

# The Researcher

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

In this issue David Leonard BL looks at the importance of medical evidence in the asylum process and he provides some recent case law on this. Also on a medical theme we have also included some excerpts from research on errors of recall by asylum seekers including those who have suffered from trauma and in a separate piece of research Patrick Dowling looks at consanguineous marriage and attitudes to disability in some Arabic cultures. On a different theme James O'Sullivan, who provides both domestic and international COI training, writes here on the critical issue of source assessment in COI Research. Jonathan Tomkin provides some advice on litigating effectively before the ECJ. Claire Bennett of Asylum Aid has summarised her recently published book, *Relocation, Relocation – The impact of internal relocation on women asylum seekers*. We publish UNHCR's statement on the important *Elgafaji* judgment at the European Court of Justice. John Stanley BL includes a summary of *Elgafaji* in his update on recent developments in refugee and immigration Law. And Sr Breege Keenan writes about the Vincentian Refugee Centre – the first Drop-in-Centre of its kind in Ireland to respond to the needs of asylum seekers and refugees.

Paul Daly, RDC



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### Disclaimer

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

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## Source Assessment in COI Research



*James O'Sullivan*  
*Refugee Documentation Centre*

### Introduction

I've been involved with training in the field of Country of Origin Information (COI) research for over two years now as part of my work with the Refugee Documentation Centre. Amongst the many subjects that my trainer colleagues and I cover in the COI courses we provide is the subject of source assessment. I've found that participants who attend our courses generally respond to the material on source assessment in a very positive way as it reflects real and practical concerns which crop up frequently in their everyday work.

We all need information, whether we work as decision-makers, legal counsel or researchers in RSD. We need information about the countries asylum seekers come from and have transited through. We need information about the laws in such countries and the application of same, about the political and human rights situation there, about economic and cultural conditions and so forth. But we don't just need information of any old kind or from any old source; we need information that is accurate and current, originating from sources we can rely on. This is where the technique of source assessment comes in, for how else can we tell if a source is to be trusted or if the information carried by that source is really accurate and up-to-date?

The article which follows will outline the main guidance we provide on the subject of source assessment in the training courses we do. It is intended to be introductory in nature, as the subject of source assessment is complex and the act of assessing a source one which is best 'taught' and indeed learned by doing rather than by reading.

### 1. COI research and the Internet

Let's start by going back to go forward. In the early days of COI research, the information available to RSD professionals was limited and usually in hardcopy form. COI research was something decision-makers and legal counsel did as a minor addendum to their other duties. The full-time, dedicated COI researcher was a very rare creature. But this all changed with the advent of what has since been dubbed the 'Information Revolution' which started to take hold in the 1990s and which has continued apace since. It is a revolution characterised, of course, by the rise of the Internet.

Since the 1990s, the Internet has become the key tool, often the only tool, used by decision-makers, lawyers,

NGO staff and COI researchers (now no longer so rare) to locate useful and reliable information about the situation in the countries asylum seekers come from or have transited through. In turn, the impact upon the way and the extent to which COI is used in the determination process itself, as Gabor Gyulai of the Hungarian Helsinki Committee has recognised, has been profound:

"Thanks to the advancement of information technology and the world-wide accessibility of the internet, now thousands of reports and newsprints are available within a click of a button. It is possible to find detailed information even on something that happened yesterday in a remote location thousands of kilometres away. The internet opened a great horizon of opportunities to use COI as determining factual evidence in asylum procedures, which enables authorities to confirm asylum-seekers' statements in a much more detailed way than previously." (Gyulai, Gabor (2007) Country Information in Asylum Procedures, pg. 9)

While the internet has certainly opened up unprecedented opportunities for locating COI, it is also not without its shortcomings as a tool for serious research. Quality control is the main issue. The absence of any single authority or entity which checks the quality and validity of the information being made available means that the researcher is faced with a challenging task. While the freedom for practically anyone to say whatever they wish and then publish their views on the World Wide Web is certainly the feature which makes the Internet such a viable and vital information tool, it is also something which has ramifications for the serious researcher. Phil Bradley outlines the issues here:

"[...] As far as the information professional is concerned there is no single authority which decides what information should be made available [via the internet], or in what form. As a result, individuals and organisations are by and large free to do exactly as they wish. Consequently, information may be sparse in some subject areas, while there may be comprehensive coverage in others; information may be current to within a few moments or it may be years out of date; information may be authoritative or wildly inaccurate; much information will be of no use or may be offensive or illegal in some countries." (Bradley, Phil (1999) The Advanced Internet Searcher's Handbook, pg.4 - 5)

You only have to do a simple Google search on any major asylum-typical issue to discover that this is certainly the case. You'll have hundreds if not thousands of results returned to you from as many sources. Some sources will already be known to you and trusted, while others will be sources that you've never encountered before, some doubtless containing useful information. What should you do in such cases?

It is tempting to just look at it from the point of view of ‘pure information’ – if the information seems useful, then you may reasonably enough decide to use it regardless of what source it comes from. This is problematic however, as you cannot isolate an item of information from the source it has emanated from. The source and the information are intrinsically linked in COI research: if you take one, you are saddled with the other. So, while the information in itself might appear useful at first glance, it could come from an unreliable or indeed, a dubious source. In a best case scenario, information from an unreliable or dubious source may very well be correct, but concerns about the source can cast it in an adverse light and lead you and others to harbour doubts about its accuracy and reliability. In a worst case scenario, information from such a source could simply be 100% wrong, misleading and unreliable. This is, in essence, why the source assessment technique is so crucial to employ at such times.

## 2. The technique of assessing sources

Source assessment essentially involves asking five critical questions to yourself about the document or report you’re found through your research and about the source that the document or report has emanated from.

The five questions are:

<b>WHO?</b> –	WHO has authored/published the document?
<b>WHAT?</b> -	WHAT kind of information does the document contain?
<b>WHY?</b> -	WHY was this information published?
<b>WHEN?</b> -	WHEN was the information produced and published?
<b>HOW?</b> -	HOW was the information collected?

The process of seeking answers to these five questions will involve you engaging thoroughly with the source, its outlook and workings, and the answers you find will assist you in coming to a conclusion as to whether the source is likely to be trustworthy, and hence usable, or not.

**Note** – The five questions outlined above and the additional notes of explanation which appear below are based on the original work of the authors of ‘Researching Country of Origin Information – A Training Manual’. See reference list below for further details.

## 3. Who, what, why, when and how?

Let’s consider each of the five questions in more detail:

### WHO? - Author/publisher of the information

When assessing a source, it is important to examine who the author/publisher of a given piece of information is. Is the information emanating from a governmental source or from an NGO? From a media source or a private individual? Establishing who the source is will reveal the possible ambitions or restrictions the original author or publisher had, what inherent slant or bias they may have followed etc. In the case of a governmental source for instance, policy considerations, such as a particular relationship that state has with another, may colour their reporting and lead them to be less objective than they might otherwise be.

When examining the issue of who the author or publisher of the information is, consider also who funds the source and what the possible interests of the financiers might be. This may suggest to you the degree to which the source is able to maintain its impartiality and independence. Examine also the issue of the source’s capacity to establish knowledge on the topic at hand.

### WHAT? - Content covered by the source

Ask yourself if the source is publishing a fact-finding mission report, a press release, an annual report on human rights practices, a news article or other kind of document, as the content will be dictated by the type of report it is. You’ll find that some sources focus their reporting on specific countries, regions or topics. Again, the issue of the source’s capacity to establish knowledge on the subject should be considered here. A good indicator of quality when it comes to content is whether the information contained in the report can be corroborated elsewhere.

### WHY? - Purpose of publication

This is an important consideration as most reporting relating to human rights and asylum issues is not done solely for the sake of information provision. Instead, the bulk of reporting is done for one or more than one of the following reasons:

- To report to donors
- To fundraise
- To advocate
- To influence a particular government
- To create an instrument of foreign policy
- To effect the release of prisoners
- To inform asylum decision-makers

In order to establish the motivation behind the publication of something, try to find out more about the official mission and mandate of the publishing organisation. This will also help you to determine whether the issues chosen by a source reflect a particular and problematic bias on their behalf or just a deliberately limited scope of reporting. Also, take a look at the target group and audience of the publication. Is it the general public, a certain government, policy-makers, donors, human rights activists, UN Committees, courts, decision makers?

Try to ensure that the information provided by a source is based on observable facts and does not derive from just their opinions or impressions.

Be ever mindful of the possible hidden intentions of information producers: most human rights organisations are aware that getting the facts right enables them to do effective advocacy work, but there are still some organisations that use dramatic language and exaggerated claims in order to draw the public's attention to human rights violations.

#### **WHEN? - Currency of the information**

The currency of information, how up-to-date it is, is an important element of good quality COI. A lot of COI is perishable; information on some subjects can go out of date very quickly as events in the country of origin unfold. Even yesterday's newspaper article can come to be superseded by more immediate news of even more recent events! In other cases and with regard to other topics however, a report from three years ago might still be accurate. This can be especially true of information of an anthropological nature, for instance.

Consider how up-to-date the information is at the time of publication as compared to when the information upon which the report is based was collected. For instance, in the case of fact-finding mission reports, the report itself can sometimes be published months or even years after the mission was completed. This is not to say that information in such reports is completely outdated and inaccurate, though it is advisable to reference both the date of publication and the date of the mission when referring to it in a decision or legal submission.

#### **HOW? - Methodology of information acquisition**

The research methodology utilised by a source can be an important indicator of its quality and reliability. Try to find out how the author/publisher has gathered the information and consider such factors as whether the author got the information firsthand or based his work on secondary sources, what kinds of secondary sources he used and their quality, how the author selected and cleared the information etc. Information on the reporting methodology used enables you to assess whether the source has an established knowledge base

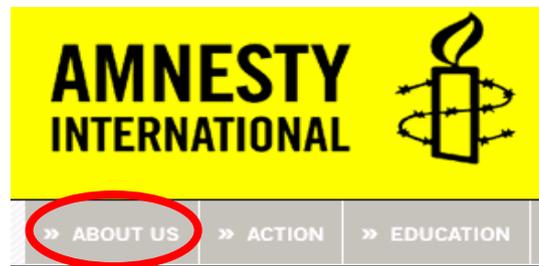
about a particular situation and whether the information has been carefully researched using a variety of sources.

It is also valuable to examine the writing style of the source. Balanced and even-handed reporting is generally expressed in appropriate language. The language and style employed by a source can tell you a lot about its bias and standpoint.

Now that we have outlined the main things to consider when assessing a source, it is time to consider how, in practical terms, you can go about establishing answers to these kinds of questions.

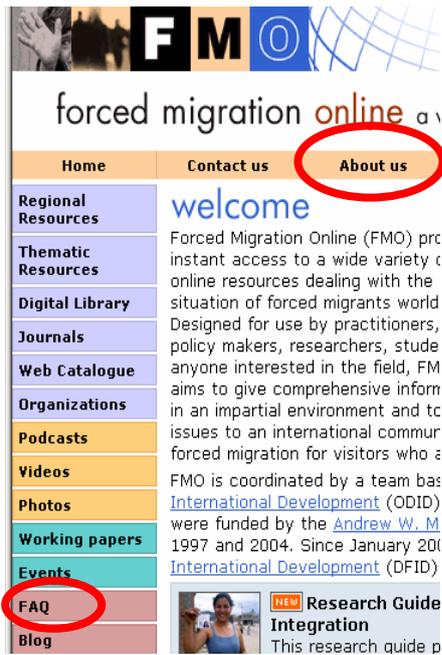
#### **4. "About Us"**

The best place to begin to seek answers to the questions outlined above is to go to the homepage of the source you're examining and look for an 'About Us' link. Many, though not all, sources will include an 'About Us' section and it usually contains information about the mandate of the organisation in question, how it is funded, how it collects information etc. It may also provide you with information about the individual people involved, such as senior personnel within the organisation or contributors to the website. The information contained in this section will therefore be invaluable to you in a practical sense when conducting a source assessment and so is often the first and best place to start your examination of a source.



**Illustration 1: The 'About Us' link on the Amnesty International website (circled).**

In addition, many websites also now contain an 'FAQ' section. 'FAQ' is short for 'Frequently Asked Questions' and is the section of a website where information is offered in response to the questions that most regularly arise about the source and about the work it undertakes. As such, the information contained in this section will also be invaluable to you when conducting a source assessment.



**Illustration 2: The links to the ‘About Us’ and ‘FAQ’ sections of the website of Forced Migration Online (circled).**

It is also advisable to look to see if the website contains a ‘Contact’ or ‘Contact Us’ link. If it does, it means you can submit any questions you may have to the source itself – a handy feature to have if the website does not contain all the information you need in the first place when doing an assessment. A source may be slow to respond to your message in some cases though, which may present a difficulty if you are operating under tight deadlines.

The inclusion of an ‘About Us’, ‘FAQ’ and ‘Contact Us’ section on the website of a source is usually a good indicator of that source’s commitment to working in a transparent manner. Keep in mind however that the inclusion of such sections is not enough in itself to ensure that the source is reliable and appropriate to use in an RSD context. Rather, it is the information you’ll find there which will help you to answer the all important who, what, why, when and how questions and help you decide on the veracity of the source.

Lastly, some websites will not contain any ‘About Us’, ‘FAQ’ or ‘Contact Us’ links and so will prove difficult to assess directly. You can try assessing such sources indirectly however, by simply conducting a search engine search to see what others are saying about it. This is a recommended approach when doing all source assessments anyway, but is especially appropriate in instances where the source itself does not appear to be forthcoming with information.

### 5. Identifying a dubious source

All sources have an agenda, a focus or a bias particular to them, even those core sources which are universally consulted by us all when conducting COI research.

