

The Researcher

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Welcome to the fourth issue of *The Researcher*.

There has been a lot of change in recent months with the publication of the Scheme for an Immigration, Residence and Protection Bill, the coming into force of Subsidiary Protection and the making available by the Refugee Appeals Tribunal of previous Decisions.

This issue focuses on Subsidiary Protection. We are particularly grateful to Patricia Brazil, Barrister-at-Law and Lecturer in Law at Trinity College Dublin for her article, 'Subsidiary Protection Under Irish Law' and to Maria Maguire, Solicitor in Galway RLS for her contribution to our understanding of the same legislation, 'A Positive Obligation to Protect'. I know that Refugee Legal Services are appreciative of Emilie Wiinblad Mathez of UNHCR for her training on Subsidiary Protection, which was given at short notice to them at the end of October. Emilie kindly agreed to publication of a summary of her training in this issue.

In addition, we are indebted to Dr Ronit Lentin of Trinity College Dublin for her socio-political critique, 'Between Refugee and Citizen'. John Stanley BL examines the "IBC 05" Scheme and the Rights of Irish Citizen Children'. Also in this issue, Fr Michael Begley describes the education services of Spiritan Asylum Services Initiative (Spirasi). Bobby Pringle of the Dublin Mission of the International Organisation for Migration writes of the IOM's newly launched project, the Directory of Return for Asylum Seekers (DORAS).

On the home front, RDC staff are well represented in this issue: Carol Doyle has written of COI Network III; Isabel Duggan gives us an update on RDC library books; Patrick Dowling writes of COI from the perspective of an armchair anthropologist; David Goggins investigates the question, 'Who are the Janjaweed?' and I look at two issues: the situation of Christians in Iraq and the crossing of the Gulf of Aden by 22,000 people in smugglers' boats.

We would like to wish all our readers a merry Christmas and a happy New Year!

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Subsidiary Protection under Irish law



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Introduction

On 10th October 2006, the European Communities (Eligibility for Protection) Regulations 2006 (SI 518 of 2006) came into force in Ireland. These Regulations are intended to give effect in Irish law to the European Union Directive on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who otherwise need International Protection and the Content of the Protection Granted (Directive 2004/83/EC: "the Qualification Directive"). The main objective of the Directive is to ensure that member states apply common criteria for the identification of persons genuinely in need of international protection, and to ensure the availability of a minimum level of benefits for such persons in all member states.¹ The purpose of this article is to outline the scheme of subsidiary protection provided for under SI 518 of 2006, to address the class of persons entitled to seek subsidiary protection, and to outline key aspects of the substantive content of such protection.

What is subsidiary protection?

It has long been recognised that the provisions of the 1951 Geneva Convention on the Status of Refugees do not address the situation of all persons in need of international protection.² Some of the most common situations falling outside of the international refugee regime relate to persons who can demonstrate a well founded fear of persecution but who cannot link such persecution to a Convention reason (also known as "the Convention nexus"); and persons who are at risk of serious harm owing to a serious and widespread deterioration in public order in the country of origin. The concept of complementary or subsidiary protection arises from the form of protection offered by some States to persons who fail to meet the stringent requirements of the

Convention definition of a refugee. The subsidiary protection measures contained in the Qualification Directive are stated to be "complementary and additional to the refugee protection enshrined in the Geneva Convention".

Regulation 2(1) of SI 518 of 2006 provides that a person eligible for subsidiary protection means a person (a) who is not a national of a member state, (b) who does not qualify as a refugee, (c) in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, would face a real risk of suffering serious harm, (d) to whom the exclusion clause in Article 13 does not apply, and (e) is unable, or owing to such risk, unwilling to avail himself or herself of the protection of that country. A number of commentators have expressed concern at the restriction of this definition to third-country nationals, on the basis that such a limitation is incompatible with the prohibition on discrimination contained in article 3.³

Both the Qualification Directive and the Regulations define an application for "international protection" as a request made by a third country national or a stateless person for protection from a member state, who can be understood to seek refugee status *or* subsidiary protection.⁴ An issue which is not immediately apparent from either the Directive or the implementing Regulations, is the precise relationship between these two separate applications. In particular, by failing to clarify the precise meaning of the second limb – (b) who does not qualify as a refugee⁵ – it may be arguable that an application for subsidiary protection is separate and/or severable from an application for refugee status. This is potentially significant, as if the two applications are severable it may be the case that an application for subsidiary protection can be made by a person present within this jurisdiction who has previously been refused refugee status by another member state. It would appear that there was an attempt to deal with this issue in the Regulations, in the definition of a "protection applicant" as a person who has made an application for protection in the State and whose application has not been (a) determined, (b) withdrawn or deemed

to be withdrawn, or (c) transferred to another country. The basis on which this definition was inserted is unclear, as there is no equivalent provision within the parent Directive. Furthermore, this may not resolve the issue as it would appear that the Dublin II Regulation does not apply to applications for subsidiary protection.⁶ Thus, a person may be entitled to seek subsidiary protection in this jurisdiction notwithstanding the refusal of their asylum application by another member state, and on the basis that Dublin II does not apply to applications for subsidiary protection, this State would be obliged to accept and process such application.

What is serious harm?

The definition of “serious harm” is also contained in Regulation 2(1), which states that serious harm consists of (a) death penalty or execution, (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin, or (c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict. Paragraphs (a) and (b) are uncontroversial, reflecting a number of international instruments, including the United Nations Convention Against Torture and Protocol 6 and Article 3 of the European Convention on Human Rights. Paragraph (c) represents the most significant element of the scope of subsidiary protection for the purposes of Irish law, in that it “reflects the existence of consistent, albeit varied, State practice of granting some form of complementary protection to persons fleeing the indiscriminate effects of armed conflict or generalised violence without a specific link to Convention grounds.”⁷

Whilst paragraph (c) might appear at first glance to represent a welcome extension of the scope of international protection for persons at risk, a closer examination of the wording of this provision gives cause for concern. For example, regarding the nature of the threat, there would seem to be an inherent contradiction in requiring a person to demonstrate a “serious and *individual*” threat to their life or person by reason of indiscriminate violence in situations of international or internal armed conflict. Surely it is the essence of indiscriminate violence that any person may be at risk, irrespective of their individual characteristics or status? Such concerns are compounded when recital 26 is considered, which provides “[r]isks to which a population of a country or a section of the population is generally exposed do normally not create in themselves an individual threat which would qualify as serious harm.” This demonstrates an incorrect understanding of the relationship between risk to an individual and situations of “generalised oppression”; to paraphrase Professor

Hathaway’s comments in the context of refugee status, the issue is not whether the claimant is more at risk than anyone else in her country, but rather whether the risk of serious harm is sufficiently serious to substantiate a claim to subsidiary protection.⁸ If persons like the applicant face serious harm in the country of origin, then in the absence of effective national protection, the applicant is entitled to subsidiary protection. In order for paragraph (c) to have a practical impact, and to ensure the concept of subsidiary protection is not rendered illusory, decision-makers must ensure that the issue to be addressed is whether the applicant faces a reasonable risk of serious harm, and not whether that risk is identifiable to the applicant alone.

Who may apply for subsidiary protection?

The question of who may apply for subsidiary protection goes to the heart of the impact of these Regulations upon Irish law. Article 18 of the Qualification Directive provides that “[m]ember states shall grant subsidiary protection to a third country national or a stateless person eligible for subsidiary protection in accordance with Chapters II and V”.⁹ In marked contrast to this mandatory obligation, Regulation 3 of SI 518 of 2006 purports to limit the applicability of the Regulations to a specified class of “protection decisions” made on or after the coming into operation of the regulations. The class of such decisions is stated as follows: (a) a recommendation by the Refugee Applications Commissioner,¹⁰ (b) an affirmation of such recommendation,¹¹ or a recommendation to set aside a negative decision of the Commissioner and a recommendation that the applicant should be declared to be a refugee by the Refugee Appeals Tribunal;¹² (c) the notification of an intention to make a deportation order under section 3(3) of the Immigration Act 1999 in respect of a person whose application for asylum has been refused by the Minister;¹³ (d) a determination by the Minister on an application for subsidiary protection¹⁴ or an application for humanitarian leave to remain.¹⁵

It is clear that no such limitations are contained in the Directive upon which these Regulations are based. There is no limitation of applications for subsidiary protection to prospective applications in the Qualification Directive; nor does it contain any equivalent to the “triggering mechanism” apparently required under the transposing Directives, the trigger being the issue of a notification pursuant to section 3(3) of an intention to deport. An examination of the provisions of the Regulations reveals a lack of clarity in drafting; if indeed it was the intention to exclude those persons already the subject of a deportation order, or those who have, prior to the coming into force already been

invited to make representations pursuant to section 3 of the 1999 Act, this would not appear to have been achieved by the Regulations. The compatibility of any such purported limitation would furthermore remain to be tested against the parent Directive.

The origin of the purported “triggering mechanism” for an application for subsidiary protection is Regulation 4(1)(a) of SI 518 of 2006, which provides that a notification of an intention to deport shall include a statement that a person whose application for refugee status has been refused and who considers that he or she is eligible for subsidiary protection, shall be entitled to make an application for subsidiary protection to the Minister within the 15 day period contained within the notification.¹⁶ Any such application is expressed to be in addition to the entitlement to make representations to the Minister pursuant to section 3(3)(b) of the Immigration Act 1999. Indeed, it is clear that subsidiary protection comprises an *intermediate* level of protection, and is not intended to replace the concept of humanitarian leave to remain. Regulation 4(5) provides that where the Minister determines that a person is not a person eligible for subsidiary protection, the Minister shall proceed to consider whether, having regard to the matters contained in section 3(6) of the 1999 Act,¹⁷ a deportation order should be made. Furthermore, Regulation 4(6) provides that nothing in the regulations shall affect the discretionary power of the Minister under section 3 of the 1999 Act.

The absence of any equivalent limitation to the triggering mechanism in the Qualification Directive has already led to queries being raised as to the validity of the transposition of that Directive contained in the Regulations. In *Ugbelase v Minister for Justice, Equality and Law Reform*¹⁸ leave was granted to the applicant upon an *ex parte* application for judicial review, challenging the refusal of the Minister to accept and/or process the applicant’s application for subsidiary status. The applicant sought to challenge the refusal of the Minister to process her application for subsidiary protection, which refusal was apparently based upon the fact that the applicant was a person in respect of whom a deportation order was already extant. Finlay Geoghegan J granted leave to the applicant to challenge the Minister’s refusal to process and determine her application for subsidiary protection on the grounds that such decision was unlawful and *ultra vires* the European Communities (Eligibility for Protection) Regulations 2006 (SI 518 of 2006), and that the said Regulations do not exclude from their scope or ambit persons in respect of whom a deportation order has been made. Significantly, leave was granted on the basis that a necessary, integral and essential element of the duty

on member states to grant subsidiary protection under the Qualification Directive to a person eligible for such protection was a duty to consider and determine an application for such protection, and that the Minister's refusal to process and determine the applicant's application for subsidiary protection was unlawful and in breach of the applicant's right to fair procedures, and was furthermore in breach of Article 18 of the Qualification Directive. Leave was also granted on the grounds that the Regulations were not being applied in a manner such as to achieve the aims and results of the Directive, and that the Minister had failed to transpose and/or implement the Qualification Directive into Irish law correctly and properly and in accordance with the Directive.

Exclusion from subsidiary protection

Regulation 13(1) provides that a person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that he or she (a) has committed a crime against peace, a war crime, a crime against humanity, (b) has committed a serious crime, (c) has been guilty of acts contrary to the purposes and principles of the United Nations, or (d) constitutes a danger to the community or the security of the State. Whilst this provision is clearly influenced by Article 1F of the Convention, the grounds for exclusion from subsidiary status are in fact wider than those which apply to persons seeking refugee status, by reference to the commission of a "serious crime". Exclusion from refugee status pursuant to Article 1F(b) of the Convention is permissible only in respect of those persons who have committed a "serious non-political crime". Although the precise definition of serious non-political crimes remains the subject of debate within the international community,¹⁹ it is clear that allowing a person to be excluded from subsidiary protection on the basis of the commission of any serious crime greatly extends the scope of exclusion. As McAdam notes, "[o]nce it can be shown that a person has committed a 'serious crime', there is no need to determine whether or not the crime is political or non-political in nature. Accordingly, subsidiary protection is not available to any person excluded from Convention (or Directive) refugee status. In this respect, subsidiary protection does not function as a residual status, since more people are excluded from subsidiary protection than from refugee status."²⁰

Actors of protection

The final element in the definition of persons eligible for subsidiary protection refers to such person being unable, or owing to the risk of serious harm, unwilling to avail himself or herself of the protection of that country. Regulation 2(1) provides that protection against

persecution or serious harm shall be regarded as being generally provided where reasonable steps are taken by a state or parties or organisations, including international organisations, controlling a state or a substantial part of the territory of that state to prevent the persecution or suffering of serious harm. It is stated that such protection may be provided, *inter alia*, where such actors operate an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, where the applicant has access to such protection. It is clear that both Regulation 2(1), and Article 7 of the Directive from which it derives, contemplate the provision of protection by non-State agents, which is capable of defeating an application for subsidiary protection. The compatibility of such "de facto protection" with international law is hotly contested; Lambert notes that the Directive has been criticised in adopting this approach on the grounds that "administrations or international organizations are generally not parties to international human rights treaties and are therefore left largely unaccountable for their actions".²¹

Content of subsidiary protection

General

The content of subsidiary protection is detailed in regulations 16-19 of SI 518 of 2006. Regulation 15 provides that in the application of regulations 16-19, the special situation of vulnerable persons such as minors (whether or not unaccompanied), disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence shall be taken into account. It is interesting to note in this context that recital 12 and Article 20(5) of the Qualification Directive state that "the best interests of the child" should be a primary consideration of member states when implementing the Directive. These provisions reflect the obligation contained in Article 3 of the Convention on the Rights of the Child that in all actions concerning children, the best interests of the child "shall be a primary consideration". It has previously been remarked that the Refugee Act 1996 makes "limited provision" for minor applicants,²² and there is no equivalent to the "best interests" requirement in Irish legislation on refugee law.

Family Unity

Regulation 16 addresses the entitlement to family unity. Regulation 16(1) provides that a person who has been deemed eligible for subsidiary protection may apply to the Minister for permission to be granted to a member of his or her family to enter and reside in the State, with paragraph (2) providing that the Minister shall investigate, or cause to be

investigated, such application for family unity in order to determine the relationship between the applicant and the person who is the subject of the application and that person's domestic circumstances. Regulation 16(3)(a) provides that subject to paragraph (5), the Minister shall grant permission in writing to a person to enter and reside in the State if he is satisfied such person is a member of the family of the applicant. "Member of the family" of the applicant for these purposes is defined as follows: (a) where the applicant is married, his or her spouse, provided such marriage is subsisting on the date of the application for family reunification; (b) where the applicant is under the age of 18 and not married at the date of application for family reunification, his or her parents; or (c) a child of the applicant who, on the date of the application for family unity is under the age of 18 years and is not married. The language of Regulation 16(3)(a), with the use of the mandatory "shall", indicates that there is no discretion in the Minister to decline permission to enter and reside to such persons, provided that the necessary conditions are met.

By contrast, regulation 16(4) provides that subject to paragraph (5), the Minister *may* grant permission to a dependent member of the family of an application to enter and reside in the State. Dependent members of the family are defined in paragraph (4)(b) as any grandparent, parent, brother, sister, child, grandchild, ward or guardian of the application who is wholly or mainly dependent on the applicant or is suffering from a mental or physical incapacity to such extent that it is not reasonable to expect him or her to maintain himself or herself fully. There is no equivalent provision in the Qualification Directive, and it would appear that the Minister has exercised the discretion pursuant to Article 3 of that Directive to introduce or retain more favourable standards for those eligible for subsidiary protection and the content of such protection; the broader category of dependent members of a family reflects the existing provisions of s.18(4)(a) of the Refugee Act 1996.

Finally, Regulation 16(5) provides that the Minister may refuse to grant permission, or may revoke any permission previously granted, to enter and reside in the State to a family member subject to either paragraph (4) or (5), either in the interests of national security or public policy, or where the person would be or is excluded from refugee or subsidiary protection in accordance with regulation 12 or 13.

Permission to remain in the State

Regulation 17 provides that subject to the exclusion and cessation clauses, a person who has been deemed eligible for subsidiary protection or a member of a family of such person to whom regulation 16(3) or (4) applies shall be granted permission to remain in the State for three

years. This permission is stated to be renewable, unless compelling reasons of national security or public order otherwise require. The implementing regulations thus apply a single residence entitlement; this is in marked contrast to the provisions of the Qualification Directive, which specifies an entitlement to reside for three years to persons granted refugee status (Article 24(1)), whilst beneficiaries of subsidiary protection are entitled to a residence permit which must be valid for at least one year (Article 24(2)).

