal protection free from other risks which either amount to, or are tantamount to, a risk of persecution?

(c) Do local conditions in the proposed site of internal protection at least meet the Refugee Convention's minimalist conceptualization of 'protection'?"

Internal Flight Alternative and Somalia

UNHCR have stated strongly on two recent occasions that the "an internal flight alternative is not applicable in Somalia" (UNHCR, *Position on the Return of Rejected Asylum Seekers to Somalia* (January 2004) and UNHCR, *Advisory on the Return of Somali Nationals to Somalia* (November 2005)). The background to this UNHCR position is worth looking at in some detail. Although the specific questions raised in the literature and caselaw above regarding reasonableness, relevance, the unduly harsh test, safety and protection are not explicitly asked in these UNHCR papers, the papers address the same issues.

UNHCR's 2004 Position Paper states:

"The general pattern of human settlements prevailing in many parts of Africa, including Somalia, is often characterized by common ethnic, tribal, religious and or/cultural factors, which enable access to land, resources and protection from members of the community. Consequently, this commonality appears to be the necessary condition to live in safety. In such situations, it would not be reasonable to expect someone to take up residence in an area or community where persons with a different ethnic, tribal, religious and/or cultural background are settled, or where they would otherwise be considered as aliens.

…In the Somali context, the concept of *guri* (local) versus *gelti* (outsider) is ever-present, and a profoundly important undercurrent in human relations and allocation of resources. It cannot be expected that "outsiders", meaning those not originating from a local clan, are accorded the respect, protection and resources that the "locals" consider rightfully theirs, unless this is brought about by the force of arms.

…[T]he determining factor in defining where a person originates from is where the person has effective clan and family ties, and where clan protection is thus available. In light of the above,

especially given the prevailing clan system, UNHCR is of the view that the internal flight alternative is not applicable in the context of Somalia.

… With reference to what is said on the non-applicability of the internal flight alternative in Somalia (see paragraph 4.2 above), it is UNHCR's position that no Somali should be returned against his/her will to an area of the country, from where he/she does not originate. In this regard, considerations based on the prevailing clan system are of crucial importance."

UNHCR's November 2005 Advisory states:

"5. In this connection, UNHCR underlines that an internal flight alternative is not applicable in Somalia, as no effective protection can be expected to be available to a person in an area of the country, from where he/she does not originate. In this regard, considerations based on the prevailing clan system are of crucial importance.

6. Therefore, international protection should not be denied on the basis of the internal flight alternative. Such a denial would effectively condemn the persons in question in a form of internal displacement, which brings along a high risk of denial of basic human rights and violation of socio-economic rights, exacerbating the already high levels of poverty and instability for both the individual and the community. It is especially important to note the likely weakened position of the women, children, elderly and physically and/or mentally disabled, whose overall exploitative circumstances could be expected to increase.

7. UNHCR acknowledges that not all Somali asylum-seekers may qualify for refugee status under the 1951 Convention. However, UNHCR considers that asylum seekers originating from southern and central Somalia are in need of international protection and, excepting exclusion grounds, should be granted, if not refugee status, then complementary forms of protection.

8. Correspondingly, UNHCR re-iterates its call upon all governments to refrain from any forced returns to southern and central Somalia until further notice.

9. As regards forced returns to northern Somalia, while some returns are possible under certain conditions, notably where there are clan links within the area of return and effective clan protection, large-scale involuntary returns should be avoided. Persons not originating from northern Somalia should not be forcibly returned there."

UNHCR's position on the non-applicability of the internal flight alternative in Somalia is of particular interest in this country, given that Ireland is shortly to introduce a new system of subsidiary protection. Art 2 (e) of EU Qualification Directive defines a person eligible for subsidiary protection as "a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm." No doubt UNHCR's position has already impacted to some extent on the Refugee Status Determination of Somali asylum seekers. It remains to be seen how the Subsidiary Protection Determination of Somali claimants will be affected.

Summary of Published Decision 2 of the Refugee Appeals Tribunal

by Gursunny Singh Koonjul,
Legal Intern, Tulsa University

Albania (Applicant) v. Refugee Appeals Tribunal

Refugee Appeals Tribunal Member Elizabeth O'Brien B.L.
2006 [No. of pages 14] Reference No 2

Particular social group –Family –Blood Feud – Risk of serious harm on return –Nature of Risk to Women –Effective state protection –Assessment on case by case basis. Applicant subsequently appeals to the Refugee Appeals Tribunal.