Human Rights Watch is a good example of such a core source. This organisation focuses on the promotion, defence and protection of human rights and they advocate squarely from that perspective. They are still a reliable source of information however as they employ high standards in their reporting and do not let their particular bias colour the information they carry to such an extent that we could consider their version of the facts to be over-exaggerated or falsified for the sake of furthering their cause. Indeed, much of the factual information they carry can be verified elsewhere. So, even though we know Human Rights Watch have an agenda, an agenda which they make no secret of, we can still rely on them as a source of COI because of the quality of their reporting and their commitment to transparency.

Dubious sources, which may take a number of different forms, tend to be the opposite of this. They tend to have little or no commitment to transparency and offer little or no information about themselves and how they work. At worst, they may consist merely of the subjective opinion of an individual who is not really qualified to provide a reliable assessment of the facts and who may not have even researched the issue at hand. Furthermore, said individual’s agenda or bias may colour his/her assessment to such a degree that it borders on fiction.

Dubious sources, for the purposes of COI research, are therefore ones which contain material that is almost exclusively opinion-based, detrimentally coloured by the agenda or bias of the author, and/or poorly researched (if researched at all). Decision-makers, lawyers and COI researchers should seek to avoid such sources in their work. Instead, they should seek information from sources that report responsibly, that are well-researched and factually-based.

### 6. A note on Wikis and Blogs

One of the more interesting Internet-related developments in the past number of years has been the emergence of ‘wikis’ and ‘blogs’ on the world wide web. Information from such sources is frequently returned when conducting a search engine search on specific COI topics, but RSD professionals have to take particular care when considering the use of any information from such sources.

‘Wikis’ are a web-page or collection of web-pages that enable anyone who accesses to create or modify the content contained there. Wiki is understood to be short for ‘What I Know Is’ and is collaborative by nature. Perhaps the best known example of a Wiki is Wikipedia. This is an interesting source to consider for the purposes of learning about source assessment.



Wikipedia provides ample ‘About Us’ and background information and so is clearly committed to the kind of transparency that marks out a good source. However, when you consider **how** Wikipedia, in common with all Wikis, collects the information it carries, it becomes apparent that it is not suitable for use as a reliable source of COI. The reason for this is that potentially anyone, qualified or unqualified, knowledgeable about the subject or ill-informed, can make information available via Wikipedia. The information submitted may be accurate, and in many cases is, but RSD professionals cannot afford to rely on a source such as this to locate reliable COI given that the source may equally carry inaccurate, out-of-date, unreliable or false information.

‘Blogs’, short for web-logs, are another kind of information source which RSD professionals should approach with caution. They are usually maintained by individuals and take the form of an online diary or commentary. They are opinion-based in nature and the author of a particular blog may or may not be qualified or even knowledgeable about the subject he/she is writing about. BBC journalist Paul Reynolds, in a 2006 article on the subject of blogs, reflects upon the nature of this particular communication phenomenon:

“Blogs do not really exist to provide people with the “news and information” they want on current affairs. They exist to agitate, to question, to swap information, to provide leads and opinions, and generally to act as guerrilla forces against the massed ranks of the mainstream media. [...] They are not about providing people with carefully sorted and sifted news.” (Reynolds, Paul (2006) Blogs: To trust or not to trust?)

Given the opinion-heavy nature of blogs therefore, and associated concerns about the authorship and quality of the information they carry, it is clear that such sources are generally not suitable for use as COI.

### 7. Reasons to be cheerful

Thankfully, there are many circumstances during your routine COI research when you won’t need to be overly troubled by source assessment concerns. Your office or agency may have an approved list of sources or a database containing reports which are deemed appropriate for use as COI. If so, you can rest assured

that the sources carried there have been checked from a quality perspective and so are safe for you to use without there being too pressing a need for assessment (though it is important that any such list is updated regularly and that the sources listed are monitored). The material made available through the Refugee Documentation Centre’s Electronic Library is likewise safe to use as the researchers here take great care in selecting information for inclusion from only the most reputable sources.

The task of COI research free from concerns about the quality of the source is further made all the easier by the availability of the Internet’s two dedicated COI Portal websites: Ecoi.net and Refworld.



These are gateway websites for COI research and can be considered to be COI-specific search engines in their own right. Again, great care is taken in selecting appropriate documents and reports for inclusion on these websites. As such, you can generally take it for granted that the sources returned to you when you conduct a search on either portal are safe to use. Both portals are visibly mindful of source assessment concerns too, as both contain information about every source they select for inclusion.

Of course, oversights and mistakes can happen from time to time and reports can be included on the databases and portals mentioned above that you may find reason to question. In such circumstances, conduct a routine source assessment of your own and contact the administrators of the database/portal to share your concerns.

### Conclusion

During a training session, we generally finish the section on source assessment by reminding course participants that the act of doing COI research involves keeping an open mind. We advise them to keep an open mind about the search strategies they employ when looking for COI and about the sources they consult at the beginning of a search. In practice, this means that they should feel free to look at whatever source they think will help inform them about the research topic at hand, whether that source is known to them or not.

Many experienced COI researchers, particularly if they're working on a research topic they haven't worked on before, will look at Wikipedia entries to get an overview of a situation and will examine the links to other sources contained at the end of an entry. These links may very well take them to more conventional and reliable sources on the subject which they can then explore and consider for use. As such, all sources are worth exploring during the research phase and source assessment concerns should not be seen as something which limits you in any way during this initial phase.

Source assessment really comes into play at a later stage in the process, when you've gathered and sifted through the information and you're preparing to draft that asylum decision, legal submission or COI query response. This is when you need to consider, critically and earnestly, the quality of the information you've found and the reliability of the sources you intend to use. When in doubt, assess the source, because the authority of the COI you use in your decision, legal submission or query response can only be as good as the sources you choose to rely on.

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*Researching Country of Origin Information – A Training Manual*

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Reynolds, Paul (2006) *Blogs: To trust or not to trust?*

BBC News

<http://news.bbc.co.uk/2/hi/technology/4965500.stm>

(accessed on 18/02/09)

### Websites referred to:

Amnesty International (Ireland)

<http://www.amnesty.ie/live/irish/default.asp>

(accessed on 19/02/09)

ECOI.net

<http://www.ecoi.net/>

(accessed on 19/02/09)

Forced Migration Online

<http://www.forcedmigration.org/>

(accessed on 19/02/09)

Human Rights Watch

<http://www.hrw.org/>

(accessed on 19/02/09)

Refworld

[http://www.unhcr.org/cgi-](http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain)

[bin/texis/vtx/refworld/rwmain](http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain)

(accessed on 19/02/09)

Wikipedia

[http://en.wikipedia.org/wiki/Home\\_page](http://en.wikipedia.org/wiki/Home_page)

(accessed on 19/02/09)

## Case C-465/07 Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie, European Court of Justice, 17 February, 2009

*Statement by UNHCR*

The Court of Justice of the EC (ECJ) delivered on 17/02/09, its judgment in the Elgafaji case concerning the interpretation of Art. 15(c) of the Qualification Directive, in conjunction with Art. 2(e), regarding eligibility for subsidiary protection in cases of indiscriminate violence. This case is very significant as it is the first judgment of the ECJ addressing substantive international protection concepts, in the exercise of its jurisdiction over the EC asylum instruments. The decision relates to a preliminary reference from the Dutch Council of State, seeking a ruling from the court on the scope of article 15(c), which has raised difficult questions of interpretation of the concepts of individual threat and indiscriminate violence.

### Summary of key points

The ECJ (Grand Chamber) ruled that Article 15(c) in conjunction with Article 2(e) thereof, must be interpreted as meaning that:

- There is no need for the applicant to demonstrate that he/she is individually or 'specifically' targeted in order to enjoy the protection of Art. 15(c);

- The existence of the threat referred to in Art. 15(c) can exceptionally be established where the degree of indiscriminate violence characterising the armed conflict reaches 'such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to that threat'.

The main points of the judgment include:

- a finding that Article 15(b) of the Directive corresponds, in essence, to Article 3 of the ECHR and by contrast, the content of Article 15(c) is different from that of Article 3 of the ECHR;

- Confirmation of the need for an independent interpretation of Art. 15(c) - although this should be interpreted 'with due regard for fundamental rights, as they are guaranteed under the ECHR'.

- The ECJ's interpretation refers to the Preamble (in particular the right to asylum enshrined in recital 10) and the core provisions of the Qualification Directive but no reference to or reliance on the drafting history of the Qualification Directive;

- Comparison of the three types of ‘serious harm’ defined in Article 15 of the Directive to conclude that, while Art. 15(a) and (b) cover situations in which the applicant for SP is specifically exposed Article 15(c) covers a more general risk of harm;
- Interpretation of the word ‘individual’ as covering harm to civilians ‘irrespective of their identity’, where the degree of indiscriminate violence reaches such a high level that a civilian, by his/her mere presence in the given area faces a real risk
- Clarification that the situation of indiscriminate violence can be country wide but also localized in a specific region;
- Interpretation of recital 26 of the Preamble as allowing - by the use of the word ‘normally’ - for the possibility of an exceptional situation which would be characterised by such a high degree of risk that substantial grounds would be shown for believing that that person would be subject individually to the risk in question (and by implication, finding that recital 26 does not serve to create a requirement to show or raise the threshold for specific targeting of an individual);
- Clarification that the level of indiscriminate violence to be shown by the applicant will depend on the degree of individualization of the threat: the more the applicant is able to show that he is individually targeted ‘the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection’;
- Different factors such as the possibility of an internal flight alternative (IFA) or the indication that the person has already been subject to serious harm, may be taken into account for the individual assessment of an application for subsidiary protection. The level of indiscriminate violence required for eligibility for subsidiary protection may be lower in light of such indication;
- The interpretation of 15(c) is fully compatible with the ECHR, including the case-law of the ECtHR relating to Article 3 of the ECHR. In this regard the ECtHR refers explicitly to paragraph 115 of *N.A. v UK* where the ECtHR clarifies that a violation of Art. 3 may be found if a person is returned to a general situation of violence;
- The domestic court has the obligation under EC law to seek to carry out an interpretation of national law consistent with the Qualification Directive even when it has been transposed after the facts giving rise to the dispute (which was the case in the Netherlands regarding the *Elgafagi* case).

### **UNHCR's position**

Given the above, UNHCR considers the judgment to be generally positive although, in certain circumstances, the level of indiscriminate violence required to benefit

from subsidiary protection under Art. 15(c) may be relatively high and difficult for applicants to demonstrate. In this respect, it is to be expected that updated and precise country of origin information will become even more important in the adjudicating of cases under this provision as interpreted by the European Court of Justice.

UNHCR welcomes the guidance provided by the Court, which will assist States in the determination of asylum claims from people fleeing situations of indiscriminate violence. The Office expects that the decision will have an important positive impact on the interpretation of international refugee law in the EU context, as it helps to clarify a complex provision in the Qualification Directive.

UNHCR's position was made public in January 2008 in a statement on the questions in issue in the case and is available on the internet at

<http://www.unhcr.org/protect/PROTECTION/479df9532.pdf> (also available via [www.unhcr.org/eu](http://www.unhcr.org/eu)).



## Medical evidence in the asylum process - recent developments



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### The importance of medical evidence

1. Medical or psychiatric evidence can be very important supporting evidence of an asylum seeker's account of past harm. In *M.K. v Minister for Justice* (Unreported, High Court, McGovern J, 23 January 2008), a judgment on a leave application, the applicant challenged a Refugee Appeals Tribunal decision. After determining that the applicant had not established substantial grounds for contending that the decision was invalid, McGovern J stated at paragraphs 17 and 18:

*"17. There is one other feature of this case which I believe to be of some significance. In her grounding affidavit the applicant says that she is in an extremely traumatised and vulnerable state as a result of the physical and sexual abuse that she suffered in the DRC. She says that she attended a psychologist with a view to obtaining a medical report, and acknowledges that she did not obtain a report. She says that '...I lost contact with my psychologist'. She found it extremely traumatic to speak about her experiences to anyone and that she continues to find this matter extremely difficult and humiliating. On the 10th June, 2005, the applicant's solicitors wrote to the second named respondent stating, inter alia '...We intend submitting a psychologist's report from Irin McNulty, St. Brendan's Hospital'. In the appeal against the RAC decision the applicants solicitor stated 'as a result of their political beliefs and activities, she described how she was arbitrary (stet) arrested, detained and interrogated without due process and brutally and repeatedly raped and tortured at the hands of the opposition Rassemblement Congolaise pour de Democratie (hereinafter 'RCD') and its supporters. (In this regard, the appellant is attending a psychologist in St. Brendan's Hospital and a psychological report will be submitted as soon as the same are forthcoming)."*

*18. Despite the fact that the plaintiff claims that she was raped and mutilated, and that she was attending a psychologist, no medical evidence was produced before the RAC or the RAT. The court acknowledges that it is extremely difficult and traumatic for victims to sexual assaults (particularly multiple sexual assaults used as an instrument of war) to recount those events. Most applications for*

*asylum necessarily involve the recounting of painful events which led to the applicant coming to this jurisdiction and seeking refugee status. There is no other way in which such claims can be evaluated. While the court acknowledges the difficulty for applicants in having to recount painful details from their past, it is necessary that this be done to properly evaluate the application. The failure to produce a report from the psychologist in this case is significant. It is not at all clear what the applicant meant in stating in her affidavit 'I say that I lost contact with my psychologist'. The burden of proving that she is entitled to refugee status lies on applicant, and the legislature has held that she must show substantial grounds for contending the decision of the decision making body be impugned, before she can be granted leave. In the light of the findings made by the RAC, and the lack of corroborative evidence to support the applicants account, it is extraordinary that she did not produce medical evidence when she had in fact attended a psychologist and when there might have been some medical evidence to corroborate her claim."*

2. That judgment provides an indication of the importance which can attach not only to medical evidence but also to a lack of medical evidence. The judgment should also serve as a cautionary reminder to practitioners of the risk that is undertaken when a decision-maker is told that a medical or psychiatric report is being obtained and then that report is not submitted (for whatever reason). It is always a risk to tell a decision-maker that a report is being obtained because the contents of the report may not assist the applicant or the contents could turn out to be double-edged or even harmful. Then an inference may be drawn from no report being submitted. However in many cases medical evidence will be supportive, sometimes significantly supportive of an applicant's claim of past harm.