Conclusions

The Qualification Directive has not been the subject of universal approval; the political compromises which were necessary to secure the final draft are regarded as having been achieved at the price of diluting the concept of subsidiary protection.²³ McAdam thus concludes “[t]he Directive should not be viewed as an example of complementary protection for universal adoption. Much of its content has been determined by regional conditions and concerns, and its scope is far narrower than protection principles under international human rights law, humanitarian law and international criminal law provide”.²⁴

However, the introduction of subsidiary protection to Irish law offers the potential for a significant extension of the protection afforded by this State to persons at risk in their country of origin. Prior to the introduction of the Qualification Directive, Ireland was one of only three member states of the EU whose national laws did not make specific provision for a substantive scheme of complementary protection.²⁵ The only means of obtaining protection from the Irish state outside of refugee status was by means of an application for humanitarian leave to remain. Such applications are entirely at the discretion of the Minister, and an examination of the successful numbers of such applications indicates the rarity with which the Minister exercises his discretion in this regard.²⁶ Provided that decision-makers approach applications for subsidiary protection with an open mind and apply the provisions of the Regulations in a manner that is consistent with the objectives of the Qualification Directive, the availability of subsidiary protection may yet offer significantly improved rights to persons within this jurisdiction who have fled their country of origin in fear of serious harm, and for whom return would constitute a significant risk.

¹ Recital 6 of the Qualification Directive. This Directive arose out of the agreement of the European Council at its special meeting in Tampere on 15 and 16th October 1999 to work towards establishing a Common European Asylum System. This was agreed to require, in the short term, an approximation of the rules on the recognition of refugees and the content of

refugee status, and also an agreement that the rules regarding refugee status should be complemented by measures on subsidiary forms of protection: see recitals 1-5.

² See, e.g., Hathaway *The Law of Refugee Status* (Butterworths 1991) at p.26 where he argues for the existence of a broader, “intermediate” category of refugee outside of the Convention definition, based on customary international law and comprising “a right to be considered for temporary admission, whether by formal procedure or administrative discretion, on the basis of a need for protection. That is, customary international law precludes the making of decisions to reject or expel persons who come from nations in which there are serious disturbances of public order without explicit attention being paid to their humanitarian needs”. [Emphasis in original]

³ Thus, the House of Lords Select Committee on the European Union commented: “For a major regional grouping of countries such as the Union to adopt a regime apparently limiting the scope of the Geneva Convention among themselves would set a most undesirable precedent in the wider international/global context. There is a danger that if States, on the basis of EU citizenship (i.e. nationality of a Member State), bar from refugee protection such a group as the Roma, who may be persecuted on racial grounds, or other groups, who may be persecuted on religious grounds, this would seriously undermine the effectiveness of Geneva Convention protection within Europe”: Twenty Eighth Report (16 July 2002).

⁴ Emphasis added. See Article 2(g) of the Directive and Regulation 2(1) of SI 518 of 2006.

⁵ E.g. Is it necessary for an application for asylum to have been made and refused, or can an application for subsidiary protection be made upon receipt of legal advice that the claim for refugee status will not succeed, for instance because of a lack of a Convention nexus? If it is necessary to first make such application, does the Directive require the application for subsidiary protection to be made in the same jurisdiction as the application for refugee status?

⁶ This issue was considered by the Commission in its Communication to Council and the European Parliament “A More Efficient Common European Asylum System: The Single Procedure as the Next Step” {SEC(2004) 937} where the Commission called for the extension of the scope of the Dublin II Regulation to include applications for subsidiary protection.

⁷ McAdam “The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime” (2005) 17(3) *International Journal of Refugee Law* 461. McAdam also refers to the UNHCR comment that “experience shows that most civil wars or internal armed conflicts are rooted in ethnic, religious or political differences which specifically victimise those fleeing. War and violence are themselves often used as instruments of persecution”: UNHCR’s Observations on the European Commission’s Proposal for a Council Directive on Minimum Standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection’ 14109/01 ASILE 54 (16 Nov. 2001).

⁸ *The Law of Refugee Status* (Butterworths 1991) at p.97.

⁹ Emphasis added.

¹⁰ Pursuant to section 13(1) of the 1996 Act.

¹¹ Such affirmation being made pursuant to section 16(2)(a) of the Refugee Act 1996.

¹² Pursuant to section 16(2)(b) of the Refugee Act 1996.

¹³ Pursuant to section 3(2)(f) of the Immigration Act 1999.

¹⁴ Under Regulation 4(4).

¹⁵ Under Regulation 4(5).

¹⁶ Section 3(4)(a) of the Immigration Act 1999.

¹⁷ Which provides that “In determining whether to make a deportation order in relation to a person, the Minister shall have regard to— (a) the age of the person; (b) the duration of residence in the State of the person; (c) the family and domestic circumstances of the person; (d) the nature of the person’s connection with the State, if any; (e) the employment (including self-employment) record of the person; (f) the employment (including self-employment) prospects of the person; (g) the character and conduct of the person both within and (where relevant and ascertainable) outside the State (including any criminal convictions); (h) humanitarian considerations; (i) any representations duly made by or on behalf of the person; (j) the common good; and (k) considerations of national security and public policy, so far as they appear or are known to the Minister.”

¹⁸ Finlay Geoghegan J, *ex tempore*, 13th November 2006.

¹⁹ See, e.g., Hathaway *The Law of Refugee Status* (Butterworths 1991) at pp.221-226, Goodwin-Gill *The Refugee in International Law* (Clarendon Press 1996) at pp.101-108.

²⁰ McAdam supra fn 7, at p.496.

²¹ Lambert “The EU Asylum Qualification Directive, its impact on the jurisprudence of the United Kingdom and international law” (2006) 55(1) *ICLQ* 161 at p.174.

²² See e.g. *Moke v Refugee Applications Commissioner* Finlay Geoghegan J, High Court unreported, 6th October 2005.

²³ McAdam supra fn 7, at p.516, concluding that “[t]he Directive has had more success in harmonizing the scope of ‘refugees’ and ‘beneficiaries of subsidiary protection’ than in defining the content of those statuses”.

²⁴ Mc Adam supra fn 7, at p.516.

²⁵ Along with Belgium and the United Kingdom: see Bouteillet-Paquet ‘Subsidiary Protection: Progress or Set-Back of Asylum Law in Europe? A Critical Analysis of the Legislation of the Member States of the European Union’ in D Bouteillet-Paquet (ed) *Subsidiary Protection of Refugees in the European Union: Complementing the Geneva Convention?* (Bruylant Brussels 2002) 226

²⁶ The Department of Justice *Annual Report* (2005) indicated that of 3,625 appeals rejected by the Refugee Appeals Tribunal during that year, only 137 persons were subsequently granted temporary leave to remain in the State. It should also be noted that whilst the Regulations provide that applications for subsidiary protection shall be determined by the Minister, Head 54 of the Immigration, Residence and Protection Bill indicates that such determinations shall fall within the remit of the proposed Protection Review Tribunal.



A Positive Obligation to Protect

by Maria Maguire, Solicitor
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Subsidiary Protection, introduced into Irish law on 10th October 2006, derives from international human rights norms and is a form of complementary protection in recognition of the limiting nature of the 1951 Refugee Convention offering protection to those at risk of serious *harm*.¹ This addition to refugee protection has had differing names in various jurisdictions such as, humanitarian leave and complementary protection but the meaning remains the same. Distinct from the 1951 Refugee Convention, which provides relief for those at risk of persecution for reasons of race, religion, nationality, political opinion or membership of a particular social group, subsidiary protection is 'human rights protection', the primary source in Europe being the 1950 European Convention on Human Rights and Fundamental Freedoms. In Ireland we have codified this form of protection by the implementation of the EC (Eligibility for Protection) Regulation 2006.

Subsidiary protection does not 'supersede' refugee law but is designed to complement it. Unlike refugee law, there is no need for a nexus to one of the five Convention grounds cited above, nor is there a need to prove 'persecution'. The protection afforded is wider and practitioners, decision makers and judges will need access to accurate and reliable country of origin information (COI) and the case law of the ECHR and CAT to determine such applications.

While the protection against torture outside of the 1951 Refugee Convention guarantees that a person at risk of torture in his country cannot be deported to that country, subsidiary protection provides a positive obligation to grant a residence permit if the applicant is not excludable within the terms of the 2006 EC Regulation.²

I would like to discuss, by way of illustration the key components in an application for subsidiary protection, by considering the case in the ECtHR of *N v Finland*, which found Finland to be in breach of Article 3 ECHR,³ in seeking to expel a former soldier of Mobutu to the DRC.⁴ The primary factors to be elucidated are familiar territory: (1) the applicant's overall credibility, (2) proof of origin and identity, and crucially (3) the importance of detailed COI. I chose this case as it concerns expulsion and a protection need outside of the ambit of the 1951 Refugee Convention and the denial of a residence permit to the applicant in Finland. The wording of Article 3 ECHR mirrors that of subsidiary protection namely: 'substantial grounds for believing that'; 'real risk of treatment contrary to Article 3'. We know from the definition of

subsidiary protection contained in the EC Regulation that serious harm is defined as including 'torture or inhuman or degrading treatment or punishment'.

International - Human Rights Law

The cornerstone of Subsidiary Protection lies within human rights law: i.e. the right of human beings not to be tortured. The primary universal instrument applicable is the United Nations Convention Against Torture⁵ (CAT). Article 3, sets out a clear and absolute prohibition on returning a person to a country where he is at risk of being tortured. A person must show he is at personal risk of being subjected to torture and the standard of proof as set out in Article 1 is that of being higher than a mere suspicion but lower than highly probable.⁶ Article 7 of the International Covenant on Civil and Political Rights⁷ (ICCPR), prohibits absolutely the removal of an individual to a place where he is at real risk of torture or to 'inhuman or degrading treatment or punishment'.⁸ Finally, the prohibition on return to torture, cruel or inhuman or degrading treatment or punishment is considered part of customary international law.⁹

Regional European - Human Rights Law

The European Convention on Human Rights,¹⁰ (and resulting case law thereof), should be the primary human rights instrument preferred by advocates, as it provides the most wide ranging and inclusive definition of torture and inhuman and degrading treatment and punishment, as discussed in immigration and non-immigration cases before the court (e.g. HIV and death row phenomenon).¹¹

CAT is an international instrument incorporated into Irish domestic law by virtue of the Criminal Justice Act 2006 but limits torture breaches to those perpetrated by state actors.¹²

It is the ECtHR case law we look to as well as CAT to understand the meaning of 'substantial grounds' which is also the standard of proof applicable. The case law shows us that a foreseeable future risk has to be established but it does not need to be highly probable or highly likely to occur and it is not necessary for all the facts to be proven. There are a number of lead cases to assist us in understanding Subsidiary Protection.¹³

Irish legal practitioners will need to have ECHR case law to hand for subsidiary protection submissions.

N v Finland

In *N v Finland*, the ECtHR found that the applicant's impending expulsion by the Finnish authorities to the DRC violated Article 3, this finding was not invalidated by the nature of the applicant's work in the DRC (the applicant being an informer in the regime of President Mobutu) or by the fact that minor offences (shoplifting) had

been committed in Finland. The court concluded "sufficient evidence has been adduced to establish substantial grounds for believing that the applicant would be exposed to a real risk of treatment contrary to Article 3, if expelled to the DRC at this moment in time. Accordingly, the enforcement of the order issued to that effect would violate that provision for as long as the risk persists."

The applicant N, born in 1972 was a Christian and member of the Ngbandi tribe. He worked as an informant for President Mobutu's DSP (Division Speciale Presidentielle) and FAZ (Forces Armees Zairoises). N was close to Mobutu's son, Kongulu, whom he knew from the age of three years, staying for some time in the same compound as Kongulu and Mobutu family members (Kongulu died in 1999). N had not disclosed initially in his asylum claim in Finland that he had made a previous asylum claim in the Netherlands between 1993 and 1995 where he stated that his father was the member of the DSP creating the protection need. N was deported back to the DRC having failed in his application for a declaration as a refugee in the Netherlands.

N explained to the Finnish authorities that he was sent to the Netherlands by the DSP to spy on Congolese dissidents and report back for reprisals to be taken on their family members in DRC. N disclosed that he spoke four languages Lingala, Kikongo, Swahili and French. Having left in a hurry, he arrived in Finland with no documents and was therefore unable to prove his nationality or identity other than by his own statements. Furthermore in the asylum claims in Netherlands and Finland N used different names and in total four different names were known to the Finnish authorities by the time they came to determine his claim.

The Directorate of Immigration in Finland found his claim to asylum not to be credible, that he had failed to prove his identity and that there was no real risk on return for him by merely belonging to the same tribe as Mobutu or having worked as a lower ranking official in the administration and preferred COI which indicated only higher ranking officials were at risk on return. Further, they relied on the fact that the situation in DRC had generally improved by 2001.

Due to the requirements of Finnish domestic law, as N's identity and background had not been convincingly established, it could not be assessed whether the reason for N's departure from DRC had been for reasons of *persecution* and therefore he could not be granted asylum but as he remained in need of *protection* he could have been granted a residence permit.

Throughout the various appeals in the Finnish Courts, N was not found to be credible and the country of origin information preferred was that the situation in DRC was delicate but that there was no reason to believe any risk of serious human rights violations. N was not granted a residence permit.

In the ECtHR N gave oral evidence. He provided reasons for the discrepancies including his use of four different names. He further produced a witness, KK who was also in the DSP in DRC and knew him. The Court found KK to be a credible witness and supportive of the applicant's own account, while noting that no testimony of KK was available to the Finnish authorities. The Immigration Directorate gave evidence and submitted that N had serious credibility failings, i.e. that he was not from the Nbandi tribe, (as they spoke Nbandi) and the fact that N spoke Kikongo, which made him more likely to be from Bas-Zaïre, another part of DRC. The Directorate concluded there would be no risk of serious human rights violations on his return to DRC and the only problems he would be likely to face would be economic. Documentary evidence was examined and considered by the Court including UNHCR guidelines of 1998, 2002 position paper and a 2002 country report and the 8th European Country of Origin Information Seminar in June 2002.

The court, in finding in favour of N said his testimony was evasive on many points and that they were not prepared to accept all of his statements including his account of travel to Finland. However, in light of the overall evidence before the Court, it found that on the whole he was sufficiently consistent and credible.

The court accepted that the applicant fled DRC in 1997 when the forces of Laurent Kabila were overthrowing the Mobutu regime. Also, they found it credible that although he was not of a senior military rank, he could be considered to have formed part of President Mobutu and the DSP Commanders' inner circle. They found sufficiently credible, that as an official in the DSP he took part in various events during which dissidents seen as a threat to President Mobutu were singled out for harassment, detention and possible execution. The Court noted that the Finnish authorities, while finding his account, not to be credible did not exclude the possibility that he might have worked for the DSP.

The Court relied on COI evidence from the UNHCR that there was a risk to former FAZ members and that factors other than rank, such as ethnicity or connections to influential persons, may be of importance if returned. The Court found that as an informant and infiltrator reporting directly to senior ranking officers close to the

President, he would run a substantial risk of treatment contrary to Article 3 if returned. The court added that the risk might not necessarily emanate from current authorities but from relatives of dissidents who may seek revenge. The Court suggested that the authorities would not necessarily be willing or able to protect him against threats.

Conclusion

Cases such as N ably demonstrate the importance of examining current and evolving case law of the ECHR, particularly in relation to Article 3 concerning the right not to be tortured or subject to inhuman or degrading treatment or punishment. Advocates will appreciate that the right not to be returned is distinct from the right to be granted a residence permit and therefore submissions will need to address all relevant aspects of an applicant's claim including any credibility failings.

Finally, I submit subsidiary protection, to be meaningful, must be considered in the context of an appeals regime which suspends deportation, including any final appeal of a deportation order in the higher courts. Corresponding human rights obligations such as the accessory human right to an effective remedy as laid down in Article 13 of the ECHR must continue to be provided for in law. The right to an appeal, which suspends deportation as long as the legal remedy has not yet been finalised, should continue to be provided in Irish law to make subsidiary protection relief a reality.¹⁴

- 1 S.I. No. 518 of 2006 European Communities (Eligibility for Protection) Regulations 2006 2(1) "person eligible for subsidiary protection" means a person - ... (c) in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, would face a real risk of suffering serious harm as defined in these regulations... "serious harm" consists of - (a) death penalty or execution, (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin, or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.
- 2 See S.I. above - Exclusion from subsidiary protection

13. (1) A person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that he or she—

a has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

b has committed a serious crime;

c has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the

Preamble and Articles 1 and 2 of the Charter of the United Nations; or

d Constitutes a danger to the community or to the security of the State.

(2) Paragraph (1) applies also to persons who instigate or otherwise participate in the commission of the crimes or acts mentioned therein.

(3) A person may be excluded from being eligible for subsidiary protection if he or she has, prior to his or her admission to the State, committed one or more crimes, outside the scope of paragraph (1), which would be punishable by imprisonment had they been committed in the State, and left his or her country of origin solely in order to avoid sanctions resulting from these crimes.