References: United Nations Mission, UK Home Office Report for Albania 2004, Australian Press, UNHCR Handbook; Kosovo: A Short History by Noel Malcolm; Karanakaran v. Secretary State for the Home Department(2000) 3 ALL ER 449, Canada v. Ward(1993) 2 SCR 689, Reynos v. Canada 107 FTR 220, Skenderaj [C2001/1336]; Brozi UKIAT 06 978; KOCI [UKIAT 08006]

Facts: Appellant and her then minor son applied for asylum in Ireland in 2003. Appellant's son is no longer a minor and made a separate application for status and was granted asylum. Appellant claims

her husband is serving 18 year prison sentence for murder. Appellant claims to fear persecution on the basis of law of Kanun by which the sons of the villager her husband killed would kill her son. She claims that there is no state protection for blood feuds. The Appellant claims that several threats were made upon her son's life and that, although a woman is never killed according to Kanun, she herself fears for her life. It was submitted on behalf of the Appellant that Albania experienced the highest murder rate of any Balkan nations in 2002 with 12.2 murders per 100,000 people. It was submitted that according to the Australian press blood feuds are being extended to wives, children and broader families of the male. It was submitted that the head of the Anti-Crime Police Service told the Appellant that he could do nothing to help her. It was submitted that Country of Origin Information reports state that police are untrained, unreliable and that there is corruption in the police force.

Held: Refugee Appeals Tribunal Member, Elizabeth O'Brien BL, affirmed the decision of the Refugee Applications Commissioner in refusing the Appellant refugee status. The Tribunal Member stated that the Appellant has been the subject of a direct threat to her life from the family of the victim of her husband's crime. The Tribunal Member also took into account that almost all Country of Origin Information stated that, according to the laws of the Kanun, women are not subject to retaliation although they can be killed or injured in attacks directed to male relatives. The Tribunal Member noted that in the case of *Skenderaj* the Supreme Court of Judicature held that families involved in the blood feuds were not a distinct social group and that the threat to Skenderaj was a private matter. The Tribunal Member noted that in *KOCI* [UKIAT 08006] the Tribunal found that while blood feuds are a serious problem in Albania there is clear evidence that the authorities and others are taking effective steps to deal with the problem. The Tribunal Member determined that since the alleged target, the Appellant's son, is no longer in Albania, any risk that she might be caught up in cross fire or any attack is avoided. Should the Appellant return to Albania she will no longer be protecting her son and accordingly is removed from any risk.

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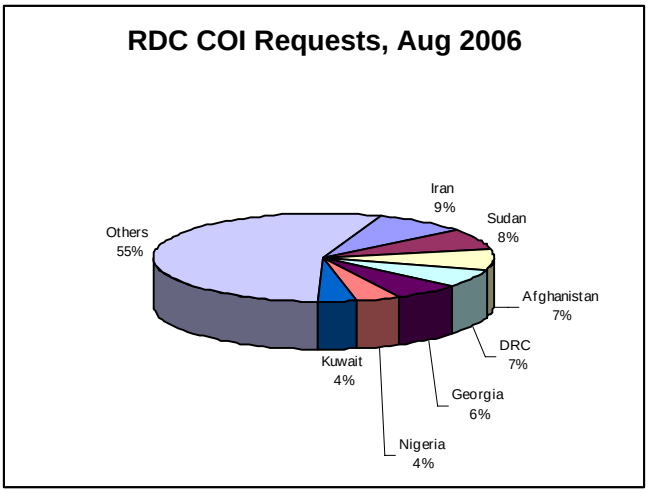
RDC Statistics August 2006



Refugee Law Quotes

Definition of Persecution

"Drawing on these precepts, persecution may be defined as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection. A well founded fear exists when one reasonably anticipates that remaining in the country may result in a form of serious harm which the government cannot or will not prevent…" Prof. James Hathaway, *The Law of Refugee Status*

State protection

"The issue that arises, then, is how, in a practical sense, a claimant makes proof of a state's inability to protect its nationals as well as the reasonable nature of the claimant's refusal actually to seek out this protection. On the facts of this case, proof on this point was unnecessary, as representatives of the state authorities conceded their inability to protect Ward. Where such an admission is not available, however, clear and convincing confirmation of a state's inability to protect must be provided. For example, a claimant might advance testimony of similarly situated individuals let down by the state protection arrangement or the claimant's testimony of past personal incidents in which state protection did not materialize. Absent some evidence, the claim should fail, as nations should be presumed capable of protecting their citizens. Security of nationals is, after all, the essence of sovereignty. Absent a situation of complete breakdown of state apparatus, such as that recognized in Lebanon in *Zalzali*, it should be assumed that the state is capable of protecting a claimant." Canada (Attorney General) *v.* Ward, [1993] 2 S.C.R. 689