### The Istanbul Protocol

3. Paragraph 186 of the Istanbul Protocol appears directly under the heading "Examination and evaluation following specific forms of torture" and states:

*"The following discussion is not meant to be an exhaustive discussion of all forms of torture, but it is intended to describe in more detail the medical aspects of many of the more common forms of torture. For each lesion and for the overall pattern of lesions, the physician should indicate the degree of consistency between it and the attribution given by the patient. The following terms are generally used:*

*(a) Not consistent: the lesion could not have been caused by the trauma described;*

(b) *Consistent with: the lesion could have been caused by the trauma described, but it is non-specific and there are many other possible causes;*

(c) *Highly consistent: the lesion could have been caused by the trauma described, and there are few other possible causes;*

(d) *Typical of: this is an appearance that is usually found with this type of trauma, but there are other possible causes;*

(e) *Diagnostic of: this appearance could not have been caused in any way other than that described."*

4. Paragraph 186 starts with a sort of disclaimer and then sets out a scale of assessment. Ideally a medical report will use the language of that scale when describing the likelihood of scars or marks having been caused in the manner alleged by the applicant. The scale goes from (a) to (e); from the least applicant-friendly "not consistent", to the highest "diagnostic of". In between lie "consistent with" which is certainly of benefit to applicants, and then on up into the level of probable cause with "highly consistent" and the even more probative term "typical of". SPIRASI reports are prepared by physicians who are fully familiar with the meaning of the terms of the scale and their significance. However one might suspect that not all general practitioners would be similarly familiar with those terms and it could prove useful for Solicitors when requesting a medical report from a GP to furnish them with a copy of paragraph 186 of the Istanbul Protocol and to request that it be followed.

#### Recent case law

5. There is a line of cases in which decisions of the Refugee Appeals Tribunal have been found to be invalid (or leave has been granted to argue they are invalid) for failure to explain adequately why medical evidence with a direct bearing on credibility is rejected or why the applicant's account is not accepted in light of the medical evidence. These were cases in which there was certainly material before the decision-maker to ground an adverse finding on credibility, but in which the High Court took the view that the medical evidence was such that had it been properly and fully considered, it could have tipped the scale in the applicant's favour. Thus it should have been dealt with specifically, the decision-maker should have been explicit about whether it was accepted and if not accepted why that was the case.

6. In *Khazadi v Minister for Justice* the applicant challenged a Tribunal decision on the basis that the medical evidence in that case had not been properly considered. In that case, a series of medical reports including one from SPIRASI and a GP were not considered directly by the Tribunal Member in

assessing credibility. There were five reasons given by the Tribunal Member for the negative credibility findings in that case and having made those findings, the Tribunal Member then went on to refer to the medical reports. He concluded in relation to the SPIRASI report in that case that the contents of the report which found that there were scars on the applicant consistent with the story he had provided, was not "evidence" of the fact that the applicant was subjected to torture. The Tribunal Member then went on to find that the Tribunal, having had the benefit of an oral hearing and copies of the country information, was entitled to take the view that he did not agree with the contents of the medical reports.

7. In the judgment on the leave application in *Khazadi v Minister for Justice* (Unreported, High Court, Mac Menamin J, 2 May 2006), Mac Menamin J stated at page 14:

*"Prima facie the signs of mistreatment or torture tended to support the applicant's account of events. It has been contended that there were relevant considerations which went to the issue of credibility. However it is arguable that what is absent is any indication that relevant medical material and evidence helpful to the applicant's case was taken into consideration or weighed in the balance in the determination of the Tribunal. It is also arguable that it is insufficient for a tribunal member in rejecting important evidence to fail to give reasons for such rejection and that is insufficient merely to state that such evidence is being disregarded because the tribunal members has had the benefit of an oral hearing and being given copies of country of origin information and documents submitted by the applicant and the commissioner. See Zhuchkova v. Refugee Appeals Tribunal (Unreported, Clarke J., 26 November, 2004)."*

8. In *Khazadi v Minister for Justice* (Unreported, High Court, Gilligan J, 19 April 2007) Gilligan J, after hearing the substantive judicial review application, determined that the applicant was entitled to an order of certiorari. Gilligan J stated at page 8:

*"Now, I take the view in the circumstances that arise that the Tribunal Member in considering any assessment of the Applicant's credibility was required to consider, as part of his deliberations, the medical evidence in total that was before him and was obliged as part of a rational analysis to explain having considered the medical evidence along with the other evidence that was before him why in the view of the Tribunal Member the Applicant was not telling the truth and his credibility was undermined."*

9. Gilligan J went on to state at page 9:

*“I take the view that as regards the content of paragraph 36 of the decision where the Member refers to the fact that the decision had been reached in the light of records and reports that were submitted to the Tribunal it is not sufficient on the vital issue as to the Applicant’s credibility and the vital issue of the totality of the medical evidence that was before him for the Member, simply, to say without rationalising the basis of his decision that the decision was made in the light of certain reports which, in effect, are unidentified.*

*My overall conclusion is that the medical evidence that was before the Tribunal Member should have been considered, weighed in the balance and a rational explanation given as to why it was being rejected in circumstances where the Tribunal Member was making a finding that the Applicant was not credible.”*

10. In *N.M. v Minister for Justice* (Unreported, High Court, McGovern J, 7 May 2008), a decision on a leave application, McGovern J stated at page 5:

*“The decision of the Tribunal member in this case runs to thirteen pages. It sets out a comprehensive statement of the facts and background to the application. The report deals with issues of credibility and states why the Tribunal member made adverse findings on credibility issues.”*

11. McGovern J found no fault with the adverse credibility findings in that Tribunal decision. McGovern J stated at page 6:

*“In my view the adverse findings on credibility would not make the decision of the Tribunal Member reviewable.”*

12. McGovern J then went on to state at pages 6 to 8:

*“9. Medical reports were submitted in this case which tended to show that the applicant was suffering from Post Traumatic Stress Disorder. The Tribunal member took these into account and said he considered ‘... all these medical reports in full and in detail’.*

*10. One of the matters that troubles me about the Tribunal member’s decision is that he refers to the Istanbul Protocol, 9th August, 1999, and the way in which it deals with examinations and evaluations following specific forms of torture and the meaning to be attached to words such as ‘not consistent’, ‘consistent with’, ‘highly consistent’, ‘typical of’ and ‘diagnostic of’. The medical report of Dr. Dennehy uses the words ‘consistent with’ at one point, but it is in the context of describing his agitation and distress and how it affects his*

*concentration and memory. What Dr. Dennehy says is that ‘this would be consistent with typical features of anxiety, particularly when they are sufficiently severe, such as with Post Traumatic Stress Disorder ...’. But none of the medical reports appear to suggest that the symptoms of anxiety or Post Traumatic Stress Disorder are either consistent with, or not consistent with, the account of torture which he gave. Indeed, the medical legal report of Dr. Finian O’Brien tends to support the applicant’s account of his ill-treatment in Ethiopia. He refers to the scars on the applicant’s body and says that the applicant told him that the scars on his legs were a direct result of the physical abuse he had received at the hands of the Ethiopian authorities. In general, the medical reports tend to support the applicant’s account although they are not conclusive. But it seems to me that the Tribunal member approached the medical reports on the basis that certain words such as ‘consistent with’ or ‘not consistent with’ were used, whereas, in fact, these words were not used except in the single context I have outlined above. The Tribunal member is entitled to weigh up the account of the applicant and his credibility in deciding whether to accept medical reports. But where the medical reports appear to support the applicant’s claim, I think that it is incumbent on the Tribunal member to specifically deal with the medical reports and state why he does not accept them.*

*11. It is no doubt true that the applicant’s anxiety or Post Traumatic Stress Disorder which was found by the doctors, could be due to reasons other than torture. But it seems to me that where the medical evidence is significantly supportive of the applicant’s claim, that cogent reasons for rejecting it should be furnished and, in my view, the Tribunal member has failed to do this.” (Emphasis added)*

13. In *Ahmed v Refugee Appeals Tribunal* (Unreported, High Court, Cooke J, 15 January 2009), Cooke J made some general remarks about the nature of the duty to give reasons:

*“In this particular case, being as I say a border line case, what is of concern to the court today is, not only the basis upon which the conclusion as to credibility was reached, but also the way in which that conclusion is expressed in the text of the contested decision of the member of the Tribunal. It seems to me that the starting point in that regard is that the obligation on a tribunal such as the Refugee Appeals Tribunal when making a determination of this kind to give reasons for its conclusion has in effect two purposes.*

*In the first place it is to enable an applicant for refugee status who is adversely affected by the conclusion to know with sufficient detail and clarity why the negative finding is being made against him or her, including the reasons for rejection of the principal or material factors upon which the claim to a well grounded fear of persecution is based. And the second element is that a decision of a tribunal of this kind, which is susceptible of judicial review before the High Court, must give the reasons for its decision in sufficiently clear and concrete terms to enable the High Court to exercise its judicial review jurisdiction so that if the Court on reading the decision and having regard to the totality of the material which is available to the court, finds that it is unable to understand the basis upon which the conclusion has been reached, then the obligation to motivate the decision is possibly defective.”*

14. Cooke J went on to hold:

*“It is clear of course the mere presence of the lesions and their being judged medically to be typical of cigarette burns does not in itself prove the truth of the applicant’s claim that they were sustained as a result of the violence of the three men who interrogated her.*

*But the exercise which the adjudicating authority is required to carry out and to explain is to evaluate the totality of the information available, to weigh the different elements that tip in one direction and the other in the balance, and to come to a conclusion as to the credibility of the evidence as a whole. It seems to this court that where there is a physical piece of evidence that is capable of being related to the events claimed to have happened by the applicant, the obligation is, first of all, to take that into account and to explain, secondly, in the decision whether any significance was thought to attach to it at all and if not why it is discounted as against the other factors that are taken into account as elements that embellish a story otherwise based upon public events.”*

15. In *A.N. v Refugee Appeals Tribunal* (Unreported, High Court, Birmingham J, 10 June 2008), Birmingham J stated at paragraphs 21 to 25:

*“21. The GP’s report, to a large extent, involves a recital by the doctor of what he was told. The report records that there are no scars on the applicant’s body and that his testes were not swollen. With the arguable exception of a reference to a complaint of tenderness in the left third costochondral area, there is an absence of physical findings consistent with or supportive of the claim of extensive ill-treatment. Much of the report is concerned with what the applicant has to say about his psychological state.*

*The Tribunal member refers specifically to the report, and is clearly of the view that the report does not offer significant support to the applicant. The conclusion reached by the Tribunal member was one that was open to her.*

22. *So far as the SPIRASI report is concerned, which came to hand after the oral hearing, it, too, to a significant extent involves a recital of what the applicant had to say. The applicant was felt to be subjectively and objectively depressed. He did not show, at that time, symptoms of a sufficient nature and degree to justify a finding of Post Traumatic Stress Disorder, though the Doctor felt he had experienced this prior to commencing anti-depressive therapy.*

23. *However, unlike the GP’s report, the SPIRASI report does deal with certain physical findings in that it records that the applicant had showed the examining physician two very small scars on his ankles, as well as referring to an irregular raised area over the chest sternal area.*

24. *The report is noteworthy as much for what it omits as for what it contains. Unusually, there is no indication whether the doctor was of the opinion that the findings were consistent, highly consistent, or typical of what was supposed to have happened, as is recommended by the Istanbul Protocol.*

25. *The Tribunal member took the view that the report did not advance the applicant’s case, and felt that the psychological difficulties’ relevance was at the humanitarian leave to remain stage. Her approach is criticised on the basis that she paid insufficient attention to such physical findings as there were and for failing to take the view that the psychological difficulties supported the applicant’s account of what he had gone through. In my view, the Tribunal member was fully entitled to take the approach that she did. The argument advanced on behalf of the applicant in effect amounts to an invitation to the Court to come to a different conclusion. Whatever might be the situation if this were an appeal, those arguments are not valid in the context of a judicial review.”*

16. In *M.E. v Refugee Appeals Tribunal* (Unreported, High Court, Birmingham J, 27 June 2008) the Tribunal had made negative credibility findings in an appeal where the applicant had put before the Tribunal a medical report from a General Practitioner. In summary, the report recorded the presence of five scars, of which four were stated to be consistent with lacerations caused by a beating with a thin rod or stick. The Tribunal Member commented that the medical report in that case was "of no probative value, in the sense" - as she put it - "that it does not assist as to how

the Applicant received the injuries as therein specified". The High Court refused leave to challenge the way in which the medical report had been dealt with by the Tribunal and considered that no criticism could be levelled at it. The Court noted that following the approach of the Istanbul Protocol, while the scars were "consistent with" a beating with a light rod or stick, there were many other possible causes (see paragraph 186 of the Istanbul Protocol). The Court distinguished *Khazadi* on the basis that the medical evidence in that case was of an altogether different quality and quantity and in that case it was noteworthy that the doctors had specifically requested that their findings be taken into account. Birmingham J stated further with regard to *Khazadi*:

*"More fundamentally, the Tribunal Member had, in that case, reached an adverse finding before going on to consider the medical evidence. In contrast, in the present case the Tribunal Member had the assistance of submissions on the medical report, was clearly aware of its possible significance, weighed it, but concluded that it was not of probative value."*

17. In *J.L. v Refugee Appeals Tribunal* (Unreported, High Court, Gilligan J, 3 July 2008) the applicant obtained leave to apply for judicial review challenging the Tribunal decision and the full judicial review came on for hearing before Gilligan J. A SPIRASI report had been submitted to the Tribunal post the appeal hearing. It would appear from the High Court judgment that in the challenged decision the Tribunal Member referred to the SPIRASI report, and simply stated that the content thereof was noted and considered in the light of the provisions of the Istanbul Protocol. The Applicant in that case argued that the Tribunal Member failed to give any proper consideration to the submitted SPIRASI report and the matters contained therein. In the alternative the Applicant argued that the Tribunal Member provided no basis or no rational basis for any finding in relation to the SPIRASI report. The Respondents argued that the content of the SPIRASI report was in fact of little probative value being just under two pages in length and, that the conclusion as reached in the report was, to say the least, guarded. The Court stated at paragraph 31:

*"Insofar as Counsel for the Applicant relies on the tribunal member having no basis or no rational basis for any finding in respect of the SPIRASI report, it is clear that the SPIRASI report was submitted after the hearing on the 29th December, 2005, and the tribunal member says he has noted and considered the report. This Court is satisfied, having had an opportunity to read and consider the content of the SPIRASI report, that its content is of little probative value to the applicants' case."*

18. In *J.A. v Refugee Appeals Tribunal* (McHugh) (Unreported, High Court, Hedigan J, 15 October 2008), the applicant argued that although the Tribunal Member made express reference in the decision to the medical report that was compiled by the applicant's GP, he failed to adequately consider that medical report. That report stated that the applicant has a wound on his left armpit that was "consistent with a stabbing". The applicant, relying on *Khazadi*, argued that the Tribunal Member should have explained why this report did not bolster the applicant's credibility. The respondents argued that the evidence that was at issue in *Khazadi* was distinguishable from the medical report compiled by the applicant's GP, which the respondents said was of little or no probative value.