- 3 Article 3 ECHR "No one shall be subject to torture or to inhuman or degrading treatment or punishment."
- 4 N v Finland (2005) 43 EHRR 12; Application No. 38885/02 July 20, 2005
- 5 1984 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) '1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.'
- 6 Gorlick, B, *The Convention and the Committee Against Torture: A Complementary Protection Regime for Refugees*, 11 IJRL 479, p481
- 7 1969 International Covenant on Civil and Political Rights
- 8 General Comment Nos. 31 (2004) and 20 (1992) of the UN Human Rights Committee, as the committee responsible for overseeing compliance with the ICCPR.
- 9 General Comment 1997 on Article 3, UN Committee Against Torture, 1987.
- 10 1951 European Convention on Human Rights and Fundamental Freedoms as incorporated into Irish law by the European Convention on Human Rights Act 2003
- 11 D v UK 1997; Soering v UK 1989
- 12 See Chan, P *The Protection of Refugees and IDPs: Non-Refoulement under Customary International Law?* IJHR Vol 10 No.3 Sept 2006
- 13 Chahal v UK (1997) 23 EHRR 413; HLR v France (1998) 26 EHRR 2; Hilal v UK (2001) 33 EHRR 2 and Application No. 32 448/96 Hatami v Sweden, April 23 1998.
- 14 See Vedsted-Hansen, J *Common EU Standards on Asylum – Optional Harmonisation and Exclusive Procedures?* European Journal of Migration and Law Vol 7, No.4 2005 p369-376 and *Conka v Belgium* ECtHR judgement of 5 Feb 2002 para 75-83 and the Council of Europe Committee of Ministers Recommendation No R (98) 13 on the *Right of Rejected Asylum Seekers to an Effective Remedy*.



Summary of UNHCR Training on Subsidiary Protection



*Emilie Wiinblad Mathez
UNHCR*

Introduction

Emilie Wiinblad Mathez of UNHCR gave a presentation on subsidiary protection to Refugee Legal Services on 31 October 2006 in the Gresham Hotel in Dublin. The training was part of the preparing of agencies for the use of Statutory Instrument 518 of 2006, which came into force on 10 October. The full title of the S.I. is the European Communities (Eligibility for Protection) Regulations 2006. This S.I. is a transposition of Council Directive 2004/83/EC, which is also known as the Qualification Directive. UNHCR has published Annotated Comments on Council Directive 2004/83/EC, which are relevant in considering the Regulations. These Annotated Comments can be found on UNHCR's website at

<http://www.unhcr.org/home/RSDLEGAL/4200d8354.pdf>

The training given by Emilie did not necessarily reflect the views of UNHCR. The intention was to give some clarity to the context of the Regulations and to outline some of the principles involved. This is new law so the actual definitions will become clear once in use. Paul Daly has put together this summary of Emilie's presentation.

What is complementary protection?

It is protection for persons with protection needs other than those defined in the 1951 Refugee Convention. Different regions define "refugees" differently: some include broader protection concerns. UNHCR's mandate has been extended by General Assembly Resolutions to include Complementary Protection. Under UNHCR's mandate a refugee is any person who is outside his or her country of origin or habitual residence and is unable or unwilling to return there owing to:

1. A well founded fear of persecution for one of the reasons set out in the 1951 convention – or
2. Serious and indiscriminate threats to life, physical integrity or freedom resulting from generalised violence or events seriously disturbing public order.

The OAU Convention includes within its scope, in addition to the 1951 Convention definition, "every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual

residence in order to seek refuge in another place outside his country of origin or nationality."

The Cartagena Declaration, in addition to the 1951 definition includes among refugees "persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order".

In Europe, the refugee definition is limited to the 1951 convention definition and there has been no agreed definition of other forms of complementary protection. Complementary protection has therefore denoted a variety of grounds for non-return. This lack of common definition of Complementary Protection is one of the issues addressed by the EU Qualification Directive, Council Directive 2004/83/EC. In Ireland the Immigration Act, 1999 includes the leave to remain consideration including non-refoulement and humanitarian grounds.

Definition of a person eligible for subsidiary protection in the Qualification Directive

"A 'person eligible for subsidiary protection' means 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 as defined in Article 15, and to whom Article 17(1) and (2) [exclusion conditions] do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country.

Background to the Qualification Directive

The Qualification Directive is one of the Directives adopted to ensure common asylum standards throughout the EU. It was adopted on 29 April 2004.

It is a set of minimum standards. It covers aspects of how to assess a refugee claim. It introduces a common legal framework for dealing with subsidiary protection. It sets out standards for granting of status. It sets out standards for the content of international protection.

Development of the EU Common Asylum System

In 1999 the European Council at Tampere had agreed to work towards establishing a Common European Asylum System. In the words of the Qualification Directive: "The Tampere conclusions provide that a Common European Asylum System should include, in the short term, the approximation of rules on the recognition

of refugees and the content of refugee status. The Tampere conclusions also provide that rules regarding refugee status should be complemented by measures on subsidiary forms of protection, offering an appropriate status to any person in need of such protection." The Qualification Directive gives effect to these twin aims: (i) harmonisation of rules on the recognition of refugees and (ii) the introduction of subsidiary protection.

Transposition of the Qualification Directive

Under Article 38 of the Qualification Directive the final transposition date was 10th October 2006. Article 249 of the EC Treaty states "A Directive shall be binding as to the result to be achieved, upon each member state to which it is addressed, but shall leave to the national authorities the choice of form and methods." Ireland's approach was to publish the Scheme for an "Immigration, Residence and Protection Bill" in September 2006, intending to enact this in 2007. In the meantime interim Statutory Instrument No. 518 of 2006 transposed the Directive into Irish legislation in time for the deadline and it came into force on 10 October.

Some key points in the Scheme for an Immigration, Residence and Protection Bill

It introduces subsidiary protection. It proposes a single procedure for assessing refugee status, subsidiary protection status and leave to remain. The Office of the Refugee Applications Commissioner is to be assimilated into the Irish Naturalisation and Immigration Service. The Bill integrates immigration and refugee issues.

Actors of persecution or serious harm (Regulation 2)

Note that non-state actors can be agents of persecution.

Note also that international organisations are listed as potential providers of protection.

Application for protection (Regulation 2)

In the Regulations an application for protection comprises those applying for refugee status or for subsidiary protection.

Persons eligible for subsidiary protection (Regulation 2)

Note that persons from an EU Member State cannot qualify for subsidiary protection.

Note that the definition indicates that the refugee question must be exhausted.

Protection against persecution or serious harm (Regulation 2)

The definition in Regulation 2 sets out qualifications for when a state has provided protection. Note that non-state entities have been included as potential protection providers. The Regulation may be complemented by non-refoulement which is absolute.

Definition of serious harm (Regulation 2)

According to Regulation 2 of the Regulations and Article 15 of the Directive “serious harm” consists of—

- (a) death penalty or execution,
- (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin, or
- (c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

Application conditions (Regulations 3 and 4)

The Regulations apply to:

- ORAC decisions/notification made on or after 10th October 2006
- RAT decisions/notification made on or after 10th October 2006
- Notification of deportation of a failed asylum seeker – 15 day letter given on or after 15th October 2006.

The subsidiary protection process only applies to “failed” asylum seekers. Late submissions may not be considered. Submission in the wrong format may also not be considered. In applying for subsidiary protection it is important to review the format to make sure that all relevant documents have been submitted and to clarify any unclear issues. Regulation 4 clarifies that it will be a two step process: first, subsidiary protection, then, other leave to remain issues will be considered including non-refoulement.

Assessment of facts and circumstances (Regulation 5)

Regulation 5 of the Regulations and Article 4 of the Directive deal with assessment of facts and circumstances.

The assessment of facts and circumstances is forward looking. However, exceptionally it can be based on past experience alone.

Regulations 6 to 8

Regulation 6 deals with protection needs arising sur place. Regulation 7 deals with internal protection. Regulation 8 deals with control of a state or a substantial part of its territory by an international organisation.

Qualification for being a refugee (Regulations 9 to 12)

In addition to dealing with subsidiary protection the Regulations also deal with refugee status. Thus Regulations 9 to 12 of the Regulations and Articles 9 to 13 of the Directive have to do with qualification for being a refugee. Regulation 9 contains some of the forms acts of persecution can take.

Regulations 13 to 19

Regulation 13 deals with exclusion from subsidiary protection. Regulation 14 deals with revocation of or refusal to renew subsidiary protection. Regulation 15 deals

with the specific situation of vulnerable persons. Regulation 16 defines family reunification for persons with subsidiary protection status. Regulation 17 states that permission to remain in the state is for three years, which is renewable, subject to certain conditions. Regulation 18 regulates travel documents. Regulation 19 outlines the rights for persons with subsidiary protection and their family granted permission to be in the state.

Death penalty or execution

Where substantial grounds have been shown that if returned the person will face a real risk of meeting a death penalty or execution, the person may be eligible for subsidiary protection. The relevant human rights law is European Convention on Human Rights Protocol 6 and the International Covenant on Civil and Political Rights, Optional Protocol 2.

Facts and figures on death penalty

Amnesty International on this topic:
60 countries have the death penalty
5,186 persons were sentenced to death in 53 countries in 2005

2,148 persons were executed in 22 countries in 2005

94% of the 2,148 were in China, Iran, Saudi Arabia and the USA

Methods used;

- **Beheading** (in Saudi Arabia, Iraq)
- **Electrocution** (in USA)
- **Hanging** (in Egypt, Iran, Japan, Jordan, Pakistan, Singapore and other countries)
- **Lethal injection** (in China, Guatemala, Philippines, Thailand, USA)
- **Shooting** (in Belarus, China, Somalia, Taiwan, Uzbekistan, Viet Nam and other countries)
- **Stoning** (in Afghanistan, Iran)

Torture, inhumane, degrading treatment or punishment

Where substantial grounds have been shown that if returned the person will face a real risk of facing torture, inhumane, degrading treatment or punishment the person may be eligible for subsidiary protection. The relevant law is the Criminal Justice Act, 2006, the European Convention on Human Rights Act 2003 and International Human Rights Law, to which Ireland is signatory.

What is torture?

Understanding of torture depends on the definition used. There are the European Court of Human Rights case law interpretation, the Convention against Torture definition and the Criminal Justice Act of 2006.

Serious and individual threat to a civilian’s life or person by reason of indiscriminate violence

Where substantial grounds have been shown that if returned the person will face a real risk of facing serious and individual

threat to a civilian’s life or person by reason of indiscriminate violence due to violence in international or internal or armed conflict the person may be eligible for subsidiary protection. This reflects the practice of EU Members of providing protection from return to individuals fleeing armed conflict.

Serious and individual threat

Individual threat is different from “being targeted” – that would be persecution. It must be a “reality” for that individual. There could be geographical considerations involved. The person could be from a place - where such threats are real. It has yet to be interpreted in EU case law.

Addendum

Examples of Jurisprudence

Emilie quoted the following research by Marisa Gomez regarding jurisprudence for torture, inhuman treatment/punishment and degrading treatment /punishment:

Meaning of torture: “*to attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering*” (Ireland v UK- ECtHR).

Meaning of inhuman treatment/punishment: Ill-treatment must attain a minimum level of severity.

Meaning of degrading treatment/punishment: “*humiliation or debasement attaining a minimum level of severity. That level has to be assessed with regard to the circumstances of the case*” (Campbell & Cosans v UK- ECtHR).

The “contemptuous” burning of Kurdish villagers houses without taking any safety precautions or offering financial and other assistance to them (see Selcuk & Asker v Turkey; Akdivar v Turkey- ECtHR).

Removal from the UK of man suffering from AIDS where the removal would subject him to “acute mental and physical suffering” (see D v UK- ECtHR). Note that the Court stressed the **exceptional circumstances** and the fact that the applicant was at the terminal stage of the disease.

Rape can constitute a violation of Article 3 of the ECHR. (see Aydin vs Turkey – ECtHR)

Conditions in detention may themselves constitute treatment in violation of Article. 3 of the Convention (see Tekin v Turkey - ECtHR).

The so-called “5 techniques”: subjection to sleep deprivation, continual noise, deprivation of food and drink, covering of the head and “wall standing” (forcing detainees to lean against the wall for hours in a spread-eagle position with the weight of their body on their fingers) (see Ireland v UK - ECtHR).





Between refugee and citizen:

Some socio-political reflections on Ireland's refugee law and practice¹

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Introduction

The deportations in March 2005 of 35 people the state described as 'failed asylum seekers' and the popular mobilisation on behalf of the deportees which ended in the return of one 'aged out' young Nigerian, have occasioned new public debates on asylum and deportations. Assuming a name, a history, and a specific 'story', reported in the Irish media in sympathetic and emotional terms, these deportees were no longer just faceless items of 'human waste' (Bauman, 2004).

However, far from being a humanitarian response to popular protest, returning the young man was more about the Irish 'us' and about the integrity of 'our' immigration, asylum and deportation systems, than about the Nigerian 'other'. The state seemed more concerned about the deportee's class mates not being able to study for their Leaving Certificate than about the young man, deported to Lagos without family, friends or means of support.

The state's insistent protests demonstrate once again the demonisation of those who seek refugee status as 'bogus refugees', 'economic migrants', 'illegal immigrants', or simply 'failed asylum seekers', linked to criminality and breaches of state security. Asylum seekers were presented as costing the state too much and as competing with disadvantaged populations for scarce resources. Crucially, the need to control them is presented as essential to the 'common good' and 'the integrity of the asylum process'.

This paper examines some theoretical implications of the 'racial state' (Goldberg, 2002) enacting refugee law and practice, to first argue, after Hannah Arendt, Zygmunt Bauman and Giorgio Agamben, that the refugee is s/he who has lost all rights and therefore 'is the sole category in which it is possible today to perceive the forms and limits of a political community to come' (Agamben, 2004). Refugees, according to Bauman, are human waste, with no useful function to play in the land of their arrival and temporary stay and no intention or realistic prospect of being assimilated and incorporated into the new social body; from their new present place, the dumping site, there is no return and no road forward (Bauman, 2004: 77).

Following Hannah Arendt (1975), who said that the Rights of Man was compromised from the start due to its necessary realisation as the rights of the *citizen*, Costas Douzinas (2000) argues that human rights were always compromised by being secondary to the rights of national sovereignty (Hirsch, 2003: 152). Therefore, the second argument of this paper is that state claims of humanitarianism as well as human rights-based NGO and popular responses to the injustices of the asylum system fail to historicise the Eurocentric origins of the human rights discourse. Alana Lentin (2005) argues that human rights are always bestowed by those whose rights are assured upon helpless others, and that the professionalisation of human rights activism over the last two decades disconnects it from the lived experiences of those on whose behalf it seeks to act, thereby dehumanising them.

'We refugees'

In *The Origins of Totalitarianism* (1975), Hannah Arendt argues that although the Declaration on the Rights of Man supposedly bestowed 'inalienable' rights, 'irreducible to and undeducible from other rights or laws', they proved to be unenforceable – even in countries whose constitutions were based upon them – whenever people appeared who were no longer citizens of any sovereign state (Arendt, 2000: 34). The Italian political philosopher Giorgio Agamben (2004) argues that laws depriving people of citizenship (as in the Nazi 1935 Nuremberg Laws), which create masses of refugees, mark a 'turning point in the life of the modern nation-state and its definitive emancipation from the naïve notions of "people" and "citizen"'. Simply put, human rights, bestowed by numerous international conventions ever since the 18th century Declaration, do not apply to those outside the citizenship pale.

Human rights and treaties, including the 1951 Convention in relation to Refugees, are reciprocal agreements between sovereign states, even though states are the prime perpetrators in depriving individuals of their 'human rights'. This means, Arendt says, that crimes against human rights,

can always be justified by the pretext that right is equivalent to being *good or useful* for the whole in distinction to its parts. (Hitler's motto that 'Right is what is good for the German people' is only the vulgarised form of a conception of law which can be found everywhere) (Arendt, 2000: 40).

Since refugees are seldom considered 'good' or 'useful' by the state, on the contrary they present 'problems' for sovereignty and state boundary, it is unsurprising that despite the universal

rhetoric of 'human rights', refugees, always considered temporary in the expectation that most – and this includes invited 'programme refugees' – will eventually return to 'where they came from', epitomise what Agamben theorises as 'bare life'.

Homo sacer and racial states

Starting from Foucault's (1978) theorisation of the modern nation-state as a 'state of population', using a series of technologies to monitor and control the nation's biological life which becomes a problem of sovereign power, Agamben (1995) shifts the theorisation of social life from the friend- versus-enemy categorical pair of western politics, to the 'bare life'- versus-political sovereignty binary. In the modern age of nation states, beyond Foucault's life (*bios*) becoming the principal object of the calculations of state power (biopower), Agamben posits 'bare life' (*zoe*) as coinciding with the political realm, signifying the state of exception.

Bare life, which Agamben borrows from Roman law to name *homo sacer*, is the opposite of sovereign power, standing at the point of indistinction between violence and the law (Agamben, 1995: 10). For Agamben, *homo sacer* is the ideal-type of the excluded being, whose life is devoid of value. Therefore killing a *homo sacer* is not a punishable offence, but neither can the life of a *homo sacer* be used in religious sacrifice. Zygmunt Bauman (2004) uses this theorisation to think of modernity constructing some categories of people as *human waste*, and argues that throughout modernity, the nation-state 'has claimed the right to preside over the distinction between order and chaos, law and lawlessness, citizen and *homo sacer*, belonging and exclusion, useful (=legitimate) product and waste' (Bauman, 2004a: 33).

Agamben's concept of bare life is useful in thinking about refugees and statelessness in the current age of global population movements. David Theo Goldberg (2002) posits modern nation-states as 'racial states', which exclude in order to construct homogeneity – which he sees as 'heterogeneity in denial' – while appropriating difference through celebrations of the multicultural. The racial state is a *state of power*, asserting its control over those within the state and excluding others from outside the state. Through constitutions, border controls, the law, policy making, bureaucracy and governmental technologies such as census categorisations, invented histories and traditions, ceremonies and cultural imaginings, modern states, each in its own way, are defined by their power to exclude (and include) in racially ordered terms, to categorise hierarchically, and to set aside. In the modern state, race and nation are defined in terms of each other to produce a coherent picture of the population in the

face of a divisive heterogeneity, which may be defined as standing *outside* the state, or as the containment of the 'other' within.

I propose to theorise Ireland, like other modern nation-states, as a 'racial state', whose main aim is to exert control over its territory-nation nexus, even in the era of globalisation, when, national boundaries arguably become secondary in a global, or European 'migration regime'. This explains the state's impetus to control asylum seekers and migrants, rarely linking between conflict zones which produce asylum seekers and their human consequences. Instead, the racial state confines its concern to the need to demonise asylum seekers, stem their flow, preventing them from landing to present asylum applications (as has been seen in Britain and Ireland, where the state boasts the success of its asylum policies by the declining numbers of asylum applications, as asylum figures for Ireland demonstrate,² omitting to mention the hardships heaped upon potential applicants prior to embarkation), all in order to regain control, as I now demonstrate by citing some examples of Irish refugee law and practice.

Stemming the tide, regaining control

Colin Harvey (2003) links state sovereignty to the insistence by states on determining who is a refugee and who is entitled to enter their territory and become a citizen. Although the 1951 Convention relating to the Status of Refugees combines this concern with the recognition of the humanitarian needs of displaced persons, it does not address the root causes of refugee movements. Like all international instruments, the 1951 Convention is a *compromise* (Harvey, 2003: 8). In line with critiques of international law as leaving too much to state discretion, Harvey concludes that refugee law, with its focus on the award of a status, leaves too much to the (racial) state to decide. The purpose is always to 'secure national level protection' (Harvey, 2003: 17).

Liza Schuster posits the demonisation of asylum seekers by states and media to conjure up cheat, liar, criminal, sponger – someone deserving hostility not by virtue of any misdemeanour, but simply because she is an 'asylum seeker – a figure that has become a caricature just as 'Blacks', 'Jews' and 'Gypsies' have been and still are. This is part of a *racist asylum regime* (Schuster, 2003: 244). Wishing to exert control over their border, European racial states – including Ireland – have developed regimes and sets of practices – including dispersal, detention and deportation – once only possible at war time and today considered 'normal' and 'common sense': see the competition between British parties on limiting immigration, but also the acceptance by many human rights NGOs

that deportation is a legitimate part of the 'asylum process'.

Dispersal and direct provision

Dispersal means that asylum seekers have no say in where they live, making the formation of networks of family and friends near impossible. In Britain, the rationale behind dispersal is sharing the burden imposed by asylum seekers (Schuster, 2003: 248). In Ireland, at the end of March 2005, there were 7,280 asylum seekers in 68 direct provision centres (4 reception and 64 accommodation centres) of whom 1,678 asylum seekers (21%) had been residing in direct provision for over 2 years. A quarter (2,094) of those living in direct provision centres are under the age of 4. Asylum seekers with children, who arrived in the country after May 1st 2004, do not receive child benefit. In addition to basic accommodation and meals, each asylum seeker receives €19.10 per adult and €6.60 per child per week, not raised since the allowances were first introduced in 2000 (www.irishrefugeecouncil.ie/stats).

Not allowed to work or access education, asylum seekers, whose income is below 20 per cent of the national household average, are 'the poorest of the poor', their presence marking 'the nadir of the putative values of the Celtic Tiger; they are marginalized, poor, and, in many respects, they lack freedom' (Loyal, 2003). In some dispersal centres, asylum seekers are housed in rows of mobile homes on a tarred surface. Food is basic and insufficient, and while some classes are provided, most residents have nothing to do all day. According to Salome Mgubua, development support worker in the Athlone direct provision centre, this resulted in asylum seekers feeling segregated and dehumanised. While asylum seeker mothers often suffer from depression and boredom, it is the men who experience greater difficulties, having been used to 'being providers and working' (Holland, 2005: W4).

Asylum seekers in Ireland are also excluded from social welfare provisions in relation to rent allowance.³ According to the Free Legal Advice Centres (FLAC, 2003), direct provision represents a departure from the normal Irish social welfare code, creating what Agamben would call 'a state of exception', where asylum seekers are positioned in a zone of indistinction between inside and outside. According to FLAC, direct provision contravenes the Equal Status Act, even though the Act does not permit a challenge to enactments by the government, further reinforcing the racial state. Peter O'Mahony of the Irish Refugee Council argues that the Irish state is enforcing and enabling 'policies of prevention and deterrence through the de facto exclusion of asylum seekers, while at the same time presenting the illusion of making earnest

efforts at their integration' (O'Mahony, 2003: 135).

Detention

Liza Schuster argues that the detention of asylum seekers, whose only 'crime' is a wish to settle in a country other than their own, is widespread across Europe, even though conditions vary a great deal. Detention means depriving people of their liberty for an unspecified period, without trial, without rights to automatic bail or to legal representation, without being informed of their rights or of what is happening in a language they understand (Schuster, 2003: 249). While Ireland, contrary to several EU states, does not have a policy of systematically detaining asylum seekers, the 1996 Refugee Act as amended does provide for the detention of asylum seekers in certain circumstances (Fraser, 2003: 95).⁴

Deportations

In *The Deportation Machine: Europe, Asylum and Human Rights* (Feckete, 2005), Liz Feckete, who documented 200 case studies, argues that British political parties compete in setting deportation targets. This 'target culture' results in brutal use of force in removals, often in violation of domestic law via powers granted to immigration officers, in the removal of protection from refugees fleeing conflict, in the contravention of the UN Convention on the Rights of the Child when deportation officials entered schools which become sites of deportations, and in overcrowded, poor and unsanitary conditions in pre-deportation detention centres. The Institute of Race Relations has published a National Declaration against Deportations of School Students, stating that 'Deportation affects a child's educational progress, health and well-being... We are also deeply concerned about the detrimental effect on the wider school or college community when personal relationships are disrupted and friends are separated' (www.irr.org.uk).

In Ireland, before the enactment of the 1999 Immigration Act, the Minister of Justice's power to deport non-nationals was based on the 1935 Aliens Act and the 1946 Aliens Order, rendered 'beyond the scope' only in 1999 with the enactment of the Immigration Act, which, according to the Irish Refugee Council, shifts the focus from identifying persons in need of protection, 'towards techniques devised to screen out as many applications as possible'.⁵ This has resulted in increasing numbers of deportations: from 146 in 2000, 278 in 2001, 521 in 2002, 1,528 in 2003 until 16 October, and 599 (out of 2,866 deportations orders) in 2004; in addition, 611 people were voluntarily repatriated.⁶ In all, since 1999 a total of 2,004 people were deported from Ireland, and 2,299 were 'voluntarily repatriated' by July 2004 (www.irishrefugeecouncil.ie).

The March 2005 deportations, in which immigration officers entered schools and allegedly behaved aggressively, upsetting pupils and teachers, demonstrate the Irish state's resolve to continue its policy of targeted deportations (Lentin and McVeigh 2006).

Even though only a minority of those issued with deportation orders are actually deported, EU states monitor neither the dangers faced by deportees on arrival, nor the inhuman and degrading conditions under which people are deported, leading to several deaths in recent years (Schuster, 2003: 252). Schuster (2003: 253) argues that from the state's point of view, the reason for continuing deportations, despite the fact that they are expensive in both financial and human terms, is that they are both ineffectual and essential, confirming the lie that states can control their boundaries and 'remove from their territory those without any right to remain', which is necessary to 'assuage public opinion, which would not view the state's incapacity in this area with equanimity'. However, the assumption that the threat of deportation creates fear and may persuade some to return 'voluntarily' is only speculative.

Eithne Luibhéid (2004) contextualises the arrival of asylum seekers to Ireland in global restructuring, global capital accumulation, and global wars, and argues that racial states need asylum seekers in order to 'redraw racial and national boundaries that have become destabilised in the contemporary era'. Her critique of EU asylum policies leads Schuster to insist that *all* controls are unacceptable, despite costs to receiving countries, and that protecting one's identity is *not* a valid reason for denying people the opportunity to save or improve their lives (Schuster, 2003: 255).

It is worth noting, however, that many human rights NGOs, including the Irish Refugee Council and Amnesty International, accept deportations 'as a reality', and merely insist that deportations be carried out in conformity with Ireland's human rights obligations (Irish Refugee Council, 2004), which begs the question of whether states and human rights organisations alike uphold the state's right to control and maintain its sovereignty and boundaries.

Conclusion: Human rights and its others

Harvey (2003) argues that international law (including several conventions and human rights instruments) provides minimum standards in relation to refugees, but admits that much is left to national legal systems to decide. Therefore, deconstructing the accepted wisdom that the inhuman treatment of asylum seekers by Western racial states is about the infringement of their 'human rights' (i.e. Fraser and Harvey, 2003; Feckete, 2005), I

want to argue that the very notion of 'human rights' is no longer theoretically adequate.

Costas Douzinas (2000) follows Arendt in focusing on the plight of refugees who are denied even the right to have rights by virtue of their expulsion from their communities and the refusal of other communities to let them in. The human rights discourse is above all limited by the differentiation made between refugees and citizens (sharpened by Ireland using a constitutional amendment to revoke birth right citizenship to further differentiate between citizen and non-citizen). Douzinas emphasises state sovereignty as the 'centrally important terrain for the battle over rights in a globalised world' (Hirsch, 2003: 151). His critique of human rights centres on exclusion being at the heart of a polity based on the rights of citizenship, and on human rights as covering up the ambitions of powerful states. He argues that human rights are at their strongest when they are utopian and at their weakest when they are tied to institutions or actions in the existing world.

Alana Lentin (2005) further posits a strong link between 'historical' racism – based on being able to civilise 'racial inferiors' by exposing them to the 'superior' culture of the dominant group – at the heart of racial states' integration policies, and human rights which dehumanise those they seek to benefit because they are practiced *on behalf of* others and granted and violated by states in equal measures. When racial states seem committed to both anti-racism and human rights, and when human rights become professionalised, she argues, 'migrants themselves have become consistently absent from the discussions that take place in these privileged transnational spaces, due precisely to the fact that they are not free to travel across borders once they reach Europe.'

Ultimately, according to Agamben, differentiating between refugee and citizen harbours dangers not only for the refugee – *homo sacer*, outside the law, forever positioned in the twilight zone of the 'state of exception' – but also for the citizen. If, as Agamben argues, the camp – concentration camp as well as refugee camp – is the paradigm for modernity, a state we are all still living in, then the apparently marginal figure of the refugee, in unhinging the old trinity of state-nation-territory, deserves to be considered the central figure of our political history, calling into question the very principles of the nation-state:

It is only in a land where the spaces of states will have been perforated and topologically deformed, and the citizen will have learned to acknowledge the refugee that he himself is, that man's political survival today is imaginable (Agamben, 2004).

- 1 This is a version of a paper presented at the Irish Society of International Law's Refugee Law in the Age of Globalisation conference, Institute of International Integration Studies, Trinity College Dublin 26 April 2005
- 2 Asylum applications in Ireland went up from 39 in 1992 to peak in 2002 at 11,634, significantly going down to 7,900 in 2003, 4,766 in 2004, and 1,259 in 2005 to 31 March. Of 7,900 applications in 2003, 345 (4.2%) were granted refugee status, 5,841 (73.9%) were refused status on various grounds, and 1,123 (21.8%) were deemed withdrawn from the asylum process (ORAC 2003 Annual Report, www.orac.ie). In 2006, following the abolition of the right to Irish citizenship to children born in Ireland to migrant parents, asylum numbers have fallen to 1997 levels. Schuster documents a sharp decrease throughout the EU from 675,460 in 1992 to 251,770 in 1997, with a slower increase to 384,530 in 2001. Ireland, with an annual average of 3,974, ranks 8th per 1,000 inhabitants (UNHCR, cited by Schuster, 2003: 238).
- 3 Section 13 of the Social Welfare Miscellaneous Provisions Act, 2003, provides a statutory footing for the exclusion of asylum seekers from entitlement to rent supplement (O'Mahony, 2003: 134).
- 4 McGee documents media reports of several cases of asylum seekers being detained prior to deportation (2003: 189-90).
- 5 Irish Refugee Council, 'Amendments to the Immigration Bill 2002', (Dublin, press release IRC, 17 June 2003, emphasis added).
- 6 Immigration Division (ECRE Country Report 2004, Ireland).



The "IBC 05" Scheme and the Rights of Irish Citizen Children



by John Stanley BL

Introduction

The Twenty-seventh Amendment of the Constitution of Ireland provided that children born on the island of Ireland to parents who were both non-nationals would no longer have a constitutional right to Irish citizenship. The amendment was effected by the Twenty-seventh Amendment of the Constitution Act, 2004, which was approved by referendum on 11th June 2004 and signed into law on the 24th June. It partially reversed changes that had previously been made to the Constitution as part of the Belfast Agreement of 1998. The Irish Nationality and Citizenship Act 2004 gave legislative effect to the 27th amendment, and this Act was commenced on 1st January 2005. Since that date it is no longer possible for people to bestow Irish citizenship on children by arranging for their birth in Ireland.

On 14th December 2004 the Minister announced revised arrangements for

processing claims from non-national parents of Irish children for permission to remain in Ireland. A notice setting out details of the scheme was published on 15th January 2005. This notice invited applications for permission to remain in the State from non-national parents of Irish born children before the end of March 2005. The revised arrangements became known as the “IBC 05” scheme.

On 14th November 2006 the High Court handed down judgment in *Bode & Ors. v the Minister for Justice, Equality and Law Reform*.¹ In the application before the Court non-Irish parents of a child born in Ireland prior to 1st December 2005 had applied to the Minister for permission to remain in Ireland pursuant to the IBC 05 scheme. It was common case that the child’s father was not continually resident in Ireland from the date of birth of his child, and that the child’s father was in Ireland on the date he submitted his application. While the citizen child’s mother was granted permission to remain, her father was refused. The applicants sought to quash the decision to refuse the applicant father permission to remain. The Court’s decision quashing the Minister’s decision clarifies some key issues regarding the rights of Irish citizen children. This article summarises the decision and discusses some of these issues.

The Terms of the Scheme

The High Court noted that no one document sets out the terms of the revised arrangements, but that the four relevant documents were (a) the announcement by the Minister on 14th December 2004, (b) the notice setting out the scheme published on 15th January 2005, (c) the application form, and (d) a letter issued to the parent applicant.

The announcement stated that the Minister intended to grant residence only to those people who could show that they had been resident in Ireland taking care of their Irish citizen children, had not been involved in criminal activity, and were willing to commit to becoming economically viable. The announcement also stated that applicants would be required to provide proof of their identity, period of residence, and of their relationship with their child. Question 3(e) of the application form asked “Have you left the State for any reason since the birth of your first Irish born child?” Applicants were required to tick ‘yes’ or ‘no’, and give details if the answer was yes. Section 4 of the form requested evidence of continuous residence in the State since the birth of the child, or, in the alternative, an explanation why such evidence could not be provided. The letter addressed to the child’s father referred to the “requirement” under the revised arrangement of continuous residency in Ireland, stated that he did not meet the criteria for granting permission to

remain in the State under the revised arrangement, and stated that his application had been refused.

Issues Before the Court

The applicants claimed that the taking of a decision to refuse a parent residency for failure to meet a requirement of continuous residency without considering the rights, including welfare rights, of the citizen child was in breach of the citizen child’s rights under articles 40.3 and 41 of the Constitution. The applicants asserted the right of the citizen child to live in Ireland pursuant to article 40.3.1. This argument was based on the judgment of the Supreme Court in *AO and DL*.² The applicants asserted the child’s right to be reared and educated with due regard to welfare under article 40.3.1. This argument was based on the judgment of the Supreme Court in *G v An Bord Uchtála*³ and *DG v EHB*.⁴ The applicants also asserted that as the parent applicants were married to each other their daughter had rights that a child derives from being a member of a family within the meaning of Article 41. The applicants also claimed that the taking of a decision to refuse residency for failure to meet a requirement of continuous residency without considering the rights of the child to respect for her private and family life was in breach of the State’s obligations under article 8 of the European Convention on Human Rights, and consequently in breach of section 3 of the European Convention on Human Rights Act 2003.

The Respondent argued, *inter alia*, that the IBC05 scheme was introduced in the exercise of the inherent power of the Executive to formulate and execute immigration policy, that the determination of the scheme’s criteria was a matter of policy and not subject to judicial review, and in the alternative, that the Respondent was not obliged to consider the rights of the child because the refusal did not alter the status of the refused parent, did not involve the breaking up of the family, and occurred in the context of a scheme that granted a privilege rather than recognising an entitlement, and as the child’s rights would be otherwise considered pursuant to section 3 of the Immigration Act, 1999, as amended. The Minister also argued that there was no interference with the child’s rights pursuant to article 8 of the European Convention on Human Rights.