19. Hedigan J held at paragraphs 21 and 22:

*"21. I am not prepared to accept the applicant's argument that the Tribunal Member failed to give adequate consideration to the medical report compiled by his GP. As noted above, the applicant relies on Khazadi, where Gilligan J. held that the Tribunal Member was required to consider the medical evidence that was before him as a whole, as part of his deliberations, and to explain, by means of a rational analysis, why the applicant's credibility was undermined. Khazadi was distinguished, however, in M.E. v The Refugee Appeals Tribunal & Ors [2008] IEHC 192, where Birmingham J. found that the medical evidence in question in Khazadi was of an altogether different quality and quantity to that in question in M.E., and that the doctors had specifically requested that the medical report would be taken into account in Khazadi. More fundamentally, Birmingham J. noted that the Tribunal Member in Khazadi had reached an adverse credibility finding before going on to consider the medical evidence. None of these elements were present in M.E., nor are they present in the within case."*

*22. In the present case, the report states that the applicant's injuries are 'consistent' with the applicant's account of events in Cabinda, As Birmingham J. noted in M.E., under the terms of the Istanbul Protocol this means that there are other possible explanations for his injuries and, as was the case in M.E., the medical report in the present case goes no further to explain where, when or in what circumstances the injuries were sustained. The report is not, therefore, of significant probative value and in my view, can be distinguished from the medical evidence that was at issue in Khadazi [sic]. In the circumstances, in contrast to Khadazi [sic], the consideration given by the Tribunal Member to the medical report in the present case was adequate."*

20. In *Vignon v Refugee Appeals Tribunal* (Unreported, High Court, Birmingham J, 21 January 2009), Birmingham J stated:

“...all of these cases turn to a significant extent on their own facts. So, to take but one example, it may be that the manner in which medical evidence is considered in one situation, may be regarded as inadequate but comparable [sic] situation against a different factual background might be regarded as perfectly acceptable.”

21. Birmingham J went on to state:

*“Having made those preliminary remarks, I will just say a few words about the individual criticisms. The Tribunal dealt with the issue of the medical evidence in the following terms.*

*‘The Tribunal is asked to accept the SPIRASI report as collaborating the applicant’s evidence. A doctor does not usually assess the credibility of an applicant, and it would not be appropriate for him to do so. The Tribunal member has more material than the doctor and will have heard the evidence tested. A doctor will always accept at face value what an applicant tells him about his history. Therefore, the report, subject to exceptions, has a limited value in advancing the applicant’s claim or in assessing his credibility. This application, taking into consideration the questionnaire, the interview notes and his testimony at his appeal, I believe that the applicant has fabricated a story to give credence to his allegation that he is fleeing persecution.’*

*It seems to me that this Tribunal member was entitled to adopt the approach to the medical evidence that he did. The most that any physical examination can do is to record what was observable and comment on whether their physical signs are consistent with the account put forward. As we know, in commenting on the significance of medical evidence, a practice is to do so by reference to a scale that is set out in the Istanbul Protocol.*

*However, what a medical report cannot do is offer any assistance as to the circumstances in which the applicant has come by his injuries. So, marks on feet can be consistent with cigarette burns, but there is no assistance to be obtained as to whether those burns were inflicted in prison during the course of torture or whether they were caused to be inflicted for the purpose bolstering the applicant’s account. The Tribunal member clearly believes, in this case, that it was just that which has happened. As the person who has observed the applicant give his evidence, he was best placed to meet that assessment, and accordingly I do not believe that the applicant’s challenge on this ground is made out. It seems to me too that there is some substance*

*in the argument made by Mr Moore, counsel on behalf of the respondent, that the medical report is significant as much for what it does not record as what it does. And certainly the findings set out seemed quite limited in the context of the account given of repeated severe torture.”*

22. Although Birmingham J was satisfied that the Tribunal had been entitled to take the approach which it did regarding the medical evidence, he granted leave to challenge the Tribunal decision in that case on a different and discrete basis.

23. It would seem that the obligation on the Tribunal to engage with medical evidence and set out a rational analysis of why notwithstanding medical evidence of torture a negative credibility finding is being made will depend on the overall quality (and possibly also the quantity) of the medical evidence in question. And it will depend also on how strong a foundation the negative credibility findings have. The conflicting jurisprudence may be reconciled in the following manner. In cases such as N.M., Ahmed and Khazadi the High Court found that the respective strength of the medical evidence as compared with the credibility findings was such that the decision-maker was required expressly to give cogent reasons for not believing that the applicant had been tortured in the manner alleged. In cases such as M.E. and J.L. the medical evidence was of rather less objective value, and perhaps also the credibility findings seemed to have rather more strength, that the decision-maker was accordingly entitled to deal with it or dismiss it in a more summary manner. Thus, when considering judicial review on the grounds that medical evidence has not been adequately dealt with practitioners have to consider very carefully whether the strength of the medical evidence in all the circumstances of the case was such that the decision-maker was under an obligation to deal with it more extensively than they did.

24. In the decided cases where applicants were successful, although there was some legitimate basis for the negative credibility finding, the elements relied on in rejecting the account of torture were such that had the Tribunal addressed more fully the medical evidence, it could have tipped the balance. The High Court undoubtedly was influenced by how impressive the medical evidence was in those cases. In the cases in which applicants were unsuccessful in the High Court, the credibility findings in the challenged decision would seem to have been more solidly based and the medical evidence was sufficiently weaker such that in the Court’s view a more extensive analysis of it would not have made any difference.



## **The Preliminary ruling procedure in the field of immigration and asylum law**

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In recent years the Community legislature has adopted a considerable amount of legislation in the field of visas, asylum, and immigration under Title IV of the EC Treaty. Such legislation is open to interpretation and review by the Court of Justice of the European Communities (the “ECJ”) through the preliminary ruling procedure established in Article 234 EC and applicable to Title IV on terms set out in Article 68 EC. At the time of writing, questions on the interpretation of directive 2004/83 (the qualifications directive) have already been referred by courts in the Netherlands and Germany. Immigration and refugee law practitioners in Ireland may also find themselves involved in cases where a reference to the ECJ may be required. The objective of this paper is to describe how this preliminary ruling procedure works in practice and to offer some strategies for effective case preparation and litigation.

### **Circumstances in which to seek a reference for a preliminary ruling**

The preliminary ruling procedure established under Article 234 EC is modified by Article 68 EC insofar as it relates to acts adopted under Title IV (visas, asylum, immigration and other policies related to the free movement of persons). Pursuant to Article 68(1) only courts against whose decision there is no appeal are entitled to refer questions to the ECJ. This limitation would, however, be removed, were the Lisbon Treaty to come into force (Article 2, paragraph 67).

It is important to emphasise that Article 234 EC establishes a cooperative procedure between national courts and the ECJ. Accordingly, it is solely for the national courts, having due regard to their obligations under EC law, to decide whether to make a reference and to determine the questions to be asked. Nevertheless, practitioners are in a position to make a case before the national courts to refer a question to the ECJ.

There are broadly three situations in which practitioners will wish to obtain a reference for a preliminary ruling from a national court. First, they may suspect that a secondary Community measure is invalid because it violates primary law (for example, a Treaty provision, or general principles of Community law, such as the respect for fundamental rights). Second, practitioners may consider that national law conflicts with a Member State’s obligations under Community law. Third, there

may be a dispute as to how Community law is to be interpreted or applied in a given case.

If practitioners suspect that there is a conflict between national law and Community law, they should outline clearly the obligations resulting from Community law and why national law interferes with such obligations. In this regard, it is useful to recall that as a matter of Community law, national courts are required to provide individuals before them, the protection offered by community measures (13 March 2007, Unibet, C-432/05, Rec. p. I-2272, paragraph 38). If the conflict between national and community law is self-evident, national courts may decide not to make a reference but will then either interpret national law in conformity with Community law (11 January 2007, ITC, C-208/05, Rec. p. 181, paragraph 70) or refrain from applying the incompatible national law (18 December 2007, Frigerio Luigi & C., Rec. p. I-12311, paragraphs 28 and 29). If, however, it is not possible to interpret national law in conformity with Community law or if national law does not provide courts with the discretion to disregard national law, or if national courts are reluctant to use that discretion, then a reference ought to be made.

### **Drafting the order for reference**

If a national court decides to refer questions to the ECJ, it may invite the parties to make propositions regarding the formulation of the question. However, ultimately it is for the referring Court to determine the questions to be referred.

From an EC law perspective, the purpose of the preliminary ruling procedure is to ensure that Community law is interpreted and applied correctly and uniformly across the European Union. The Court’s role is not to interpret law in a vacuum, but to provide an answer that will enable the national court to resolve the case pending before it.

Bearing this in mind, the order for reference should identify clearly the relevant Community and national legal provisions and succinctly set out the facts of the case at issue. From a reading of the order for reference, it should be clear why the interpretation requested is necessary for the resolution of the case pending before the national court. If the reference concerns the compatibility of a national measure with a provision of Community law, the order should set out what exactly the national measure entails. The questions should be framed in as specific terms as possible.

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### Urgent questions

The rules of procedure provide for three speeds of preliminary ruling procedure, depending on the urgency of the case: The ordinary procedure, the accelerated procedure and the urgent procedure.

At the time of writing, the ordinary procedure takes approximately 18 months. The accelerated procedure, established under Article 104a of the ECJ rules of procedure is reserved for matters of “exceptional urgency”. The order requesting accelerated treatment should set out why the referring court considers such treatment is justified. The recent *Metock* judgment referred by the High Court was dealt with under the accelerated procedure and was dealt in 4 months.

The urgent preliminary ruling procedure came into effect on 1 March 2008. This procedure is only available in respect of certain specified Treaty provisions. It is relevant to immigration and refugee law practitioners because it covers Title IV of the EC Treaty (Visas – asylum and immigration and other policies related to free movement of persons). The Court has published a guideline giving examples of situations in which it may be appropriate to request the urgent preliminary ruling procedure. One such example is where a person is detained or deprived of liberty and his or her legal situation depends on the answer to the question. For further information, see: <http://curia.europa.eu/en/instit/txtdocfr/txtsenvigreur/noteppu.pdf>.

### Outline of the preliminary ruling procedure

There are typically two stages to the preliminary ruling procedure: there is first a written stage and usually an oral stage. Once the order for reference is received by the ECJ registry, the questions referred are published in the Official Journal and circulated to EU Member States and the Institutions. EU Member States, Institutions and parties involved in the litigation before the national courts may submit written observations to the ECJ within two months and 10 days. It is worth stressing that individuals or associations that are not parties to the original proceedings are not entitled to submit observations under the Article 234 procedure. Therefore if, for example, a public interest body (for example a non governmental organisation) wishes to submit observations as part of the preliminary ruling procedure, it must ensure it is a party to the proceedings before the national court. The written observations submitted are translated into French, the working language of the ECJ.

If a hearing is to take place, the parties will be sent a “Report for the Hearing” usually at least three weeks before the date of the hearing. The Report contains succinct summaries of the different observations presented during the written procedure. Prior to the hearing the parties will be asked to indicate the time

they will take to make their oral presentation (which typically must not go beyond a maximum 30 minutes). At the hearing, members of the Court may intervene with questions during the oral presentations, or they may wait until the presentation has ended. At the end of the presentations, each party is afforded an opportunity to reply briefly to the arguments made by other parties.

If an Advocate General has been appointed to the case, then, after the hearing, he or she will set about drafting an Opinion. The Opinion is non-binding and concludes with a recommendation as to how the Court should answer the questions referred.

Once the Advocate General has published his Opinion, the case goes into deliberation. The judges agree on a single text. There are no dissenting judgments. The agreed text is then sent to the translation services. The operative part of the judgment is notified to the referring national court.

### Practical advice for practitioners

Understanding the preliminary ruling procedure and the nature of the ECJ may provide some useful insight into how to litigate effectively before the court. Below are some suggestions on effective case preparation and litigation.

#### i. Written observations

The ECJ operates under strict rules set out in the Treaty, the Statute of the Court and the Rules of Procedure. As a result, the ECJ does not have the same degree of procedural flexibility that courts in Ireland enjoy. It is therefore critical to respect the prescribed deadlines. Observations submitted after the expiry of the relevant deadlines will be returned by the Court registry without exception.