It was undisputed that the Respondent is an “organ of the State” and in considering and determining applications under the scheme was performing a “function” within the meaning of section 3(1) of the 2003 Act. The Court stated that the Respondent accordingly was under a statutory obligation pursuant to section 3 of that act to consider and determine applications under the scheme in a manner compatible with the State’s obligations under the European Convention on Human Rights. The Respondent also did not dispute that

he was constrained by obligations flowing from the Constitution, including rights guaranteed under Article 40, but did dispute the extent of this constraint. The Respondent did not dispute that he was bound to act in accordance with the principles of constitutional justice and fair procedures.

The High Court Decision

Terms of the Scheme

The Court stated that the Respondent, by the announcement of 14th December 2004, committed himself to consider and determine applications pursuant to the scheme. The Court further stated that there was nothing in any of the documents outlining the terms of the scheme that precluded from making an application anyone who was not continuously resident in the State from the date of birth of a citizen child. The Court stated that insofar as the Minister relied on the application form, the details sought at section 3(e) did not imply automatic exclusion from consideration if a person had left the State since the date of birth of their child. The Court acknowledged that the length of absence and reason for absence might be relevant.

Susceptibility of the decision to judicial review

The Court stated that what is and remains policy is a matter exclusively for the Executive or Oireachtas and is not subject to judicial review, but that where the Oireachtas transforms policy into legislation or where the Executive takes a decision that impacts on an individual, then if it is alleged that such legislation or decision is contrary to constitutional or legally protected rights, then it is a matter susceptible to judicial review by the Superior Courts.

Constitutional Rights

The Court stated that the citizen child is central to the scheme. The Court concluded that the Minister was bound to act in a manner consistent with the State guarantee to defend and vindicate as far as practicable the personal rights of the citizen, including the right to live in the State and to be reared and educated with due regard for her welfare. The Court stated that the grant of permission to remain in the State is a benefit to the lives of the Irish child as well as for the parent applicants as the permission enables the parents to work in the State, create a settled family life and make secure plans for the child’s upbringing and education. The Court found that the Minister breached the rights of the citizen child under articles 40.3 and 41 of the Constitution in refusing an “IBC 05” application without consideration of the rights of the citizen child in circumstances where he had committed himself to consider applications for permission to remain on the basis of parentage of an Irish child. Applying the judgment of Murray J

(as he then was) in *AO and DL* to the facts of the case, the Court found that the citizen child of non-national parents had a *prima facie* right to be educated and reared with due regard to her welfare. The Court stated that these rights are qualified, and that the Minister may decide for good and sufficient reason, in the interests of the common good, that a parent be refused permission to remain even if this would not be in the best interests of the child, so long as such decision is not disproportionate to the ends sought to be achieved.

ECHR Rights

The Court distinguished between alleged interference in the right to respect for family life and the alleged interference with the citizen child's right to respect for private life. The Court stated that whether the applicants enjoy a family life is a question of fact. In the instant case the Court was satisfied that at the date when the father made an application the citizen child had a family life with her parents in Ireland within the meaning of article 8, and that her family therefore enjoyed a family life in the State meriting the respect of the authorities.⁵

The Court stated that the onus was on the applicants to establish that the decision to refuse residency constituted an interference with the right to respect for family life. The applicants asserted that there was interference with the ability of the parents to provide for the welfare and rearing of the child as a refusal meant the parents would not be permitted to work in the State. The applicants advanced no authority that found interference in the right to respect for family life in the absence of interference in the ability of family members to maintain or develop their relationships, and the Court found that the applicants had therefore not discharged the onus of proof on this point.

The Court stated that the applicant child who had lived in Ireland since her birth must be considered to have a private life in Ireland that demands respect from the Minister (*Niemietz v Germany*;⁶ *Sisojeva v Latvia*⁷). The Court stated that the issue therefore was whether the applicants had established that the taking of a decision to refuse an application under the scheme constituted an interference with the respect for such a right. The Court stated that the Convention guarantees rights that are practical and effective rather than theoretical, and noted that the citizen child was dependent on her parents' presence in Ireland for the effective exercise of her right to a private life.

The Court noted that in *Kutzer v Germany*⁸ⁱ the European Court of Human Rights stated that regard must be had to the fair balance that has to be struck between the competing interests of the individual and the community, and that the State enjoys a certain margin of appreciation.

The High Court stated that this means, at a minimum, that the respondent is required to determine whether the citizen child's right to respect for her private life requires that the parent be given permission to remain in the State, and must make a fair balance between the rights of the individual child and the community. The Court stated that this in turn necessitates consideration of the relevant (i.e. Constitutionally protected) rights of the citizen child.

The Court found that in deciding to refuse the child's father's applications without considering the right to a private life, in the sense of Constitutionally protected personal rights of the citizen child, was an interference with those rights for private life protected by article 8 of the Convention. The Court noted that a decision that interferes with article 8 rights may be justified under article 8(2) of the Convention, but that no such submissions were made on the Minister's behalf.

Finding & Relief

The Court found that the Minister's decision was in breach of the citizen child applicant's rights under article 40.3 and under section 3 of the European Convention on Human Rights Act 2003. The Court held that the applicants were entitled to *certiorari* quashing the Minister's decisions refusing the citizen child's father's IBC 05 application, and ordered that his application be remitted to the Minister.

Supplemental Decisions

The proceedings here discussed were heard with four other similar but not identical applications,⁹ and three other similar applications were heard immediately afterwards.¹⁰ While there were some factual differences between the applicants' situation in these other proceedings, the Court found that there was no substantive difference between the instant case and the position of the applicants in six of the seven supplemental cases. Accordingly, those judgments follow that of *Bode*.

The Court found that the applicants in one of the supplemental cases, *Edet & Anor. v The Minister for Justice, Equality and Law Reform*, were in a significantly different factual situation that had a bearing on the outcome of the case. The parent applicant in *Edet*, a Nigerian national, applied under the IBC 05 scheme from Nigeria. The Court stated that the essential feature of the revised arrangements was that "applications from non-national parents of Irish born children born before 1st January, 2005, for permission to remain in the State can be made on form IBC 05". The Court stated that an application from outside the State would inevitably have to have been an application to re-enter the State and an application thereafter to remain in the State. Construing the announcement of 14th December 2004 and the other relevant documents in accordance with their plain

meaning, the Court concluded that the scheme was not open to people who were outside Ireland at the date of application. The applicants' claims in that case were therefore dismissed.

Issues Arising

The Impact of Policy on Individuals

The Court helpfully clarified between policy, which is a matter for the Executive or Oireachtas, and where policy is transformed into legislation or a decision that impacts on an individual, which is a matter for the Court on review if it is alleged that such legislation or decision is contrary to constitutional or legally protected rights.

Beneficiaries of Permission to Remain

The decision emphasises that the beneficiaries of a grant of permission to remain are not only those who make the application, i.e., the parents of an Irish child, but also, and crucially, the citizen children themselves. As the court noted, permission to remain in the State enables the parents to work in Ireland, create a settled family life, make plans for the upbringing and education of the child, and remove uncertainty and the threat of deportation. Accordingly, while the applicants under the scheme were invariably non-national parents of Irish children, the Irish children themselves benefited from the successful outcome of the applications, which vindicated their rights.

Continuous Residency and the Terms of the Scheme

The Court clearly set out that there was nothing in any of the documents regarding the scheme that provided that the revised arrangements would not apply to a person who was not continuously resident in Ireland since the birth of the child. The Minister's reason for refusing the parent applicant's application was that the parent applicant had not fulfilled the criterion of continuous residency. Instead, the Court emphasised that the citizen child is central to the scheme, and that the Minister was bound to act in a manner consistent with the State guarantee to defend and vindicate as far as practicable the personal rights of the citizen, whatever the criteria of the scheme were. By way of comparison, the Court found in *Edet* that it was an essential feature of the scheme that applicants be resident in Ireland at the date of application, as otherwise the application would have necessarily been for both permission to enter and remain. Accordingly, while continuous residency was not an essential term of the scheme, it is essential that an applicant be resident in Ireland at the time of application.

Theoretical v Effective Rights

The Court's approval of the cited ECHR case law clarifies that the child's rights under the Convention are to be guaranteed in a practical and effective manner. As the

child in *Bode* was of an age that the effective exercise of her right to a private life in Ireland was dependent on her parents' presence in the State, and their ability to provide for her, Article 8 of the ECHR was therefore seen to pose a positive obligation on the Minister to grant the child's parents permission to remain in Ireland. The Court noted that these rights are not absolute and are subject to qualification. Article 8(2) of the ECHR permits derogation from the right to private life where interference by a public authority with the exercise of the right is in accordance with the law and is necessary and in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. The Minister, however, offered no justification in terms of Article 8(2).

Vindication of the Rights of the Child at all Times

The Minister did not dispute that the citizen child had certain personal rights, but did assert that these rights were not relevant to the IBC 05 scheme. The Minister argued that refusal of a parent's application under the scheme did not change that parent's status in the State, and that it would not be until a deportation order issued against that parent, with its consequence of the possible breaking up of the family, that the rights of the citizen child would have to be considered. The Court clearly rejected this argument, and emphasised that the rights of the child require respect not only at deportation stage, but that as the personal rights of the child require continuing guarantees, such rights had to be defended and vindicated at all times, and therefore required the Minister's respect in his consideration of the parent's application for permission to remain, particularly as the Minister had committed himself to considering applications for permission to remain, predicated on parentage of an Irish child. The Court's decision clarifies that the effective rights of Irish children, including Irish children of non-national parents, require positive vindication, and not just consideration when, for example, the parent of such a child faces deportation.

Conclusion

The Court's decision places the rights of the Irish child at the heart of the "IBC 05" scheme, while continuous residency in the State since the birth of a child is revealed not to be a requirement of the scheme at all. Precisely what the respect due from the Minister to the children's rights consists of remains to be seen. It is clear that regard must be had to the fair balance that has to be struck between the competing interests of the individual and the community, and that while the State enjoys a certain margin of appreciation, the Minister is required to determine whether the citizen child's right

to respect for his private life requires that the parent be given permission to remain in the State, and must make a fair balance between the rights of the individual child and the community. This in turn necessitates consideration of the child's Constitutional rights, and any decision that results in an infringement of a citizen child's Constitutional rights must not be disproportionate to the Minister's stated aim. The Minister will likely appeal the decision to the Supreme Court.

- 1 Decision of Finlay-Geoghegan J.
- 2 *AO & DL v The Minister for Justice, Equality and Law Reform* [2003] 1 IR 1
- 3 [1980] IR 32
- 4 [1997] 3 IR 511. In supplemental cases where the citizen child's parents were married to each other, the applicants asserted the right that a child derives from being a member of a family within the meaning of article 41.
- 5 See *Boultif v Switzerland* [2001] 33 EHRR 1179
- 6 (1992) 16 EHRR 97
- 7 16th June 2005
- 8 (2002) 35 EHRR 653
- 9 *Oguekwe & Anor v The Minister for Justice, Equality and Law Reform; Fares & Anor. v The Minister for Justice, Equality and Law Reform; Dimbo & Ors v The Minister for Justice, Equality and Law Reform, Edet and Anor. v The Minister for Justice, Equality and Law Reform. 10 Adio and Ors. V The Minister for Justice, Equality and Law Reform; Oviawe and Ors v The Minister for Justice, Equality and Law Reform; Duman v Minister for Justice, Equality and Law Reform.*



Educational Services at SPIRASI

Fr. Michael Begley, CSSp
Director of SPIRASI

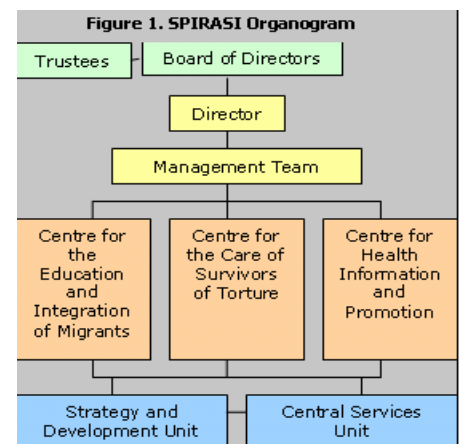
Organizational Context

The Trustees of SPIRASI (Spiritan Asylum Services Initiative), the Holy Ghost Fathers, have a long standing tradition of founding and supporting NGO's with a broad humanitarian remit. In Ireland, many readers of *The Researcher* will be familiar with organizations like Aidlink, Aids Partnership Africa, Concern, Kimmage Development Studies Centre, Refugee Trust, Self-Help Development International, and the World Mercy Fund. All of these were established to respond to the humanitarian needs of impoverished populations in developing countries. In contrast, SPIRASI, established in 1999, focuses on the needs of newly arrived disinherited immigrants into Ireland. This orientation is reflected in our mission statement: "SPIRASI is a humanitarian, intercultural, non-governmental organization that works for asylum seekers, refugees and other disadvantaged migrant groups with special concern for survivors of torture. In partnership with others, SPIRASI enables access to specialist services to promote the well-being of the human person, and encourages self-reliance and integration in Ireland". In advancement of this aspiration, and across all its programs, SPIRASI works in collaboration with statutory¹ and other voluntary bodies.

Structure and Services

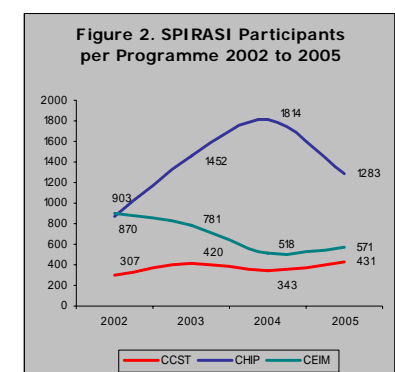
Guided by a Constitution and supported by patrons², the organization is governed by a Board of Directors.³ At operational level, services are provided by a multidisciplinary and intercultural team of 30 full-time and 35 part-time staff with assistance from 48 volunteers. Uniquely in Irish Migrant NGO terms, 36 nationalities are represented in the staff.

The governance, management and service structure of SPIRASI is presented in figure 1. It can be seen that client services are delivered through the Centre for the Education and Integration of Migrants (CEIM), the Centre for Health Information and Promotion (CHIP), and the Centre for the Care of Survivors of Torture (CCST). This overview takes as its focus the work of CEIM.



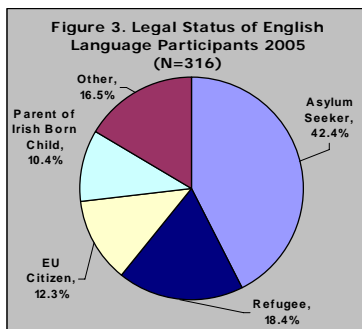
The Centre for the Education and Integration of Migrants (CEIM)

Figure 2 gives an overview of the number of participants for each of SPIRASI's programmes. In 2005, 2,285 individuals availed of our services. Of these, a quarter participated in educational activities offered under the auspices of CEIM.

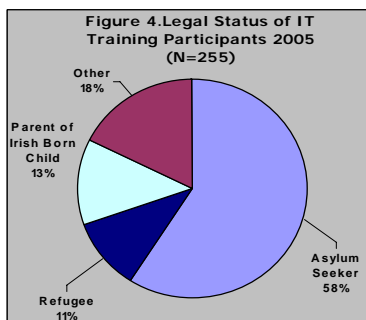


The 11 CEIM staff members provide an adult learning environment to those members of the asylum seeking and refugee communities who would otherwise have no or little access to such provision. It receives support from the European Refugee Fund, the Gender Equality Unit of the Department of Justice, Equality & Law Reform, the CDVEC, World Mercy Fund, and the Trustees.

Since its inception, modules on language, literacy, and life skills have been provided. Gaining proficiency in English is seen by immigrants as a primary pathway to integration. Equally, the value of the 'learning wide' and 'learning deep' dimensions of adult education are seen as intrinsic in the process of adaptation to any new cultural setting. During 2005, 316 students were registered for English language courses and 68.4% of these completed their courses and received certificates. Figure 2 above gives a breakdown of participants according to their status. It can be seen that nearly half, 43% of participants, were asylum seekers.



255 students also completed a diversity of courses in information technology ranging from basic computer literacy skills to web design. A higher proportion (58%) of those doing IT courses, were asylum seekers (see figure 3).



Following a review of CEIM's activities in 2005, it was decided that all students would benefit from a more intensive, integrated program offering 20 hours of tuition weekly. For registration details, contact David Mooney, ESOL Coordinator, at English@spirasi.ie. At present, modules on English language, computer literacy, life skills, and art are offered. Individualized mentoring is also provided.

In parallel with this development, an employment program - Employment for Parents of Irish Born Children (EPIC) in partnership with Business in the Community and others was recently launched by the Minister for Justice, Equality and Law Reform, Michael McDowell, TD on 20th November 2006. Our role is to provide the occupational English, life skills training, psychosocial services, and employment mentoring support dimensions as part of a wider employment

initiative. For registration details, contact Ovidiu Matuit, Integration Officer, at ceimint@spirasi.ie

For further information, please contact Edige Dhala, CEIM Manager, at ceimmanager@spirasi.ie.

¹ See Spenser, S (2006). Migration and Integration: The Impact of NGO's on Future Policy Development in Ireland. Oxford: The Centre on Migration, Policy and Society, University of Oxford.

² Mr. Peter Sutherland, Professor William Shabbas, & Senator Shane Ross.

³ Dr. Paddy Roe (chairperson), Dr. Mohammed Al-Sader, Fr. Michael Begley (secretary), Mr. Chinedu Onyejelum, Dr. Michael Murphy, & Fr. John Coleman.

An armchair anthropologist¹



By Patrick Dowling, RDC

Some of the researchers in the RDC in their thousands of searches for country of origin information have become akin to armchair anthropologists. While much of the information sought fits into familiar categories, we can still be surprised by the requests for the exotic and the obscure. Knowing the importance of COI for refugee and subsidiary protection hearings concentrates the mind, whatever the information sought. Patrick Dowling, a researcher with the RDC, has collected below some of the more uncommon requests for information and parts of the responses we have issued.

In this article an armchair anthropologist is taking a look at the unusual side of COI research, navigating a selection of unconventional and imaginative research requests received, adding in each case, the supporting material (if any) found to answer the question. It is a journey from birth to senescence, traversing multifarious issues including 'Flec Fac flags', 'Sheep names in Chad', 'Chewing tobacco in Darfur' and 'Rwandan surnames'.

Information sought on 'women in Nigeria giving birth in churches' was answered in a publication by the UNFPA which stated "poverty has engendered a spiritual revival, which has resulted in many women choosing to deliver their babies in churches."²

A question was asked of Saudi Arabia 'whether the authorities are known to make numerous mistakes on official documents such as Birth certs and passports'. No information was found on this issue.

Shedding light on documents concerning Iran the RDC was asked to find 'Information on an instrument used in

examining the authenticity of documents called Super Mini Ultra Violet Fluorescent Lantern JML 1197UV. Reg. Design No. 1000903 and Information on the reliability of the instrument'. A commercial internet site resolved the former and an embassy site addressed the latter issue as follows

"...there is a very useful item called a "Super Mini Ultra Violet Fluorescent Lantern". This is basically a small ultra violet detector, which detects a particular watermark logo at the bottom of each certificate... For those of the manning agencies which do not already possess (sic) such a device, we would strongly suggest obtaining one. It is a very efficient and easy way of verifying fake documents, money notes etc"³.

Asked about the Flec Fac flag the *Flags of the World* portal provided an answer to questions about its design, insignia and colours, including different factional flags of Flec Fac.⁴

The following was requested of Cote d'Ivoire: the 'treatment of those with non-Ivorian names.' *IRIN* in January 2006 points out

"Migrant workers from neighbouring countries such as Burkina Faso and Mali comprise nearly 26 percent of Cote d'Ivoire's population. Many immigrants complain of intimidation and racketeering by security forces, while rebels in the north say that foreigners and Ivorians born of immigrant parents are often treated as second-class citizens"⁵.

'Is it common for a brother and sister in the same family to have different surnames in Rwanda' was addressed in a document from *African Rights* which elucidated that:

"Each family member has his or her own individual surname, as well as first name. Some urban middle class families use family surnames shared by their children, but this is still comparatively rare. Hence siblings can have different surnames, and having a common surname is not a sign of being related, but of coincidence"⁶.

Regarding Somalia 'What would happen to Habar Gedir female who married or became pregnant by a member of the Reer Hamar or other minority clan' was a query submitted to the RDC. No information could be located on this subject, however the *Norwegian Refugee Council* note how lineage is important to Somalia'

" "Based on their patrilineal kinship and lineage segmentation, the Somali people are divided into six major clans, which in turn branch out into numerous sub clans, and minority groups. The major clans include Darod, Dir, Hawiye and Issak collectively known as Samale group, and the Rahaweyn (Digile and Mrifile) community categorized as Sab group. The Hawiye clan includes Habargedir, Abgal,

Murusade, Hawadle, Galjel, Moblen, Sheikal, Djijele, Badi Adde, and Ajuran while the Darood group include Majerten, Marehan, Dhulbahante, and Ogaden, LeelaKase, Ortoble, Kaskiiqabe and Dashiishe. The Dir sub clans include Biyamal, Gadsan, Gadabursi, Fiqi Muhumud, Samaron, Qubeys, Werdai and Akishe. The Issak are subdivided into Habar Awal, Habar Jalo and Habar Yunis, Edigale, Ayub and Arab. The Digil and Mirifle are subdivided into sub clans. The Digil include Geledi, Shanta Aleen, Bagadi, Garre, Tuni, Jido, and Dabarend while the Mirifle are divided into Siyed and Sagal. Some of the major sub clans in the Mirifle group are Laysan, Harin, Elay, Boqol Hore, Jiron, Jilible, Gelidle, Hadame, Luway, Huber and Yantar".⁷

'How accurate are bone density tests in determining age' was required in the context of Iranian COI. A medical agency *Imagis* in a survey said

"The accuracy of bone mineral density test is high, ranging from 85% to 99%".⁸

'Any information on treatment of suffers of epilepsy in Zimbabwe'. An Abstract of a pilot study of epilepsy in Zimbabwe by *National Center for Biotechnology Information* reported that:

"As a preliminary to designing a health education programme on epilepsy for teachers in Zimbabwe, we evaluated the knowledge and attitudes to epilepsy of teachers in Epworth, a poor, high density suburb of Harare, Zimbabwe. MATERIALS AND METHODS: All teachers in Epworth were invited to awareness workshops on epilepsy. A questionnaire on knowledge and attitude of epilepsy was distributed to all consenting participants. RESULTS: 165 teachers (Male: Female 1:1.9) responded. Of the respondents 89% had heard or read about epilepsy, while 70.6% had observed an epileptic seizure. Epilepsy was considered hereditary by 34.6%, while 12.6% thought it was a form of insanity. Only 0.6% thought evil spirits were a cause, 22.6% thought that epilepsy was contagious, 82% would allow their child to play with an epileptic child, 76% would marry an epileptic while 55.7% would employ an epileptic. The majority would accommodate an epileptic and teach an epileptic child in class. CONCLUSIONS: These positive attitudes towards epilepsy by teachers may be attributed to their higher level of education and may imply that with increasing levels of formal education in the general African population, a more tolerant attitude towards epilepsy can be expected".⁹

An article in the Nigeria newspaper *This Day* on the topic of 'facial markings' purports

"In Nigeria generally, facial marking is fading. Because it is done to infants most

adults who today bear facial marks did not have any choice in the matter but as parents it behoves on them to decide whether their children should be marked or not."¹⁰

'Is there any information regarding Soaad (chewing tobacco) in Darfur in Sudan'. No COI could be sourced referring to chewing tobacco as "Soad". A map from the *Humanitarian Information Centre Darfur* shows that the North Darfur areas of Tawila and Korma are mainly associated with the production of tombac (chewing tobacco).¹¹

Another agricultural issue was sought, this time for Chad: 'Names and types of indigenous sheep'. The *European Farm Animal Biodiversity Information System* lists breeds of sheep in Chad as follows

"Arabe (Local names: Black Maure, Mauritiana, Moor, Moorish); Barbarin (Local names: Fezzanais); Bornu (Local names: Balandji, Balani, Balemi, Balonndi); Bororo (Local names: Fellata, Waila); Fulani (Local names: Foulbe, Fulbe, Peul-Peul, Peulh); Kababich (Local names: Bidiri North Sudanese, Desert Sudanese, Drashiani, Gash); Kirdimi (Local names: Djallonke, Fouta Djallon, Futa Jallon, Guinean"

European Farm Animal Biodiversity Information System (EFABIS) (undated) *Breed Names: Sheep – Arabe; Barbarin; Bornu; Bororo; Fulani; Kababich; Kirdimi*".¹²

A query on Iran was posed: 'if there is a particular season in Iran when lambs or ewes are born'. The 'Summary' of an *FAO* report says

"The adequacy of quality and quantity is very important for breeding ewes. The range forage plant supply and its quality are adequate for only a limited time in the late spring and early summer each year. Following an autumn mating, the lambs are born in late winter or early spring. Under this regime, it is not possible to have more than one lamb crop per year. In addition, because the range forage for the ewes does not meet their requirements, the percentage of lambing is low and lamb mortality is high".¹³

Information was sought on 'when the rainy seasons occur in Somalia'. Sources consulted by the RDC state that there are two rainy seasons in Somalia: a long rainy season called Gu and a shorter rainy season called Day, Dayr or Deyr. A country profile on Somalia published by *Forced Migration Online* says that

"The Somali differentiate between four seasons, two wet and two dry: Gu (long rainy season) lasting from April to July, Haggaa (dry) lasting from July to October, Dayr (the small rains) from October to December, and Jilaal (long dry season) lasting from December to April".¹⁴

In Zambia a question was asked on 'practices of the occult/rainqueens'. No specific sources were available for this but on witchcraft an article from *Reuters* notes

"A Zambian man has been jailed for witchcraft after a human heart was found in his possession, and police are investigating a possible murder, state radio and prosecutors said Thursday".¹⁵

'Information on the practice of voodooism in Benin' was requisitioned in a *US Department of State* report which found that

"Many individuals who nominally identify themselves as Christian or Muslim also practice traditional indigenous religions. Among the most commonly practiced is the animist "Vodun" system of belief, also commonly known as voodoo, which originated in this area of Africa. Almost all citizens appear to believe in a supernatural order".¹⁶

In neighbouring Nigeria a request on 'the custom of bride price' was surveyed by *Asylum Aid* who in an analysis on refugee women and domestic violence answered

"The commodification of women in marriage – the bride price. This low status of women is confirmed on marriage by abuse of the bride price system. The bride price is a sum of money paid by the groom and his family to the family of the bride, and completes the marriage contract. Originally a sign of respect for the value of the bride, it has now become a symbol of "purchase" of the woman by the man, and of the right of a husband to do as he wishes with his "possession". The institution therefore commodifies women and sets into place a power structure whereby women are excluded from decision-making and violence and abuse may result".¹⁷

For Guinea the RDC had to source 'information regarding the traditional marriage ceremonies of the Fulani tribe'. The *Encyclopaedia of World Cultures (Africa and the Middle East)* says

"There has been some confusion regarding what constitutes the marriage ceremony among the Fulani. Because neither bride nor groom may be present at the ceremony, owing to shame-avoidance taboos, the significance of the cattle ceremony (koowgal) overlooked. In that ceremony the bride's father transfers one of his herd to the groom, legalizing the marriage. There may also follow a typical Islamic ceremony termed *Kabal*. Again, neither bride nor groom may actually be present at the ceremony".¹⁸

Regarding the subject of 'widows in Togo being forced to marry their brother-in-law', a singular reference by the *International Federation of the Red Cross* pointed out

"Togolese Red Cross activities, which were carried out in cooperation with the Society's various partners made the following types of impact on the communities... Better understanding and change in attitudes of the communities regarding some traditional, but harmful practices such as: widows forced to marry their brother-in-law".¹⁹

The moribund practice in Togo of widows forced to marry their brothers in law is part of the same human reciprocity that this article began with. The succeeding parturition issues have witnessed a trek through a variegated array of COI requests; therefore it is not inappropriate, completing a cycle of growth, to conclude with care of the elderly.

A discussion of 'Care of the elderly in Nigeria' was addressed in a study by *Uzoma Okoye* which states

"Caring of the elderly has always been taken for granted to be filial responsibility with little or no government support in Nigeria (Ekpeyong, 1995; Ohuche & Littrell, 1989). However social and economic changes currently occurring have put into doubt the continued viability of such traditional arrangements for the elderly. Such changes like increased emphasis on smaller family units, migration to urban areas, more working wives, new life styles and changing values all have effects on the entire society the youth inclusive and will to a large extent affect their overall relationship with the elderly now and in future".²⁰

The RDC has no control over what it will be asked for COI but it is our role as researchers to answer as well as we can whatever we receive. Now back to those sheep in Chad...

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Directory on Return for Asylum Seekers



by Bobby Pringle

International Organisation for Migration

The Dublin Mission of the International Organization for Migration recently launched their new research project titled *Directory on Return for Asylum Seekers* (DORAS). This research project aims to assist asylum seekers, with both pending and rejected status, to make a more informed decision on voluntary return to their country of origin. It is also intended that this research project will enhance the reintegration assistance currently offered by IOM in countries of return.

The International Organization for Migration currently operates a number of Assisted Voluntary Return and Reintegration (AVR) programmes which are open to asylum seekers and irregular migrants from non-EEA countries. The programmes are for those who wish to return to their home country, but do not have the means, including the necessary documentation, to do so. An important optional component of the AVR programme is a Reintegration package designed to help people resettle in their country of origin.

The DORAS research project arose as a result of reoccurring questions and concerns expressed by AVR applicants on matters such as the citizenship of children, access to employment, education opportunities and questions on healthcare provision in their home country. In the past IOM attempted to respond to these concerns on a case by case basis. DORAS now aims to address such needs by compiling and distributing information sheets addressing as comprehensively as possible the most frequently return related concerns of IOM applicants. DORAS aims to provide information on service providers for a wide range of social supports and service provision.

The information packs will include information on one or more of the following topics:

Information on Benefits or Entitlements including, but not limited to:

- Government agencies which provide benefits or entitlements
- Non-governmental agencies which provide advice and assistance on obtaining benefits or entitlements



- Types of benefits available
- *Healthcare*
- State healthcare
- Health insurance
- *Social Services*
- State organisations
- NGOs
- Services for children
- Services for the elderly
- *Education*
- Primary and Secondary education (Private and State)
- Third level education
- Apprenticeships and other Training
- *Accommodation*
- Finding accommodation
- Private Rented accommodation
- Deposits
- Complaining about accommodation standards
- Emergency Accommodation
- *Employment*
- Reintegration funding from IOM and other sources
- Funding for small businesses
- Getting advice on starting a business
- Apprenticeships and other Training
- *Citizenship in Countries of Return*
- Through marriage
- Through descent
- Through Birth
- Application Procedures
- *Support Groups*
- Contact details of other support groups
- Contact details of International NGOs and Intergovernmental
- Organisations active in the country of origin

It is hoped that this information will positively contribute in enabling asylum seekers to make a more informed decision on return as well as facilitating a more sustainable and comprehensive reintegration provision of the AVR programme.

The research project which runs for 18 months is a joint collaboration between IOM Dublin, The Irish Government, IOM offices in countries of origin, local partners in Ireland and local partners in country of origin. It is funded jointly by the Irish Government and the European Refugee Fund.

Considering the frequency and distribution of IOM offices worldwide, IOM are in a unique position to provide concise, informed and up-to date country of origin information. Such information will be gathered with reference to current best practices in relation to return related countries of origin. Research results will be made available in hardcopy and also on the IOM Dublin website.

It is important to note that the return information provided will not relate to protection concerns, or concerns directly related to asylum claims. IOM is not a protection agency, and any issues of this nature which may arise will be referred onto appropriate agencies, including legal representatives.

This project will be monitored by IOM and regular reports will be submitted to the Department of Justice, Equality and Law Reform. A final report will contain information resulting from the project, as well as a supporting narrative on these results, along with future recommendations.



COI Network Project III



by Carol Doyle, RDC

The Refugee Documentation Centre (RDC) was invited to join the COI Network and Training group in 2003. Since then the RDC has contributed actively to building a network of non-governmental/independent COI centres in Europe, identifying best practices in COI and aiming for a common training approach in COI. The RDC participated in and contributed to the production of a training manual, *Researching Country of Origin Information*, which was produced in three languages. The course was adapted as an e-training module available in cd-rom or a networked version.

The Network's third project, COI Network III, commences in December 2006 with a meeting in Vienna. It comprises governmental and non-governmental organisations from 15 EU member, accession and candidate states. It is based on preliminary recommendations and experience of the COI Network II project. The COI training activities will be expanded geographically to incorporate more member states and accession states of the European Union. The training will also be expanded institutionally to incorporate asylum authorities. In order to contribute to the EU goal of achieving an objective, transparent and accurate COI system that delivers official, relevant and reliable information, the COI Network III project will concentrate on the following activities: -

Training

Training will be provided for COI users and decision makers involved in RSD procedures. During the project COI training will be provided in 12 European countries including EU member states and Croatia, Romania and Turkey.

COI Trainer Pool

Up to 12 experienced COI researchers, selected from governmental and non-governmental COI units, will be trained as COI trainers. These trainers will form a

sustainable training pool in order to provide trainings for COI users. The Refugee Documentation Centre Ireland will be in charge of implementing this part of the project in cooperation with ACCORD and Hungarian Helsinki Committee. The RDC will host three two-day train-the-trainer seminars in Dublin during 2007. The seminars will provide trainers with the skills necessary to create a learning environment for participants on training courses. A wide range of topics will be covered including presentation and communication skills, types of training and the pros and cons of each, practicalities of organising a training course, e-training skills, motivation of participants and sustainability of quality assurance.