It is important to keep in mind that the working language of the ECJ is French and observations submitted in English will be translated into French. Therefore observations should be written in plain English. Idiomatic expressions or legal jargon that is specific to national law should be avoided. Otherwise, there is a danger that an important point may be misunderstood and mistranslated.

If the questions referred concern the compatibility of national law with Community law, it is important to set out precisely the terms and scope of the national legal provision and how it is applied in practice. The pleadings should then examine whether or not national law interferes with a Community law right and if so whether such interference can or cannot be justified. It is worth examining in detail whether any seemingly justified interference also satisfies the test of proportionality.

As mentioned in the previous section, the written observations will be summarised in the preparation for the Report for the Hearing. Therefore it may be helpful to preface the observations with an executive summary of the main arguments. Highlighting arguments that practitioners consider crucial will help ensure they do not get edited out of the summary. The text should be well structured and sign-posted with clear headings and with a definite proposal as to how the questions should be answered. Pages and paragraphs should be numbered.

Where a question relates to the interpretation of a piece of EC legislation, pleadings should contain an analysis of the wording, the scheme and the objective of that legislation. In order to ascertain the objective, it may be worth examining the Recitals of the legislation. If possible, as part of the analysis, it may also be worth comparing different language versions of the legislation.

It is important to cite relevant EC case-law and to give full citations of the cases as authority for assertions made.

While the written pleadings should be exhaustive and self-contained, relevant documents relied upon (national legislation or documents relating to the facts of the case) should be included in an annex. If documents are lengthy, it is advisable to include relevant extracts only. The submission should include a page listing the documents annexed.

The emphasis at the ECJ is on the written procedure. Therefore all the principal arguments should be included in the written observations. It is inadvisable to save the best arguments for the hearing.

## ii. Oral submissions

In the context of a preliminary ruling procedure, the hearing provides a useful (and only) opportunity for advocates to respond to the observations submitted by any other parties, Members States and Institutions. In addition, the hearing should be used to emphasise the most important aspects of your case and to answer questions asked by members of the Court.

When making oral submissions at the hearing, it is important to keep in mind that most Members of the Court are not native English speakers and may be hearing arguments through simultaneous interpretation. Accordingly, it is advisable to speak slowly and clearly and to ensure that the oral presentation is well sign-posted. Experience shows that advocates reading from a prepared text tend to speed through their pleadings and interpreters often struggle to keep up. It is therefore usually more effective to speak from notes. Interpreters usually prepare for the hearing in advance. It is possible and advisable to provide them with a copy of oral submissions prior to the hearing. (The relevant fax

number is: **+352 4303 3697** or email is: [interpret@curia.europa.eu](mailto:interpret@curia.europa.eu)).

The court is very strict on adhering to time limits for presenting arguments. If there are several parties sharing a common position, it is useful to co-ordinate and divide arguments between the different advocates to make the most of the time allotted and to avoid repetition. The first advocate speaking should set out the different topics that will be taken by the other advocates.

## Costs

The Court does not charge any fee for hearing cases. Insofar as preliminary rulings are concerned, judgments contain a standard costs clause which essentially leaves the matter of costs to be decided by the referring court:

*“Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.”*

Article 76 of the Rules of Procedure regulates the provision of Legal Aid. Article 76 provides that applicants unable to meet the costs of the proceedings, in whole or in part, may apply for legal aid. The application must be accompanied by relevant information set out in that article establishing the applicant’s lack of means.

## Further Information

The web-site of the ECJ ([www.curia.europa.eu](http://www.curia.europa.eu)) contains a lot of useful information on the Court and should be consulted in the event that a practitioner is involved in running a case before the ECJ. In addition to Treaty provisions, the Statute of the Court and the Rules of Procedure, practitioners will find a number of “Guidance notes” to advocates as well as to national courts concerning the preliminary ruling procedure.



## Vincentian Refugee Centre



by Sr. Breege Keenan, Manager

The Vincentian Refugee Centre (VRC) is based in St. Peter's Church, Phibsborough, Dublin 7. The VRC was the first Drop-in-Centre of its kind in Ireland to respond to the needs of asylum seekers and refugees and many other Centres have been modelled on it.

The VRC is a partnership project between the Vincentian Community, the Daughters of Charity and Society of St. Vincent de Paul. The Vincentian Community (also known as the Congregation of the Mission) was founded in Paris in 1625 by Vincent de Paul and number around 3,600 priests and brothers who serve in 86 countries. The Daughters of Charity were also founded by Vincent de Paul in 1633 in Paris and number around 20,000 sisters serving in 91 countries. The Society of St. Vincent de Paul (SVP) was founded in 1833 to help impoverished people living in the slums of Paris. The primary figure behind the society's founding was a young lawyer, Frederick Ozanam. There are about 950,000 SVP members, both men and women working in 132 countries making it one of the largest charities in the world. While the SVP was founded by Frederick it took as its patron St. Vincent de Paul.

Vincent De Paul was the initiator of assistance to abandoned children (foundlings), to prisoners, victims of war, galley slaves, refugees, and especially visiting the housebound. In all these works, he was a precursor, showing the way which is still followed today by institutions and governmental departments of social services. His model was Jesus Christ and he placed himself at the service of the poor. He taught that true charity does not consist only of distributing alms, but of helping the people to regain their dignity and independence. By opening a Centre to respond to the needs of people seeking asylum and refugees, the Vincentian "family" were continuing the work begun by Vincent de Paul in 1625.

On the 25<sup>th</sup> January, 1999 the then Taoiseach, Mr. Bertie Ahern officially opened the Vincentian Refugee Centre. The Taoiseach was complimented by some sections of the media for striking a welcoming note, highlighting, during his opening speech, that the Vincentian Refugee Centre was 'a welcoming

community that recognises, values and respects cultural diversity' and that he could not think of anything more 'frightening than being a stranger in a strange land'.<sup>2</sup>

The VRC is primarily a place of welcome, and hospitality. Each person is offered tea/coffee and given the newspaper to read, if they wish. We believe as Christians, that the practice of hospitality is not a pastime but it is one of the hallmarks that characterize us as Christians. The practice of hospitality is not limited to other Christians but to whoever crosses our threshold. Listening to and spending time with clients is not always easy, but for many of the clients of the VRC it is of the utmost importance that they are treated with respect and dignity. I cannot over emphasize the importance of listening.

We try to recall the name of each client of the VRC. It is difficult when we ring government agencies and then the clients become a "number" a "statistic" and not an individual with a name and a history. When we ring the Irish Naturalisation and Immigration Service we must have the client's 69/...../09 number available; contacting the Citizenship Division it is their 68/...number and if contacting the Department of Social and Family Affairs it is their PPS number.

During the past ten years we have welcomed over 7,500 visitors to the VRC from 122 countries. These figures are a record of the first visit of a person to the Centre, most of whom, return for a number of subsequent visits. For example, in 2007 the VRC welcomed 629 new clients but there were 5,100 visits made to the Centre in that same period, the majority of those by previously registered clients. The 5,100 visits exclude partners and children; the numbers who attended the women's group; group for men in the asylum process; group for men with refugee status; homework club for separated children; home/hospital visits and the numbers attending English classes. Clients from Nigeria, Romania, DR Congo, Somalia, Poland, Algeria, Angola, Cameroon, Russia and Kosovo were the most highly represented countries.

The Vincentian Refugee Centre offers:

- A place of welcome and hospitality
- Information, Advice and Advocacy
- Housing Service (includes advocacy, settlement, follow-up and mediation)
- Health and Well-being ( support, attending appointments with clients)
- Integration (social cultural and religious)
- Home-work club and social activities for separated children.

As the VRC is a drop-in-Centre, one day is never the same as another. Monday 5<sup>th</sup> January, 2009 was our

<sup>2</sup> Irish Times, Editorial, 26 January 1999

first day back at work after the Christmas break. The following is a list of the people who called to the Centre on that day and their particular query; I do not give the responses to the queries.

- EU national from Eastern Europe<sup>3</sup>. He arrived in Ireland on the 30<sup>th</sup> December 2008 from Spain. He had booked himself into a hostel in the inner city for the next seven nights but had little money left to survive on. He sought help with finding work but had poor English.

Called back later in the day, requesting we write a text message on his mobile saying that he is a painter and available for work.

- Refugee from Eastern Africa was living in a flat in the north inner city but wished to move. He gave notice to his landlord that he was leaving and used his deposit to pay the months rent. He had seen another flat which he hoped to get. When he went to the “new” flat it was already gone and he now finds himself homeless and is staying with friends.
- Asylum seeker from Southern Africa joined her sister who subsequently returned to Africa. She was in the care of the HSE until 2008 and is now in a hostel where she is receiving Supplementary Welfare Allowance. She wanted to find accommodation for herself as she is now nineteen, but is still in the asylum process. (She has no right to private rented accommodation or to social welfare money)
- Refugee from Northern Africa requested help filling in a Supplementary Welfare Allowance Review Form. She asked a private solicitor to make an application for family reunification for her and her son. She paid the solicitor €800 and did not know whether the solicitor had made the application or not as she had heard nothing from the Office of the Refugee Applications Commissioner even though the application was “supposed” to have been made over four months ago.
- Naturalised Irish citizen (Southern Africa) came to inform us that he had moved flat. He is in receipt of a disability payment; has a mental health problem and needs on-going support.
- Refugee from Western Africa needed help completing his application form for citizenship.
- Asylum seeker from Central Africa has been living in a Direct Provision hostel for the past two years and was wondering what her chances of getting “self-catering” or a flat were? She is sixty years of age, was extremely upset, and finding it very difficult

to learn English. She asked that we contact the Reception and Integration Agency for her.

- Refugee from the Middle East requested we explain a letter he received from the Community Welfare Officer.
- Refugee from Western Africa requested assistance with seeking alternative accommodation and help with writing letters.
- EU national from Eastern Europe with her family and a member of the Roma community asked that she be referred to the Society of St. Vincent de Paul for assistance.
- Asylum seeker from Western Africa living in a Direct Provision hostel sought information on volunteering and wished to join the Women’s Group.
- Asylum seeker from Eastern Africa wondered what her chances were of being allowed to remain in Dublin as she is due for transfer from Hatch Hall, Direct Provision Hostel, (Dublin) this week.
- Man with residency from Western Africa, who is barred from his family home, requested that the Vincentian Refugee Centre make an appointment with him and his wife and children to discuss his entitlement to access to their children.
- Woman with residency from Western Africa called in for support with rearing her children.
- Refugee from Southern Asia called in for support; she finds it lonely in her flat.
- Man from Western Africa (came under family reunification) requesting assistance with finding alternative accommodation as he reckons there is drug dealing in the house where he has a flat in the north inner city.
- Man with Leave to Remain from Western Africa who is married to an asylum seeker who is expecting their first child; he wanted to know if she could join him and what their entitlements would be. She had her interview with the Office of the Refugee Applications Commissioner and awaiting a decision. He wondered if she would be granted permission to remain in the State on the basis of the letter he had sent to the Department of Justice, Equality and Law Reform.

<sup>3</sup> Names of the countries have been changed to larger regions to protect the identity of the clients.

- Naturalised Irish citizen (Central Africa) was homeless and asked for assistance in finding accommodation and funding to bring his four children to Ireland, as he was granted family reunification.
- Man from Southern Africa, he was on Stamp 2, but his visa has expired, wanted to know how to get it renewed.
- Refugee from Eastern Africa called in for support, issues around her social welfare payment
- Asylum seeker from Eastern Africa left his Direct Provision hostel down the country as he did not like it. He has been living with friends in Dublin for quite a few months and now wants to return to a Direct Provision Hostel. However, he wants to go to Mosney or Portlaoise (both outside Dublin) and requested the VRC to write to Reception and Integration Agency (responsible for housing asylum seekers) and to use the VRC address for his correspondence as he keeps moving from friend to friend.
- Refugee from Eastern Africa was questioning the “entitlements” of refugees.  
He asked why a refugee gets a “hard” covered travel document, but if his family join him they get “soft” covered travel documents?  
Garda National Immigration Bureau (GNIB) is now asking those with “soft” covered travel documents to bring their passports, how can someone travel to Eastern Africa for a passport? Who is going to pay the cost?  
GNIB are also asking asylum seekers who get Leave to Remain to bring their passports as proof as to who they are before they will issue them with a green card with Stamp 4.  
He called back later to tell us that many people were quite concerned about trying to get their passports.
- Programme refugee from Eastern Africa requested help with completing passport form, when in fact she meant a naturalisation application form. She had applied for family reunification and has heard nothing for 17 months and had paid a solicitor €400 to make the application.

### Women’s Group:

Four women attended the first group for 2009. Three come from Eastern Africa and one from Central Africa. The VRC had put one woman in touch with the Abbey Presbyterian Church (Parnell Square) and she was delighted to have been able to participate in their ceremonies given it was her first Christmas in Ireland. Another woman was upset as she did not participate in any ceremonies and while her family were Presbyterians she was not practising and was ashamed

to attend. She was encouraged to attend with the other lady.

They were given information on courses available in Ozanam House run by the Society of St. Vincent de Paul and to choose what course they would like to attend. Information was also given to them on volunteering. Many of the women were missing so a plan of activities for the rest of the term was left until the next meeting.

### Home Visitation:

Four families were visited on 5<sup>th</sup> January 2009:

- One family from Eastern Africa who have problems paying bills and finding a secondary school places for their children.
- Lone parent from Eastern Africa who is finding it difficult to adjust in her flat after living in the hostel where she had company and companionship
- Man from Eastern Europe who is abusing drugs
- Family from the Middle East, wife is naturalised (Irish) but the husband was refused because he had some minor offences

The work of the Vincentian Refugee Centre would not be possible without the commitment and dedication of its five staff and several volunteers. We also acknowledge the funding from the Homeless Agency, Dublin City Council, Health Service Executive, European Refugee Fund and the founding partners of the Vincentian Refugee Centre.