COI Master Class

The master class aims for the enhancement of professional performance of research staff of COI units. The master class is intended to be a forum for up to 40 COI professionals whereby professional experience and know-how can be exchanged. It will take the form of workshops, lectures etc. It is intended to hold the master class immediately prior to a COI Seminar i.e. country presentations on two selected countries of origin by human rights experts and UNHCR experts to an open forum of governmental and non-governmental representatives. ACCORD will implement this part of the network project in cooperation with all partners.

Good practice of COI

The aim is to analyse leading jurisprudence from 2nd and 3rd instances of all EU member states, from the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR). The project will examine the use of COI in the asylum field in the European Union. The research will result in a comparative study which may serve as a helpful tool contributing to EU Member States' efforts to establish a single asylum procedure and common standards in refugee status determination. The Hungarian Helsinki Committee will be in charge of this part of the project.

The Dutch Council for Refugees is responsible for continuous monitoring and evaluation of the COI Network III project.

A Steering Committee was formed to oversee the third project and the Refugee Documentation Centre was invited to become a member. The first Steering Committee meeting is taking place in Vienna on 12th December followed by a Network Meeting on 13th and 14th December. COI Network III has officially commenced and I will keep you up to date with all developments throughout the project.



Who are the Janjaweed?



David Goggins Investigates.
RDC Researcher

Introduction

Mukesh Kapila, United Nations Humanitarian Coordinator for Sudan, has described the present situation in the Darfur region as “the World’s greatest humanitarian crisis and quite possibly the world’s cruellest war at the moment.” Louise Arbour, UN High Commissioner for Human Rights, has stated that the Sudanese government and an allied militia known as the Janjaweed are “responsible for the most serious violations of international human rights and humanitarian law.” According to a WHO, survey about 200,000 people have died since this crisis began, and there are many other studies which suggest that the actual death toll may be 400,000 or higher. Between 2 and 2.5 million people are said to have been displaced, either internally or to refugee camps in Chad.

Background to the conflict

The Darfur region is in western Sudan, bordering the Republic of Chad. It is about the size of France, with a population of about 5 million people. This population consists of about 40 ethnic groups, broadly divided on the basis of language and occupation into “Arabs”, who are Arabic-speaking nomadic herders of camels and cattle, and “Africans”, who are mainly sedentary farmers. The most prominent African groups are the Zaghawa, the Masalit and the Fur. (Darfur means land of the Fur) However, Alex de Waal, Programme Director at the Social Science Research Council, says that:

“Despite talk of ‘Arabs’ and ‘Africans’, it is rarely possible to tell on the basis of skin colour which group an individual Darfuri belongs to. All have lived there for centuries and all are Muslims.”

Originally the various ethnic groups of Darfur lived in harmony. However, a severe drought in the 1980s led to competition over scarce resources such as land and water, resulting in increasingly violent clashes between farmers and nomads. As a result of these clashes the Arabs formed militia groups which had support from the Arab-dominated government in Khartoum, while African villages formed self-defence units to protect themselves.

Origin of the Janjaweed

According to Alex de Waal, the Janjaweed were originally members of a Chadian militia which had supported Muammar Gaddafi’s invasion of Chad and which had

been armed and trained in Libya. Following the Libyan defeat in 1987 this militia retreated into Darfur, where it was given sanctuary by Sheikh Musa Hilal, chief of the Mahamid Rizeigat Arabs of north Darfur, eventually been incorporated into his own forces.

What does the name Janjaweed mean?

The term “Janjaweed” is often translated as “Devils on horseback, or “Evil spirits on horseback”. HRW offers the following definition:

“Definitions of the term generally allude to armed horsemen. One Arabic speaker told Human Rights Watch that “Jan” referred to a gun and “Jaweed” to horse. A Darfuri scholar of Darfur, remarked that “Janjaweed” was the term used during his youth to describe outlaws.”

An alternative explanation of the origin of the name “Janjaweed” is presented by the anonymous author of an entry on the Janjaweed in the Wikipedia online encyclopedia who suggests that the term is a derivative of the Persian words “Jang” (war) and “Jangawee” (warrior).

Rebellion in Darfur

The present crisis arose in February 2003 when two rebel movements, The Sudanese Liberation Army/Movement (SLA/M) and the Justice and Equality Movement (JEM) began an insurgency in Darfur, rebelling against what they claimed was the marginalisation of the region by the government in Khartoum. Both SLA/M and JEM were dominated by members of the Zaghawa tribe.

To counter this rebellion the Sudanese government enlisted the services of existing “Arab” militia groups, who they considered to be more reliable than the regular Sudanese army.

Janjaweed attacks on civilians

The principal charge levelled at the government of Sudan is that, rather than use the militia in direct conflict with the SLA/M and JEM, they have instead incited the Janjaweed to attack civilian villages suspected of providing support for the rebels. Among the crimes of which the Janjaweed have been accused are mass killings, the burning of homes (sometimes with the occupants still inside), gang rape, looting of cattle and other livestock, the destruction of crops and food stores, and the abduction of children.

An International Crisis Group (ICG) report published in 2004 described Janjaweed attacks on civilians as follows:

“Testimony of displaced people and refugees depict a consistent pattern of attacks by a government aligned militia, the Janjaweed, whose horse-and camel-mounted fighters use scorched-earth tactics, backed by government air and land strikes. Survivors tell of Janjaweed assaults in which villagers are

indiscriminately killed, whipped and raped. Hundreds of villages have been burned to the ground after looting. Grain in storage or about to be harvested is destroyed. These tactics have led to the depopulation of entire areas inhabited by the Fur, Zaghawa, Massaleit, and other smaller groups of black African origin.”

Human Rights Watch (HRW) has reported extensively on the situation in Darfur, providing the following description of the campaign against the civilian population:

“Since the February 2003 official emergence of the Darfur rebel groups, attacks on civilians have increased in scale, number and brutality and have been conducted on villages and towns in the absence of rebel presence or military targets. Civilians sharing the ethnicity of the rebel movement, namely the Fur, Masaalit, and Zaghawa and a few small tribes, have become the main targets of government military offensives aimed at destroying any real or perceived support base of the rebel forces. Government forces and Janjaweed militias have inflicted a campaign of forcible displacement, murder, pillage, and rape on hundreds of thousands of civilians over the past fourteen months”

A typical HRW report describes attacks on civilian villages as follows:

“Dozens of refugees interviewed by Human Rights Watch and others have described repeated attacks on their villages and towns. Hundreds and hundreds of villages have been destroyed, usually burned, with all property looted. Key village assets, such as water points and mills, have been destroyed in an apparent effort to render the villages uninhabitable. Numerous civilians have been killed and injured by aerial bombardment and militia raids. Hundreds of women have reportedly been raped by militia and government troops. Children have been abducted in large numbers. Once they fled their homes, thousands of civilians have been subjected to systematic attacks, looting, and violence by militias in government-controlled towns and at Janjaweed checkpoints that dot the roads. Even when displaced persons have reached the larger towns where they hope to find assistance and at least a refuge from further attacks, they continue to be systematically preyed upon by the Janjaweed”

A day-day record of incidents in the Darfur region can be found on the website of the Humanitarian Information Centre (HIC) for Darfur.
(<http://www.humanitarianinfo.org/darfur/>)

Role of the Sudanese government

Although the Sudanese government has consistently denied any connection with the Janjaweed, human rights groups, such as HRW and ICG, have stated that the government is financing and arming the

militia, providing them with weapons, training and uniforms, The ICG says that:

“Travellers to the region relate that most Janjaweed are armed with either AK-47s or G3 rifles and ride camels or horses provided by the government. It is alleged that the government paid many of them roughly U.S \$100 when fighting began.”

HRW suggests that Janjaweed members receive between \$100 and \$400, as well as continuing state support for their relatives should they die in combat.

HRW has alleged that there is collusion between the Janjaweed and government forces, saying that:

“Massacres or mass killings of civilians in Fur, Masalit and Zaghawa areas have taken three forms: extrajudicial executions of men, by army and Janjaweed; attacks in which government soldiers and Janjaweed have played an equal role, fighting side by side; and attacks in which government forces have played a supporting role to Janjaweed – “softening up” villages with heavier weapons than those carried by the Janjaweed, providing logistical support and, in the opinion of many villagers interviewed, “giving the Janjaweed protection as they leave.”

Usman Tar, a Doctoral Researcher at the University of Bradford, in a paper on the activities of civil militias in Darfur refers to the relationship between the Sudanese government and the Janjaweed as follows:

“There is a relative consensus, both within Sudan and outside, on the role of the government of Sudan in the recruitment, deployment and maintenance of the Janjaweed militia. While the government continues to keep mute or at best present a cloaked official position, confessions by several serving and past state officials, as well as evidence from intercepted classified official documents, tends to reveal that the Janjaweed militia are indeed an ad hoc unit of Sudan’s army. Outside Sudan, several concerned individuals and organisations such as the UN Secretary-General, Mr Kofi Annan, US Secretary of State, Mr Colin Powell, and UK Secretary for International Development, Mr Hillary Benn; UN High Commission for Refugees, Amnesty International, Human Rights Watch, and so on have blamed the government of Sudan for complicity with the Janjaweed militia.”

Usman Tar also says that:

“Within Sudan, experiential testimonies of threats and utterances of Janjaweed militia on their victims as well as confessions made by key state functionaries validate the concerns held by the international community: that there has been a deliberate and well planned decision by the government to involve and support

Janjaweed militia, both as a client and an ally to carry out counterinsurgency and ethnic cleansing against Fur, Masalit and Zaghawa Sudanese in the Darfur region.”

Kenneth Roth, Executive Director of Human Rights Watch, has commented on the close co-operation between the Janjaweed and government troops, saying that:

“The Janjaweed are no longer simply militias supported by the Sudanese government. These militias work in unison with government troops, with total impunity for their massive crimes.”

A HRW report which identifies 16 Janjaweed camps in Darfur says that:

“Five of the 16 camps, according to witnesses, are camps the Janjaweed share with the Sudanese government army. Even more ominous, the Sudanese army has incorporated members of the Janjaweed militia into the police and the Sudanese army, including Islamist militia the Popular Defense Forces (PDF), which is under army jurisdiction.”

The London-based human rights organisation Justice Africa says that:

“During the last twenty years, the characteristic mode of action employed by successive governments in Khartoum, when they want to fight a cheap and effective counterinsurgency, has been to employ militias and to give great discretion to commanders on the ground. Thus the militia massacres in Bahr el Ghazal and the killings and forced relocations of the Nuba were carried out, in a way that the government could pretend was not at its direct behest. On every occasion, however, it subsequently became clear that military officers were involved in supplying militias and directing their activities. The involvement of the air force, whose raids must be directly authorised by the chief of staff’s office in Khartoum, is evidence for high level involvement.”

Membership of the Janjaweed

Questions such as how many Janjaweed members there are and which tribes they are recruited from are answered in a HRW report which says:

“The Sudanese government is reported to have recruited 20,000 Janjaweed militia members. Most are believed to be from Arab camel-herding tribes from North Darfur and Chad. The tribes and clans most frequently mentioned by refugees and other credible sources are the Irayqat and Ouled Zed subclans of the camel herding northern Rizeigat, the Mahariya, and the Beni Hussein. Many of the militia members are believed to be Chadian in citizenship and while some have been attracted to the Janjaweed by the increasing ethnic polarization in the

region, the prospect of loot apparently has been a greater incentive for most.”

According to the BBC, “the main clans involved on the Janjaweed side are the Jalul, Ereigat and Mahariya of Musa Hilal.” It should be noted that not all Arab groups in Darfur have joined the Janjaweed, with many tribes remaining neutral instead.

Janjaweed uniforms

HRW cites Masalit witnesses as saying that the only difference between Janjaweed and army uniforms is a badge depicting an armed horseman that the Janjaweed wear on their breast pocket.

Structure of the Janjaweed

ICG states that the government set up three separate Janjaweed divisions: The Strike Force, The Border Guard and the Hamina (traditional tribal leaders). HRW says that rebel leaders have identified six Janjaweed brigades, naming two of them as the “Liwa al-Jammous, or Buffalo Brigade, formerly headed by Musa Hilal, and the “Liwa al-Nasr, or Victory Brigade, formerly led by “Shukurtallah”.

Current activities of the Janjaweed

A treaty known as the Darfur Peace Agreement (DPA) was signed in May 2006. However, this treaty is seen as being seriously flawed as it rejected by the two main rebel groups, who have continued to fight against the government.

Following pressure from the African Union (AU), the Sudanese government announced in October 2006 that it had plans to disarm the Janjaweed within two months, although it was not specified how the government intended to accomplish this.

A November 2006 report from the Christian Science Monitor on the presence of the Janjaweed in the town of Tine says that:

“Under a peace agreement signed last May, Sudan’s was supposed to disarm the Janjaweed and inform the AU commanders of any troop movements. They have done neither. In fact, the arrival of the fighters in this border town is fresh evidence that the government is remobilizing the Janjaweed and other irregular Arab militias in large numbers”

On 27 November, a report from the BBC quoted Minni Minnawi, a former rebel leader who is now a special adviser to President Omar al-Bashir, as saying that:

“They know, everybody knows that the government is re-arming the Janjaweed, that the Janjaweed are activated even more than before somehow.”



Refugee Documentation Centre Books: a Wealth of Background Reading and Analysis



By Isabel Duggan,
Librarian of RDC and LAB Libraries

In the previous edition of The Researcher, we provided a brief introduction to the resources available in the RDC library. In this edition, I am going to concentrate on the most visible resource, the books!

The vast majority of research work undertaken by the RDC is via online resources on, for example, subscription databases such as Lexis Nexis or reputable portals such as www.ecoi.net. However, the RDC also has a growing number of books on a range of topics relevant to COI research. A catalogue of the RDC books is available for all users of the RDC COI service. The RDC also has a lending section. Please see below for further details.

The RDC book collection

Reference

The reference section has a large number of travel guides from countries as diverse as Ethiopia, Azerbaijan and Cuba. Dictionaries and language guides to lesser known languages are available. Other reference resources include the Europa World Yearbook, the Times Atlas of the World, Regional Surveys of the World, encyclopaedias of world cultures and political dictionaries.

Country information

Books in this section are classified according to country. They cover topics such as history, politics, sociology, ethnicity, religious beliefs and culture. Sample titles are as follows:

Alexander, Jocelyn: The Unsettled Land – State-making & the Politics of Land in Zimbabwe 1893-2003. Oxford, 2006.

Gardner, Judith: Somalia, the Untold Story. The War Through the Eyes of Somali Women. Pluto press, 2004.

McCarthy, Rory: Nobody Told Us We Are Defeated – Stories from the New Iraq.

Chatto & Windus, 2006.

Moorehead, Caroline: Human Cargo – A Journey Among Refugees. Vintage, 2006.

Irish law

The library has a small collection of core Irish law books.

EU law

The library has a good collection of core European law textbooks as well as books relating to the European dimension of refugee and human rights law.

Immigration and refugee law

A large collection of books and handbooks relating to a variety of jurisdictions are available. These include books by Hathaway, Goodwin-Gill and Symes.

Human rights law

The library has a varied collection on human rights. Butterworths Human Rights Cases are held.

Sociology

Sociological themes such as race, identity and citizenship are well represented in the collection.

Religion

Comprehensive guides to all main religions are held as well as short introductions to Islam, Buddhism, Judaism and Hinduism.

Who can the RDC lend material to?

The RDC lends material to staff of 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. Solicitors and Barristers on the RLS panel may also borrow material. Members of the public may not borrow material.

Registering as a library member

You may register as a library member by contacting the library staff. The generic email for registering is

Refugee_Documentation_Centre@legalaidboard.ie

Accessing the RDC catalogue

You may access the RDC library management system in either of the two following ways:

Click on the link for RDC library system on Lotus Notes *or* the web address for the RDC LMS is <http://lib.lab.ie> (IP address <http://15.199.2.11>) and log in.

The opening hours of the RDC library

The opening hours of the RDC library are from 10.00am to 12.30pm and 14.00pm to 17.00pm. It may be possible to accommodate visitors prior to 10am and between 13.00pm and 14.00pm if you contact us in advance.

Contacting the Refugee Documentation Centre

You may contact the RDC in the following ways: Tel: 01 477 6250 Fax: 01 661 3113 Email:

Refugee_Documentation_Centre@legalaidboard.ie You may also email in a query form as you would for a COI query.

How long may I keep a borrowed item?

You may borrow 3 items may for a one month period. This is renewable if the items are not required by another borrower.

Contact us to avail of the treasure trove of COI and legal material which is the RDC library!



Refugee Appeals Tribunal Decisions Now Searchable by New Unit in RDC

The Legal Aid Board has established a Decision Search Unit (DSU) managed by the Refugee Documentation Centre (RDC) to undertake searches of the Refugee Appeals Tribunal decisions database for RLS solicitors and for Private Practitioner solicitors and Barristers on the RLS panels. The DSU service is also available to other agencies in the asylum process in common with other RDC services.

Requestors should identify the keywords and issue(s) of legal principle involved and forward a request in writing to the Decision Search Unit in the RDC – using the query form (electronic or hard copy version available). On receipt of a request the DSU will conduct a search and request the identified relevant redacted decisions which will be sent to the requestor as soon as they are received.