The day in the life of the VRC gives the reader an idea of the diversity of clients and of queries to the Centre and each day brings its own challenges. On many occasions, we refer clients to other governmental and non-governmental organisations and there are the times when nothing can be done. To accompany the asylum seeker or the refugee is not time wasted but a privilege for all of us.



## Consanguineous marriage and attitudes to disability in some Arabic cultures



by Patrick Dowling, RDC

### Introduction

The Palestinian police force raiding a house in Beit Awwa, a town north of Hebron in August 2008, came across two siblings, Bassam, 39, and his sister Nawal, 42, who were found in a dingy filthy basement, imprisoned by a locked iron door.<sup>4</sup> Bassam and Nawal were naked and held "...since childhood in two concrete rooms that stank of sweat and urine...."<sup>5</sup> Few others in this rural West Bank village were aware of their existence.<sup>6</sup> The police said the owners of the house had tried to prevent them from entering, "...saying that if we go near the place, their son Bassam would 'cut us to pieces' "<sup>7</sup> The police would later learn that Bassam and Nawal were mentally disabled.<sup>8</sup> Their father, a local imam, was arrested while their mother protested that the siblings were not held involuntary but for their own protection. " "We lock them up to keep them away from people and children out on the streets who could harm them. We are not holding them prisoner," she said"<sup>9</sup> An uncle of the family said " "If they go outside, people will laugh at them, "..."<sup>10</sup> The siblings' uncle also said that the "...family could not find long-term care for them and hid them to avoid bringing shame on the family"<sup>11</sup> A representative of the Al-Ihssan institute for the mentally handicapped in the region Khaled Zaatara says "...that for many parents having a disabled child is considered a stigma. "Some people hide their mentally disabled children and don't speak about them because they are afraid this will harm their reputation," Zaatara said. He said there are many cases of mentally handicapped people in the region but that the Al-Ihssan institute has only room for 120"<sup>12</sup> A member of a human rights organisation in the region Imad Abumohr

<sup>4</sup> Majeda El Batsh, (28 August 2008), *Handicapped Palestinian siblings locked in cellar 'for years'*, AFP <http://www.france24.com/en/20080828-handicapped-palestinian-siblings-locked-cellar-years>

<sup>5</sup> Nasser Shiyoukhi, (27 august 2008), *Police: Disabled Palestinian siblings hidden away*, Associated Press <http://www.wtop.com/?nid=106&sid=1467805>

<sup>6</sup> *Ibid*

<sup>7</sup> Majeda El Batsh, *op.cit*

<sup>8</sup> *Ibid*

<sup>9</sup> *Ibid*

<sup>10</sup> Nasser Shiyoukhi, *op.cit*

<sup>11</sup> *Ibid*

<sup>12</sup> Majeda El Batsh, *op.cit*

said, this type of case was not unfamiliar. "He said last year they were called on to rescue a 17-year-old youth with mental disabilities who had been thrown into a garbage bin. Abumohr said the boy had scars on his stomach, neck, hands and feet where he'd apparently been tied up. "I'm sure there are other cases of hidden people in the rural areas," he said"<sup>13</sup> The father of Bassam and Nawal had "...married his first cousin and had eight children, five with disabilities who died in childhood; Nawal and Bassam; and another son, who has since married, the family said"<sup>14</sup> The case of Nawal and Bassam in Palestinian Beit Awwa highlights the issue of marriage between first cousins in Arab culture, called consanguineous marriage, and the affect on resulting children. This article will focus on the practice of such kinship marriage, including the history of consanguineous marriage in Arabic culture, the affects that first cousin marriage can have on respective children; examples of genetic disorders from Arab countries are mentioned alongside regional health comparisons; addressed also are issues in relation to women with disabilities, the associated shame within some families who have disabled relatives, and how awareness that consanguineous marriage can increase the chances of producing children with disabilities does not automatically result in changed behaviour.

### Consanguineous marriage

Consanguineous marriage is common throughout the Arab world which has kept the issue of recessive genetic disorders prevalent.<sup>15</sup> Specifically "...consanguinity is linked to high incidences of congenital malformations, mental retardation, and disability"<sup>16</sup> Why does such marriage occur in Arabic culture? History and geography provide an initial answer. "The Arabian culture and history as well as the geographical concentration of many population groups in small and isolated areas promoted the tradition of consanguineous marriages"<sup>17</sup> Maintenance of family resources and the issue of the marital contract add further reasons. "Many families consider the choice of consanguineous marriage between close relatives as a way to maintain the unity of family assets. Marriage with a relative is also preferred because of the comparative ease with which premarital negotiations

<sup>13</sup> Nasser Shiyoukhi, *op.cit*

<sup>14</sup> *Ibid*

<sup>15</sup> Hanan Hamamy, (2006), "Consanguineous Marriages in the Arab World", *1st Pan Arab Human Genetics Conference*, Dubai, United Arab Emirates, April 5-6, 2006. Centre for Arab Genomic Studies, <http://www.cags.org.ae/1stpahgabstracts.html#s113>

<sup>16</sup> Ghazi Omar Tadmouri, (2004), "The Arab World", *Genetic Disorders in the Arab World: United Arab Emirates, Volume 1, 2004*, Centre for Arab Genomic Studies,

<http://www.cags.org.ae/cbc01ar.pdf>

<sup>17</sup> *Ibid*

can be conducted and the greater stability of consanguineous union due to the advanced relationship between the female partner and her in-laws...".<sup>18</sup> Hamany and Bittles provide the following example of a consanguineous marriage where first "...cousin unions are especially popular, in particular the paternal parallel subtype 'bint amm', i.e., between a man and the daughter of his father's brother. 'Bint amm' unions are favored culturally and socially, and are considered to be the usual or expected form of marriage for first cousins, whether they have been reared in close proximity or apart. As a result, first cousin unions constitute almost one quarter of all marriages in many Arab countries...".<sup>19</sup> Tadmouri provides the following statistics from a selection of Arabic countries. "Estimates indicate that the percentage of first cousin marriages is approximately 11.4% in Egypt, 21% in Bahrain, 29% in Iraq, 30% in Kuwait, 31% in Saudi Arabia, and 32% in Jordan".<sup>20</sup> Tadmouri in another publication notes the variance of first cousin marriages, including countries where it has increased. "While the rates of consanguineous marriages remain unchanged or have declined in several countries, these rates have increased since the last generation in Algeria (Zaoui and Biemont, 2002), the United Arab Emirates (Al-Gazali et al., 1997), and Yemen (Jurdi and Saxena, 2003)".<sup>21</sup> Another study points out that in "...Jordan, the rate of consanguinity is about 50%, even in this new millennium. It was reported by Janson Staffan that kinship marriage rate of 67% in the experiment groups of parents with severely mentally retarded Jordanian children was higher than the national average (50%)(6). Even in liberal Lebanon, in 1990, 20 % of ever-married women and 24% of illiterate women liberal Lebanon were married to close relatives".<sup>22</sup>

<sup>18</sup> *Ibid*

<sup>19</sup> H Hamany & AH Bittles, (2009), *Genetic Clinics in Arab Communities: Meeting Individual, Family and Community Needs*, Public Health Genomics 2009;12:30–40

<http://content.karger.com/ProdukteDB/produkte.asp?Aktion=ShowPDF&ArtikelNr=153428&Ausgabe=240325&ProduktNr=234186&filename=153428.pdf>

<sup>20</sup> Ghazi Omar Tadmouri, *op.cit*

<sup>21</sup> Ghazi Omar Tadmouri, (2006), "Chapter 1, Genetic Disorders in Arab Populations: A 2006 Update", *Genetic Disorders In The Arab World - Bahrain volume 2, 2006*, Centre for Arab Genomic Studies

<http://www.cags.org.ae/cb24c1.pdf>

<sup>22</sup> Kozue Kay Nagata, (2003), *Gender And Disability In The Arab Region: The Challenges In The New Millennium*, Asia Pacific Disability Rehabilitation Journal, Vol 14, No 1 2003, <http://www.aifo.it/english/resources/online/apdrj/apdrj103/arab-region.pdf>

### Inherited illness

Research into populations where consanguineous marriage is prevalent indicates a higher level of birth defects. This is because "...the more closely two people are related, the more genes they share. A marriage between first cousins increases the risk of having a child with a severe congenital or genetic disorder by 2.5 times since parents share one-eighth of their genes. An average of 30% first cousin marriage in a population would increase the birth prevalence of many conditions by 5-15 times and their collective frequency by 5.5 times. Frequent consanguineous marriage increases the incidence of autosomal recessive disorders by 5- 10 times at the population level. When first cousin marriage is considered, the risk of recessively inherited disorders is multiplied by 15-30 times; hence, doubling the total frequency of congenital and genetic disorders (Alwan and Modell, 1997)".<sup>23</sup> Tadmouri elsewhere provides the following specifics where research in the Arab region has "...drawn strong correlations between consanguinity and hearing loss (Bener et al., 2005), infanto-youthful death rate (Hammami et al., 2005b), respiratory allergies, eczema (Bener and Janahi, 2005), congenital heart defects (Yunis et al., 2006), mental retardation, epilepsy, diabetes (Bener and Hussain, 2006), and many others (reviewed in Tadmouri, 2004; Tadmouri et al., 2004)".<sup>24</sup> Research into congenital disorders suggests they "...are more common in Arab countries than in industrialised countries...".<sup>25</sup> A regional comparison by Hamany and Bittles citing the WHO says that studies "...on the birth prevalence of congenital and genetic disorders that are lethal or cause lifelong impairment if untreated indicated that, of the 6 World Health Organization (WHO) regions, the highest rate of 1 65 affected children/1,000 live births was reported in the Eastern Mediterranean region, which covers a majority of Arab countries...These figures were supported by a recent March of Dimes report which estimated birth defects to be 1 69.9/1,000 live births in most Arab countries, as opposed to 52.1/1,000 live births in Europe, North America, and Australia...".<sup>26</sup> Congenital disorders are one of the principal factors in "...perinatal and neonatal

<sup>23</sup> Ghazi Omar Tadmouri, (2004), "The Arab World", *Genetic Disorders in the Arab World: United Arab Emirates, Volume 1, 2004*, Centre for Arab Genomic Studies

<http://www.cags.org.ae/cbc01ar.pdf>

<sup>24</sup> Ghazi Omar Tadmouri, (2006), "Chapter 1, Genetic Disorders in Arab Populations: A 2006 Update", *Genetic Disorders In The Arab World - Bahrain volume 2, 2006*, Centre for Arab Genomic Studies

<http://www.cags.org.ae/cb24c1.pdf>

<sup>25</sup> Lihadh Al-Gazali, Hanan Hamamy, Shaikha Al-Arrayad, (21 October 2006), *Genetic disorders in the Arab world*, British Medical Journal Volume 333

<http://www.bmj.com/cgi/reprint/333/7573/831.pdf>

<sup>26</sup> H Hamany & AH Bittles, *op.cit*

mortalities in Arab populations...”.<sup>27</sup> That “...isolated subpopulations with a high level of inbreeding...” still exist in the Arab world, means the continuance of birth defects due to consanguineous marriage remains a problem.<sup>28</sup> Al-Gazali et al goes on to say that “...in many parts of the Arab world the society is still tribal...This has made the epidemiology of genetic disorders complicated, as many families and tribal groups are descended from a limited number of ancestors and some conditions are confined to specific villages, families, and tribal groups, leading to an unusual burden of genetic diseases in these communities...”.<sup>29</sup>

### Country examples

Al-Aqeel in a conference on Arab genetics notes the concern of public health authorities over the prevalence of birth defects.<sup>30</sup> A paper at the same conference says that “...genetic diseases are relatively prevalent among the Arab population, and are a significant cause of morbidity and mortality in this population. Incidence of congenital malformations among Egyptians ranges from 1,16 to 3,17 %. This is probably due to the high consanguinity rate (20 – 40 %) among Egyptians”.<sup>31</sup> In the United Arab Emirates it is reported that marriages “...between consanguineous couples are still the norm rather than the exception. As a result there is a high frequency of genetic disorders...”.<sup>32</sup> In Lebanon the rate of consanguineous marriages while declining remains high and the country as a result “...has a high incidence of common and rare genetic diseases”.<sup>33</sup> In Qatar

<sup>27</sup> Ghazi Omar Tadmouri, (2004), “Genetic Disorders in Arab Populations”, *Genetic Disorders in the Arab World: United Arab Emirates volume 1, 2004*, Centre for Arab Genomic Studies

<http://www.cags.org.ae/cbc02ga.pdf>

<sup>28</sup> Lihadh Al-Gazali, Hanan Hamamy, Shaikha Al-Arrayad, *op.cit*

<sup>29</sup> *Ibid*

<sup>30</sup> Al-Aqeel A.I, (2007), “Genetic Counseling in the Muslim World: The Challenges”, *2nd Pan Arab Human Genetics Conference*, November 20-22, 2007, Dubai, United Arab Emirates, Centre for Arab Genomic Studies

<http://www.cags.org.ae/2ndpahgc.pdf>

<sup>31</sup> El-Ruby M., Afifi H., Temtamy S.A., et al, (2007), “Most Encountered Genetic Disorders in Egypt: Classification and Registry”, *2nd Pan Arab Human Genetics Conference*, November 20-22, 2007, Dubai, United Arab Emirates, Centre for Arab Genomic Studies

<http://www.cags.org.ae/2ndpahgc.pdf>

<sup>32</sup> Lihadh I. Al-Gazali, (2006), “Genetic Disorders in United Arab Emirates”, *1st Pan Arab Human Genetics Conference*, Dubai, United Arab Emirates, April 5-6, 2006, Centre for Arab Genomic Studies

<http://www.cags.org.ae/1stpahgabstracts.html#s113>

<sup>33</sup> André Mégarbané, Salim M. Adib, (2006), “Genetic Diseases in Lebanon”, *1st Pan Arab Human Genetics Conference*, Dubai, United Arab Emirates, April 5-6, 2006, Centre for Arab Genomic Studies

research reveals a “...high prevalence of an autosomal recessive disease in a highly consanguineous Arabian population”.<sup>34</sup> Marriage in Saudi Arabia remains substantially consanguineous in a culture where marriage “...between cousins has been part of the culture for millennia leading to...a large number of autosomal recessive diseases”.<sup>35</sup> Indeed Saudi Arabia “...has been ranked among countries with high consanguinity and inbreeding levels, thus giving rise to [the aforementioned] Autosomal recessive genetic disorders, mainly genetic blood disorders”.<sup>36</sup>

### Arabic culture and health

Overall in the Arab world consanguineous marriage remains common “...and intra-familial unions currently account for 20–50% of all marriages...”.<sup>37</sup> Consanguineous marriage is one of the main factors contributing “...to the high prevalence of genetic disease among Arabs”.<sup>38</sup> The WHO concurs and lists consanguinity as one of the contributors to inherited disabilities for MENA (Middle East and North Africa) countries.<sup>39</sup> Consanguinity is also listed by the Centre for Arab Genomic Studies in a conference paper as one of the factors making “...genetic and congenital disorders responsible for a considerable proportion of perinatal and neonatal mortalities in Arab populations”.<sup>40</sup> The WHO says that a significant

<http://www.cags.org.ae/1stpahgabstracts.html#s113>

<sup>34</sup> El-Said M.F; Badii R; Bessiso M.S; Shahbek N; El-Ali M.G; El-Marikhie M; El-Zyoid M; Salem M.S.Z; Hoffmann G.F; & Zschocke J., “A Common Mutation in the CBS Gene Explains a High Incidence of Homocystinuria in the Qatari Population”, *2nd Pan Arab Human Genetics Conference*, Dubai, United Arab Emirates, November 20-22, 2007, Centre for Arab Genomic Studies

<http://www.cags.org.ae/2ndpahgc.pdf>

<sup>35</sup> Al Aqeel A.I., (2007), “Pre-Marital Genetics Screening: The Saudi Experience”, *2nd Pan Arab Human Genetics Conference*, Dubai, United Arab Emirates, November 20-22, 2007, Centre for Arab Genomic Studies

<http://www.cags.org.ae/2ndpahgc.pdf>

<sup>36</sup> Al-Rasheed S.A., (2007), “Saudi’s Perception of Premarital Screening and Consanguinity”, *2nd Pan Arab Human Genetics Conference*, Dubai, United Arab Emirates, November 20-22, 2007, Centre for Arab Genomic Studies

<http://www.cags.org.ae/2ndpahgc.pdf>

<sup>37</sup> H Hamany & AH Bittles, *op.cit*

<sup>38</sup> Riad A Bayoumi and Anne Yardumian, (21 October 2006), *Genetic disease in the Arab world*, Editorials British Medical Journal, 333,

<http://www.bmj.com/cgi/reprint/333/7573/819.pdf>

<sup>39</sup> WHO, (30 June 2005), *A Note On Disability Issues in the Middle East and North Africa*

<http://siteresources.worldbank.org/DISABILITY/Resources/Regions/MENA/MENADisabilities.doc>

<sup>40</sup> Ghazi O. Tadmouri, Mahmoud Taleb Al Ali, Sarah Al-Haj Ali, and Najib Al, (17 September 2005), *CTGA: the database for genetic disorders in Arab populations*, Khaja, Centre for Arab Genomic Studies

proportion "...of the disability in MENA countries stems from preventable impairments, and a large part of the disability could be mitigated through treatment, or alleviated through rehabilitation and other forms of care".<sup>41</sup> The British Medical Journal says that there is a "...lack of public health measures directed at the prevention of congenital and genetic disorders, with inadequate health care before and during pregnancy, particularly in low income countries...".<sup>42</sup> Commenting on the overall human development situation in the Arab world Hamamy and Bittles suggest that health "...deficits impede human development in a majority of Arab countries, with low literacy levels, low social and economic status of women, poor overall levels of formal qualifications and expertise among health staff, and inadequate interaction between patients and medical personnel identified as contributory causes...".<sup>43</sup>

### Women

The UNDP note in 2006 the increasing reliance on women in the Arab world who look after the sick and disabled without the necessary social support.<sup>44</sup> For women with disabilities themselves their position is even more constrictive. "As women, they are segregated from male society, but as women with disabilities they are also isolated from the lives of other women. They are, for all intents and purposes, invisible; their issues receive little, or no, consideration; and there are very few programmes that target them specifically. In a social structure that is male dominated in the best of cases, women with disabilities do not stand a chance of rehabilitation, education, accessibility or any number of services available to men with disabilities".<sup>45</sup> And while the situation for disabled women in Arab countries varies regionally "...the theme of marginalization to a greater or lesser extent, is common to all of them. In poorer countries or in more conservative communities this marginalization is deeper and more difficult to combat".<sup>46</sup> This is exemplified by the symbiosis of women and marriage where in

<http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=1347378>

<sup>41</sup> WHO, *op.cit*

<sup>42</sup> Lihadh Al-Gazali, Hanan Hamamy, Shaikha Al-Arrayad, (21 October 2006), *Genetic disorders in the Arab world*, British Medical Journal, Volume 333

<http://www.bmj.com/cgi/reprint/333/7573/831.pdf>

<sup>43</sup> H Hamany & AH Bittles, *op.cit*

<sup>44</sup> UNDP, 2006, *Arab Human Development 2005*

<http://204.200.211.31/contents/file/ArabHumanDevelopRep2005En.pdf>

<sup>45</sup> Hissa Al Thani, (2007), *Disability in the Arab Region: Current Situation and Prospects*, Adult Education and Development, Number 68, DVV International

[http://www.iiz-dvv.de/index.php?article\\_id=137&clang=1](http://www.iiz-dvv.de/index.php?article_id=137&clang=1)

<sup>46</sup> *Ibid*

"...communities where a woman's status is dependent on making "a good marriage", being "a good wife" and a "good mother", women with disabilities do not stand a chance. They are not considered marriageable...".<sup>47</sup>

### Shame

The situation of disabled women in the Arabic world is enmeshed within how disability itself is regarded. The Asia Pacific Disability Rehabilitation Journal point out that "...Arab societies always treated certain categories of disabled persons as a negligible quantity, treating them as though it was the end of the road. Disability in Arab culture has traditionally been seen as something shameful, an ordeal to be endured by the family" "...<sup>48</sup> In Saudi Arabia the "...view of people with disabilities is based on a simple notion of disability, and comprises helplessness, continuing dependence, being home-bound, low quality of life and lack of productivity...".<sup>49</sup> Also in Saudi Arabia, a difficulty in carrying out research in the area of disability is the shame "...that some families feel about having...a person with a disability and as a result, [they] tend to avoid participation in such research...".<sup>50</sup>

### Conclusion

The British Medical Journal provides the following example of research and application. "The strategy most widely used to tackle disorders such as thalassaemia and sickle cell disease is mandatory premarital screening followed by counselling on the risks of genetic disease...This approach is used in Bahrain, Saudi Arabia, and Jordan. However, experience from Iran and Saudi Arabia shows that most couples choose to marry despite a high risk of inherited genetic disease in their offspring".<sup>51</sup> An advocate for The Centre for Arab Genomic Studies is reported on the progress of studies in the Gulf saying " "Despite all this progress, we are seeing in the Gulf, you still see this problem. I have visited families where the parents have had seven children, and all of them suffer from visual

<sup>47</sup> *Ibid*

<sup>48</sup> Kozue Kay Nagata, (2008), *Disability And Development: Is The Rights Model Of Disability Valid In The Arab Region? An Evidence-Based Field Survey In Lebanon And Jordan*, Asia Pacific Disability Rehabilitation Journal, Vol 19. No. 1, 2008

[http://www.aifo.it/english/resources/online/apdrj/apdrj108/disability\\_lebanon\\_jordan.pdf](http://www.aifo.it/english/resources/online/apdrj/apdrj108/disability_lebanon_jordan.pdf)

<sup>49</sup> Abdul-Salam A., Al-Shehri, Moataz M., & Abdel-Fattah (2008), *Disability Among Clients Attending Taif Rehabilitation Centre, Saudi Arabia* Asia Pacific Disability Rehabilitation Journal, Vol 19. No.2, 2008

[http://www.aifo.it/english/resources/online/apdrj/apdrj208/taif\\_rehab\\_centre.pdf](http://www.aifo.it/english/resources/online/apdrj/apdrj208/taif_rehab_centre.pdf)

<sup>50</sup> *Ibid*

<sup>51</sup> Riad A Bayoumi and Anne Yardumian, (21 October 2006), *Genetic disease in the Arab world*, Editorials, British Medical Journal, 333,

<http://www.bmj.com/cgi/reprint/333/7573/819.pdf>

impairments. Or another case where there were four children and all were deaf,” she said. “Of course, this is a matter of intermarriage. There should be more awareness on the part of the doctors, who should advise these families to think about stopping. And then again, there are families that do not want to listen. Again, it is about the culture”<sup>52</sup>. A doctor specialising in the area says that genetic “...disorders in the Arab world are a legitimate threat...It is a problem in the region due to the high prevalence of the disorders compared with the rest of the world”<sup>53</sup>. The special rapporteur for the UN on disability described in September 2008 the Arab region “...as lagging behind the rest of the world. “Disabled people are more marginalised and more isolated than other people. But specifically in the Arab region, they are invisible, because of negative social attitudes and the lack of a human rights culture,” Sheikha Hissa said”<sup>54</sup>. Meanwhile in Palestine Bassam and Nawal were handed over “...to an institute for the handicapped”<sup>55</sup>.



## Recent Developments in Refugee and Immigration Law

### SUBSIDIARY PROTECTION

#### *Case C-465/07 - Elgafagi v Staatssecretaris van Justitie, European Court of Justice, 17<sup>th</sup> February 2009*

*ECJ - PRELIMINARY RULING - ARTICLE 15 OF COUNCIL DIRECTIVE 2004/83/EC – SUBSIDIARY PROTECTION – INDISCRIMINATE VIOLENCE – INDIVIDUALISED HARM*

#### Facts

This case arose from a reference for a preliminary ruling regarding the interpretation of Article 15(c) of Council Directive 2004/83/EC. The Elgafagis submitted applications for temporary residence permits in the Netherlands, together with evidence seeking to prove the real risk to which they would be exposed if returned to Iraq. They relied in particular on facts relating to their personal circumstance, claiming, *inter alia*, that Mr Elgafagi worked for a British firm, and that they had received a letter threatening “death to collaborators”. The Staatssecretaris van Justitie (Department of Justice) refused to grant them temporary residence permits, finding that they had not proved satisfactorily the circumstances on which they were relying and therefore had not established the real risk of serious and individual threat to which they claimed. The Elgafagis successfully appealed to the Rechtbank te ‘s-Gravenhage (District Court). That court held that Article 15(c) of the Directive did not require the high degree of individualisation of threat required by Article 15(b). The Minister appealed the decision of the court to the Raad van State (Council of State). The Raad van State held that there were difficulties in interpreting the Directive’s provisions and referred the following questions to the European Court of Justice for a preliminary ruling:

“1. Is Article 15(c) of [the Directive] to be interpreted as offering protection only in a situation in which Article 3 of the [ECHR], as interpreted in the case-law of the European Court of Human Rights, also has a bearing, or does Article 15(c), in comparison with Article 3 of the [ECHR], offer supplementary or other protection?”

“2. If Article 15(c) of the Directive, in comparison with Article 3 of the [ECHR], offers supplementary or other protection, what are the criteria in that case for determining whether a person who claims to be eligible for subsidiary protection status runs a real risk of serious and individual threat by reason of indiscriminate violence within the terms of Article 15(c) of the Directive, read in conjunction with Article 2(e) thereof?”

<sup>52</sup> James Reinl, *op.cit*

<sup>53</sup> Gulf News, (15 December 2004), “Genetic disorders remain viable threat in Arab world”

<http://www.cags.org.ae/news200412.html#2>

<sup>54</sup> James Reinl, *op.cit*

<http://www.thenational.ae/article/20080903/FOREIGN/331820926/1011/SPORT> The list of signatories to the UN

Convention on the Rights of Persons with Disabilities (UN CRPD) is at

<http://www.un.org/disabilities/countries.asp?id=166>; similar information on Arabic signatories to the UN CRPD is at

[http://www.disabilitymonitor-me.org/n\\_cprd.php](http://www.disabilitymonitor-me.org/n_cprd.php)

<sup>55</sup> Majeda El Batsh, *op.cit*

## Decision

The Court stated that the referring Court essentially asked whether Article 15(c) must be interpreted as meaning that the existence of a serious and individual threat to the life or person of the applicant was subject to the condition that the applicant adduce evidence that he would be specifically targeted by reason of factors particular to his circumstances. The Court compared the three types of serious harm set out in Article 15 and noted that Article 15(c) covered a more general risk of harm as compared with Article 15(a) and (b). The court further noted that there were three features of Article 15(c): (i) that it referred more generally to a threat, (ii) that that threat was inherent in a general situation of armed conflict and (iii) that the threat is described as indiscriminate. The Court stated that in that context the word “individual” must be understood as covering harm to civilians irrespective of their identity. The Court stated that the provision must nevertheless be subject to a coherent interpretation in relation to the other two situations referred to in Article 15 and must therefore be interpreted by close reference to individualisation. In that regard, the Court held that the more an applicant is able to show that he is specifically targeted by reason of factors specific to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection.