Requests for specific decisions identified by “TRC” or “69” number can be made directly to the Tribunal without going through the search process. DSU will process such requests if required. Copies of any redacted decisions received from such direct requests should be copied to the DSU. It is expected that the DSU will operate at full capacity by mid December 2006.

Queries for the Decision Search Unit should be sent to:

Decision Search Unit
Refugee Documentation Centre
Montague Court
7/11 Montague Street
Dublin 2

Phone: 01-4776250 – ask for Decision Search Unit
Fax: 01 6613113
Email: dsu@legalaidboard.ie



The Situation of Christians in Iraq



Paul Daly, RDC

The situation in Iraq at present is one of civil war, according to outgoing UN Secretary General Kofi Annan in a BBC interview broadcast on 4 December¹. The Iraq Study Group stated on 6 December that “the situation is grave and deteriorating. ... [i]f the situation continues to deteriorate, the consequences could be severe. A slide toward chaos could trigger the collapse of Iraq’s government and a humanitarian catastrophe...”² Much of the coverage has focussed on the sectarian violence between Shia and Sunni Muslims. In this article Paul Daly looks at the situation of Christians in Iraq.

Over half the Christians in Iraq have left in the last three years. The US Library of Congress stated in August 2006:

“It was estimated that there were 700,000 to 800,000 Christians in Iraq in 2003 mostly belonging to the Chadean Catholic Church. However, up to 2004 approximately 500,000 left Iraq following the acceleration in targeted attacks against Christians. A further 40,000 left Iraq in 2004 after a series of bombings targeting Christians³.”

The Guardian reported on 6 October 2006:

“[A]lthough Christians made up less than four per cent of the population - fewer than one million people - they formed the largest groups of new refugees arriving in Jordan’s capital Amman in the first quarter of 2006, according to an unpublished report by the UN High Commission for Refugees (UNHCR). In Syria, which has a longer border with Iraq, 44% of Iraqi asylum-seekers were recorded as Christian since UNHCR began registrations in December 2003, with new registrations hitting a high early this year. Fleeing killings, kidnappings and death threats, they come from Baghdad, from Basra in the zone of British control and, disproportionately, from Mosul in the north. The Catholic bishop of Baghdad, Andreos Abouna, was quoted recently as saying that half of all Iraqi Christians have fled the country since the 2003 US-led invasion⁴.”

The decline in the number of Christians in Iraq is not a recent phenomenon. The US Department of State International Religious Freedom Report 2006 stated:

“According to official estimates, the number of Christians decreased from 1.4 million in 1987 to fewer than 1 million, with Catholics (Chaldeans) comprising the majority. Christian leaders estimated that approximately 700,000 Iraqi Christians lived abroad⁵.”

IRIN gave one reason for the exodus in the 1990’s:

“The last Iraqi census, in 1987, counted 1.4 million Christians, but many left during the 1990s when economic sanctions were imposed on the country⁶.”

By contrast, the International Religious Freedom Report quoted the Christian and Other Religions Endowment as reporting a very different reason for the recent mass departure:

“[A]fter a series of church bombings and incidents of violence targeting Christians over the past two years, more than 200,000 non-Muslims left the country or fled to the North. Many remained in Jordan or Syria awaiting improvement in the security situation⁷.”

Religious Demography

According to the CIA Factbook, religions in Iraq are made up as follows:

“Muslim 97% (Shi’a 60%-65%, Sunni 32%-37%), Christian or other 3%⁸”

The International Religious Freedom Report gave a breakdown of these figures:

“The country has an area of 437,072 square miles and a population of 26 million. An estimated 97 percent of the population is Muslim. Shi’a Muslims--predominantly Arab, but also including Turkmen, Faili Kurds, and other groups--constitute a 60 to 65 percent majority. Sunni Muslims make up 32 to 37 percent of the population, of whom approximately 18 to 20 percent are Sunni Kurds, 12 to 16 percent Sunni Arabs, and the remainder Sunni Turkmen. The remaining 3 percent comprises Chaldean (an eastern rite of the Catholic Church), Assyrian (Church of the East), Syriac (Eastern Orthodox), Armenian (Roman Catholic and Eastern Orthodox), and Protestant Christians, as well as Yazidi, Sabeen, Baha’i, Kaka’i (a small, syncretic religious group located in and around Kirkuk), and a small number of Jewish believers. Shi’a, although predominantly located in the south, were also a majority in Baghdad and had communities in most parts of the country. Sunnis formed the majority in the center and the north of the country.⁹”

Distinguishing the different Christians, the report went on to state:

“There were approximately 225,000 Assyrian Christians and an estimated 750,000 Chaldeans (Eastern Rite Catholics). The Chaldean and Assyrian Christians are descendants of the earliest

Christian communities, and they share a similar cultural and linguistic background. Both communities speak the same ancient language (Syriac); however, they are considered by many to be distinct ethnic groups. Chaldeans recognize the primacy of the Roman Catholic Pope, while the Assyrians, who are not Catholic, do not. While some Chaldeans and Assyrians considered themselves Arab, the majority, as well as the Government, considered both groups as ethnically distinct from Arabs and Kurds.¹⁰”

In October 2005 Guidelines UNHCR described Iraq's Christian population as follows:

“Iraq's Christian population includes, among others, members of the Assyrian, Chaldean, Armenian and Catholic sects. Many Assyrian Christians originate from the Governorate of Ninewa, whose capital Mosul is the second largest city in Iraq. Other Assyrians, including some members of the Assyrian Democratic Party or sympathizers thereof, originate from Baghdad and its surroundings. Many of Iraq's other Christians originate from Basrah¹¹.”

The Situation of Christians in Iraq UNHCR stated in October 2005:

“Most Iraqi Christians claim fear of persecution from insurgent groups (e. g. Ansar Al-Sunna) and Islamic militias such as the Badr Organization or the Mehdi Army, which have substantial control of the streets in various major cities and towns¹².”

The UNHCR Guidelines distinguish the situation of Christians from that faced by Iraqis in general:

“While much of the hardship and harassment they report that they face is symptomatic of the situation of general insecurity faced by all Iraqis in present-day Iraq, members of the Christian minority nevertheless appear to be particularly targeted. Iraqi Christians feel especially apprehensive about the overwhelming presence of extremist Islamic groups and armed militias, whose display of intolerance towards non-Muslim has become a nearly daily feature in Iraq¹³.”

The UNHCR Guidelines details reported acts of violence to Christians:

“Acts of violence reported by Christians and/or which appear to target Christians include bombings and other attacks on churches, the forcible closure of Christian-owned liquor shops by armed militias, serious or fatal attacks on shop owners and/or business persons involved in trading and selling alcohol, harassment, extortion, kidnapping and even torture of persons perceived as not respecting Islam (e.g. women who appear in public without a *hijab*, persons accused of not respecting

the teachings of the Koran and persons refusing to convert to Islam)¹⁴.”

Apart from religious reasons, the Guidelines gave a variety of other causes for the violence:

“Others have been attacked because of a widespread belief among the insurgents that Christians assisted and supported the US invasion of Iraq and continue to support the presence of the MNF, as the MNF is composed of mainly Western Christian ‘infidel’ nations...Others have been targeted for kidnapping against ransom based on the perception that Christians are generally more wealthy than others. Resentment towards Christians appears to be particularly vehement in the South and in the so-called Sunni triangle, where rising extremist attitudes are fuelling the trend towards a stricter interpretation of Islam¹⁵.”

The situation of women is noted in the Guidelines:

“Muslim and even Christian women are increasingly being encouraged and pressured to wear veils. Many Christian women have taken to wearing a veil simply to avoid drawing attention to themselves. In the aftermath of the war, certain Islamic groups have also taken positions at universities, hospitals and other institutions and ordered women to cover their heads and put on a scarf at all times, often threatening those who dare to show themselves in public places without a *hijab*¹⁶”

In relation to RSD the Guidelines noted:

“While discriminatory acts against Christians do not always amount to persecution *per se*, the results of combined and continuous discriminatory measures must be assessed carefully in each case since they could amount to persecution on cumulative grounds. Particular consideration should be given to those cases where discrimination creates unreasonable obstacles, makes it impossible to earn a livelihood or enjoy socio-economic rights, or has created a climate of fear, insecurity or apprehension for the individual concerned¹⁷.”

UNHCR published a Background Information paper on Iraq also in October 2005. This paper described the situation of non-Muslim communities in Iraq:

“Christians are seriously affected by the dramatic deterioration of the situation of non-Muslim communities. They increasingly experience discrimination with regard to access to the labour market or basic social services. Many Iraqi Christians are particularly afraid of persecution by insurgent groups such as *Ansar Al-Sunna* as well as Islamic militias such as the *Badr Organisation* or the *Mehdi-Army*, which have gained *de facto*

control over entire neighbourhoods in various cities and villages in Iraq. There are reports from almost all parts of the country about assaults and attacks against Christian individuals and facilities. For example, on 1 August 2004, nearly simultaneous attacks on five Christian churches in Baghdad and Mosul killed at least 15 persons. In the course of another devastating series of attacks on six Christian churches in Baghdad on 16 October 2004, at least one person was killed and nine persons were injured. On 8 November 2004, car bombs exploded in front of the St. George and the St. Matthias church in Baghdad, killing at least three people and wounding dozens of others. Further attacks on Christian churches in Baghdad caused substantial property damage. On 7 December 2004, a series of attacks on Armenian and Chaldean churches in Mosul caused substantial damage to property. In January 2005, the head of the Christian Democratic Party in Iraq, Minas Al-Yousifi, as well as the Syrian Catholic archbishop of Mosul, Basile Georges Casmoussa, were kidnapped. In February 2005, a Christian nurse was beheaded by her kidnappers and on 18 March 2005, *Ansar Al-Sunna*, which mainly operates in Northern Iraq, announced the killing of a Christian general of the Iraqi Army on its internet website. In all parts of Iraq, Christian women face increasing pressure by extremist groups to adhere to strict Islamic dress codes and to cover their hair with a veil. In spring 2005, some 1,500 female students left Mosul University in order to avoid constant threats directed against them, including through leaflet campaigns. On various occasions, Christian-owned shops selling alcohol, CDs or videos have become the target of bomb attacks or looting. For example, on 28 September 2004, four Christian-owned shops were completely destroyed in a series of arson attacks in the Iraqi town of Bald. Due to the previously described inefficiency of the ISF [Iraqi Security Forces] and the religious component inherent to the assaults, most such incidents are not reported to the authorities. The victims frequently keep a low profile in order to not attract further attention. Finally, they may decide to leave their place of residence in order to avoid further threats. Consequently, it is assumed that a high number of incidents go unreported. Attacks, assaults and discrimination are often motivated by a variety of factors which may have to be considered alternatively or cumulatively.¹⁸”

In relation to state protection the same document stated:

“The Iraqi Security Forces (ISF) are currently not capable of effectively maintaining law and order. In addition, the lack of a functioning judiciary often leaves victims of assault, maltreatment, expropriation and other attacks without

legal protection and redress, including members of religious minorities. Increasingly, Iraqis are resorting to extra-judicial conflict resolution and protection mechanisms such as tribal law. Members of religious minorities often do not have access to such traditional mechanisms, as they do not necessarily belong to a tribal grouping¹⁹.”

Conclusion

The situation of Christians in Iraq, as that of the country as a whole, is in the words of the Iraq Study Group “grave and deteriorating”. Whether, as that report hopes, a political solution can be found by the diplomatic engagement of Iran and Syria and international consensus remains to be seen. In the meantime, our hearts and prayers must go out to the people of Iraq of whatever faith or none. The recent IRIN story of Julie Carlo expresses life for many in Iraq:

“Julie Carlo, 36, has tried to leave Iraq for Jordan several times to be with her parents, but hasn’t been allowed in by the Jordanian authorities. The reason for her desperation to leave is her religion. She is Christian and has been threatened by Islamic militants.

‘Recently, life for Christians in Iraq has turned into a horror movie,’ Carlo said. ‘I will leave everything here [and] even if I do not have anything to eat there [Jordan], it is better to die from hunger than be beheaded’.

...In the meantime, Christians who can not leave Iraq make do the best they can. Christian parents have stopped their children from attending schools and universities after many fellow students made verbal threats against Christian students.

Christian women have started to wear ‘Abayas’ (the traditional full-length cloak that Muslim women wear) and head scarves to prevent them from being distinguished from Muslim women.

‘We now are being forced to be Christians just in our heart because externally we should be like Muslims, even though we don’t have anything to do with the sectarian violence’ Carlo said.²⁰”

¹ BBC News

http://www.bbc.co.uk/pressoffice/pressreleases/stories/2006/12_december/03/kofi_annan.shtml

² BBC News

http://news.bbc.co.uk/2/hi/middle_east/6212918.stm

³ Library of Congress – Federal Research Division Country Profile: Iraq, August 2006 <http://lcweb2.loc.gov/frd/cs/profiles/Iraq.pdf>

⁴ The Guardian “In 20 years, there will be no more Christians in Iraq” 6 October 2006

⁵ US Department of State International Religious Freedom Report 2006

<http://www.state.gov/g/drl/rls/irf/2006/71422.htm>

⁶ IRIN (19 Oct 2006) IRAQ: Christians live in fear of death squads

http://www.irinnews.org/report.asp?ReportID=56005&SelectRegion=Middle_East&SelectCountry=IRAQ

⁷ US Department of State International Religious Freedom Report 2006

<http://www.state.gov/g/drl/rls/irf/2006/71422.htm>

⁸ CIA World Factbook

<https://www.cia.gov/cia/publications/factbook/g eos/iz.html>

⁹ US Department of State International Religious Freedom Report 2006

<http://www.state.gov/g/drl/rls/irf/2006/71422.htm>

¹⁰ US Department of State International Religious Freedom Report 2006

<http://www.state.gov/g/drl/rls/irf/2006/71422.htm>

¹¹ UNHCR - Guidelines Relating to the Eligibility of Iraqi Asylum-Seekers October 2005

<http://www.unhcr.org/cgi-bin/texis/vtx/home/openssl.pdf?tbl=RSDLEGA L&id=4354e3594>

¹² Ibid ¹³ Ibid ¹⁴ Ibid ¹⁵ Ibid ¹⁶ Ibid ¹⁷ Ibid

¹⁸ UNHCR - Background Information on the Situation of Non-Muslim Religious Minorities in Iraq (October 2005)

<http://www.unhcr.org/cgi-bin/texis/vtx/rsd/rsddocview.pdf?tbl=RSDLEG AL&id=4371cf5b4>

¹⁹ Ibid

²⁰ IRIN – ‘Iraq: Christians live in fear of death squads’

http://www.irinnews.org/report.asp?ReportID=56005&SelectRegion=Middle_East&SelectCountry=IRAQ



UNHCR: 22,000 Cross Gulf of Aden in Smugglers’ Boats

by Paul Daly, RDC



A young mother waits for a boat with her two children. Her husband and two other children are waiting for them in Saudi Arabia. / UNHCR / K. McKinsey / February 2006

More than 22,000 people have crossed the Gulf of Aden from Somalia to Yemen this year in smugglers’ boats, according to UNHCR¹. The refugee agency state that at least 355 died making the perilous voyage and more than 150 are missing². UNHCR say that the deaths are frequently the result of overcrowded boats capsizing or breaking down and going adrift without food or water³. Those who survive the voyage to Yemen often give brutal accounts of smugglers beating passengers or forcing them overboard while still far off shore -- in some instances with their hands and feet bound.⁴

Nearly 1,500 Somalis and Ethiopians arrived in 12 smugglers’ boats between 16 and 24 November of this year, according to UNHCR spokesperson, Ron Redmond⁵. At least 18 people aboard those boats died and 17 are missing, he said⁶. The boats from Somalia usually land along a remote, 300-km stretch of tribal-ruled coastline according to Mr Redmond⁷. The refugee agency have only limited access to the often insecure coast but they were able to transport 853 Somalis and Ethiopians to their May’fa reception centre in the eight day period in November, providing them with food, water, medical care and other assistance⁸.

Most of the new arrivals told the UNHCR teams that they were from southern and central Somalia, where they claim their freedom has been significantly curtailed since the region came under the control earlier this year of the Islamic Courts Union (ICU), according to Ron Redmond⁹. The arrivals also cite an increase in inter-tribal and inter-clan conflict and say they fear for their lives¹⁰.

UNHCR have been working with the authorities in Puntland, in north-eastern Somalia, on ways to tell people about the dangers of using smugglers to cross the Gulf of Aden. This includes the making of videos and radio programmes to raise awareness among Somalis and Ethiopians of the risks involved in such crossings.¹¹

¹ UNHCR Briefing Note (24 November 2006)

<http://www.unhcr.org/news/NEWS/4566d1594.html>

² Ibid

³ UNHCR -International help needed to halt deadly people-smuggling across Gulf of Aden

<http://www.unhcr.org/cgi-bin/texis/vtx/photos?set=aden>

⁴ Ibid

⁵ UNHCR Briefing Note (24 November 2006)

<http://www.unhcr.org/news/NEWS/4566d1594.html>

⁶ Ibid ⁷ Ibid ⁸ Ibid ⁹ Ibid ¹⁰ Ibid

¹¹ UNHCR (See note 3 above)

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