The Court added that two factors may be taken into account: (i) the geographical scope of the situation of indiscriminate violence and the actual destination of the applicant if he is returned (Article 8(1) of the Directive noted), and (ii) the existence if any of a serious indication of real risk (Article 4(4) of the Directive noted).

The Court held that Article 15(c) of the Directive must be interpreted as meaning that:

“-- the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances;

“-- the existence of such a threat can exceptionally be considered to be established where the degree of indiscriminate violence characterising the armed conflict taking place -- assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred -- reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to that threat.”

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## *Gavrylyuk & Bensaada v The Minister for Justice, Equality and Law Reform* [2008] IEHC 321, Unreported, High Court, Birmingham J, 14<sup>th</sup> October 2008

*JUDICIAL REVIEW – CERTIORARI – SUBSIDIARY PROTECTION – DISCRETION – DISCRIMINATORY TREATMENT – SI NO 518 OF 2006 – COUNCIL DIRECTIVE 2004/83/EC – SERIOUS HARM – TORTURE – STARE DECISIS*

### Facts

The applicants had been refused asylum and had also been refused leave to remain and were issued with deportation orders before 10<sup>th</sup> October 2006, the date on which the provisions of Council Directive 2004/83/EC were transposed into Irish domestic law by S.I. No 518 of 2006. Following the transposition of the Directive, they then applied for subsidiary protection. The Gavrylyuks, who were Ukrainian citizens, claimed that they would be subjected to inhuman or degrading treatment in the Ukrainian penal system, and furnished country information stating, *inter alia*, that detention facilities in Ukraine likely reached the Article 3 ECHR threshold. Mr Bensaada, an Algerian citizen, claimed that he would be subjected to inhuman or degrading treatment and torture in Algeria by the (non-State) GIA who had already tortured him, and provided a new SPIRASI medico-legal report confirming that he had been tortured, and made submissions, *inter alia*, arguing that he feared serious harm pursuant to Article 15 of Council Directive 2004/83/EC. In considering whether Mr Bensaada was at risk of torture before originally recommending, in 2004, that he be deported, the Repatriation Unit of the Department of Justice had stated that while Mr Bensaada was a victim of torture, it was important to note that the torture was carried out by non-State agents.

In *NH & TD v The Minister for Justice*, Unreported, High Court, [2007] IEHC 277 Feeney J had held that the Minister had a discretion to consider subsidiary protection applications from persons in respect of whom deportation orders had been signed and notified prior to the coming into force of the 2006 regulations under Regulation 4(2) of those regulations. In the instant cases the Minister had refused to exercise his discretion to consider subsidiary applications made by the applicants, in respect of whom deportation orders had been signed and notified prior to the transposition of the 2006 regulations, for the stated reason that the applicants had failed to identify altered circumstances which would lead to them being at risk of suffering serious harm. The applicants sought to challenge the Minister’s refusal by way of judicial review on three grounds: (a) that the Minister’s interpretation of the decision in *NH & TD* was erroneous in that by limiting the discretion exercised to consideration of whether there were changed or altered circumstances the

Minister had misinterpreted the ratio of the *NH & TD* decision, adopted an inflexible rule and had fettered his discretion, (b) that there was unfairness or discriminatory treatment in that the Minister had allowed a group of people in respect of whom deportation orders had been made but who had not been notified of this fact, to make an application for subsidiary protection, and (c) that even if the Minister was correct in his interpretation of the decision in *NH & TD*, he had failed to give adequate consideration to submissions made in respect of changed circumstances.

With regard to the *NH & TD* decision, the applicants contended that Feeney J was merely setting out a number of indicative criteria as to when the Minister might choose to exercise his discretion, while the Respondent contended that the exercise of the Minister's discretion under Regulation 4(2) was limited to situations where the applicants show new facts or circumstances.

### Decision

The Court refused certiorari in respect of Mr and Mrs Gavrylyuk's applications, but granted certiorari in respect of Mr Bensaada's application. The Court held (a) that the Minister's, and not the Applicants', interpretation of *HL & TD* was correct, and (b) that the Minister had not acted unfairly but had treated equals equally and unequals unequally and, in drawing the distinction that he did between applicants generally and those who had not yet been notified of extant deportation orders made before the transposition of the 2006 regulations, had pursued a legitimate aim designed to achieve fairness and to promote confidence in the system. With regard to (c), the claim that the Minister had failed to give adequate consideration to the criteria he said he was applying, i.e., whether there were changed circumstances, the Court again found against the Gavrylyuks, but in Mr Bensaada's favour. With regard to the Gavrylyuks, the Court found (i) that the Minister had already considered those applicants' claims under Section 4 of the Criminal Justice (CAT) Act 2000 and Article 3 of the ECHR, neither of which required a nexus to a Convention ground, and (ii) that the new country of origin information, when scrutinised, was not significantly different to the old country information in that a concern re Article 3 was extant in the old information, and there was nothing to indicate that material conditions had deteriorated in Ukraine.

With regard to Mr Bensaada, the Court noted that Feeney J had indicated three non-exhaustive examples of changed circumstances: (a) where an applicant's position is affected by a change in the definition of serious harm, (b) where altered personal circumstances have arisen, and (c) where conditions in the country of origin have changed. The Court noted, however, that the Minister's letter informing Mr Bensaada of the

possibility of applying for subsidiary protection referred only to the latter two of these possible scenarios. The Court then found that as the applicant's file was examined under Section 3 of the Immigration Act 1999 on 4<sup>th</sup> February 2003, a point in time when the Department of Justice operated (wrongly) on the basis that to satisfy the definition of torture under the United Nations (Convention Against Torture) Act 2000, it had to have a nexus to a public official, while the wider definition of torture under Article 15 of the Directive contained no such nexus. The Court further noted that the applicant had in fact been tortured, and that the previous Ministerial submission in Mr Bensaada's case stated that it was important to note that his torture was carried out by non-State actors, and held that the Minister failed to have sufficient regard to the changed definitions of serious harm and torture, pursuant to Article 15 of the Directive, in circumstances where the applicant had, in fact, been subjected to torture.

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*Mishra v The Minister for Justice, Equality and Law Reform* [1996] 1 IR 189  
*NH & TD v The Minister for Justice, Equality and Law Reform* [2007] IEHC 277  
*O'Brien v Keogh & O'Brien* [1972] IR 144  
*The State (Nicolaou) v An Bord Uchtala* [1966] IR 567  
*Weston v An Bord Pleanala* [2008] IEHC 71  
*Yesilova v The Minister for Justice, Equality and Law Reform*, Unreported, High Court, Hedigan J, 9<sup>th</sup> October 2008

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## COUNTRY INFORMATION IN ASYLUM CLAIMS

*P.S. (A Minor) v Refugee Applications Commissioner & Ors, Unreported, High Court, McMahon J, 11<sup>th</sup> July 2008*

*JUDICIAL REVIEW – CERTIORARI – REFUGEE STATUS DETERMINATION – CREDIBILITY – SECTION 13(5) & (6) REFUGEE ACT 1996 – SELECTIVE USE OF COUNTRY OF ORIGIN INFORMATION - FAIR PROCEDURES – CONSTITUTIONALITY OF SECTION 13(5) & (6) REFUGEE ACT 1996, AS AMENDED*

### Facts

The applicant, a minor from South Africa, arrived in the State claiming a well-founded fear of persecution in her country of origin by reason of her membership of a particular social group comprising young women or girls. The then 14 year old applicant arrived in the State while pregnant and subsequently gave birth to a stillborn child. She claimed that she had become pregnant as a result of being raped in South Africa. The Commissioner stated that while the applicant may need support and assistance, there was a possibility that she had motives other than flight from persecution for departing South Africa. The Commissioner's authorised officer also stated that he was obliged to find that Section 13(6)(e) of the Refugee Act 1996, as amended, applied as South Africa was designated a safe country. This resulted in a circumscribed appeal to the Refugee Appeals Tribunal, without an oral hearing. The applicant sought to judicially review the Commissioner's recommendation, seeking a number of reliefs on a number of grounds, including (a) that the Commissioner used country information in the Section 13(1) Report that was not put to her, thereby depriving her of an opportunity to make observations, (b) that the Commissioner placed selective reliance on country information, (c) that a constitutional construction of Section 13(6) of the 1996 act meant that the Commissioner had a discretion whether to apply its provisions, and (d) that depriving the applicant of an oral hearing was unconstitutional since it denied the applicant her constitutional right to a fair trial or a fair hearing. The third of these grounds, re whether the Commissioner has a discretion to apply Section 13(6), was advanced later than the other grounds, and was out of time under the statutory regime by approximately 21 months.

### Decision

The Court granted leave to seek judicial review. The Court found that the Commissioner accepted the applicant's account of rape and that the Commissioner apparently accepted that she was a member of a particular social group. The Court took note of the dictum of Clarke J in *VI v The Minister for Justice*, that if a matter is likely to be important to the determination

of the Refugee Appeals Tribunal then that matter must be fairly put to the applicant, but held that it does not follow that every piece of country of origin information must be put to an applicant. The Court stated that it was of the opinion that it is only if it is special and significant that it must be put, and that whether a particular matter assumes such significance depends on the circumstances of the case, and that one must look at the overall picture. The Court was satisfied that, taken in the round, there was no breach of fair procedures in failing to put matters to the applicant more specifically. The Court did, however, hold that the Commissioner was selective in his use of country information, finding that a paragraph quoted in support of the decision omitted the remainder of the quoted source which greatly modified the selected paragraph. Moreover, the Court found that the Commissioner failed to engage in a rational analysis of the conflict and gave no reasons to justify his preferment of one view over the other. The Court ruled that the first of the two constitutional grounds was out of time, and though it was of the view that the applicant had not advanced any legal basis to demonstrate that the law as expressed by McGuinness J in the *VZ* case did not apply to the instant case, the Court granted leave on all grounds (save the ground that was advanced out of time) due to their interconnectedness.

### Cases Cited

*Jolly v Minister for Justice, Equality and Law Reform* (Unreported, *ex tempore*, High Court, Finlay Geoghegan J, 6<sup>th</sup> November 2003)

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

*Olatunji v Refugee Appeals Tribunal & Anor* [2006] IEHC 113

*S v Minister for Justice, Equality and Law reform & Anor* [2007] IEHC 305, Unreported, Edwards J

*V.I. v Minister for Justice, Equality and Law Reform & Anor* [2005] IEHC 150

*V.Z. v Minister for Justice* [2002] 2 IR 135, Supreme Court

*Z v Refugee Appeals Commissioner & Anor* [2008] IEHC 36

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***S.M.I.O. (An infant) v Minister for Justice, Equality and Law Reform & Anor, Unreported, High Court, Edwards J, 30<sup>th</sup> July 2008***

*JUDICIAL REVIEW – LEAVE – CERTIORARI – REFUGEE STATUS DETERMINATION – REFUGEE APPLICATIONS COMMISSIONER – ALTERNATIVE REMEDY – COUNTRY INFORMATION – FAIR PROCEDURES – FORWARD LOOKING TEST – UNHCR HANDBOOK - COSTS*

**Facts**

The applicant was born in Ireland in 2006 to a Ugandan mother and a Nigerian father, and sought asylum for fear of persecution in both Uganda and Nigeria. The Refugee Applications Commissioner recommended she not be declared a refugee, and the applicant's mother brought judicial review proceedings on her behalf, seeking to quash that decision. The High Court application was based on three claims: (a) that there was a want of fair procedures in that the Commissioner had failed to put its doubts to the applicant's mother in order to give her an opportunity to dispel those doubts, (b) that the Commissioner had failed to carry out a proper analysis of the case, failed to give proper reasons for its conclusions, and failed to give proper consideration to the effectiveness of country of origin laws, and (c) that the Commissioner had failed to have any regard to the UNCR Handbook, and in particular failed to carry out a proper assessment of the claim in the context of what is known about the countries of origin, and failed to consult relevant country information. The Respondent made a preliminary objection that the applicant ought to pursue her legal remedy before the Refugee Appeals Tribunal, rather than before the High Court by way of judicial review.

**Decision**

The Court exercised its discretion not to grant leave because of the availability of an alternative remedy before the Refugee Appeals Tribunal. The Court stated that it had concerns about the Commissioner's decision, in particular that the country information analysis was significantly deficient and could not possibly have justified the inferences drawn, but was of the view that these concerns could be best addressed in the appeals process. The Court stated that this was a borderline case and that if it felt that the applicant had established substantial grounds it would have been disposed to grant leave to apply for judicial review. In the circumstances the Court made no order as to costs.

**Obiter**

While the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate the relevant facts is shared between the applicant and the Refugee Applications Commissioner. The Commissioner has significantly greater resources than the applicant in terms of access to country information and has an extensive library of such information. It is surely

possible for the Commissioner to access and exhibit a meaningful picture of a country of origin's society and legal system for the purpose of a meaningful appraisal of the availability of state protection. The Court adopted with approval the following statement contained in *The Refugee in International Law* (3<sup>rd</sup> Ed) by Professor Goodwin Gill and Jane McAdam concerning the proper and appropriate use of country of origin information:

“There can be no doubting the value of accurate, in depth, up to date and trustworthy information in the refugee determination context. For example, refugees may have fled the country as a result of counter insurgency operations. The fuller the picture will show the historical origins of the conflict, such as resistance to dispossession of historical and land rights; the protagonists (such as the military, representing a dominant or indigenous elite); the policies (such as institutionalised or systematic discrimination against particular ethnic, linguistic, religious or economic groups or classes); and the tactics (such as the abduction, torture and arbitrary killing of group representatives). A complete picture will never be available, but a comprehensive approach will contribute significantly to identifying refugee related reasons for flight. Knowing past patterns and present conditions enables one to make reasonably accurate predictions about the future; and about the way certain elements are likely to react and interact; and therefore about the degree of security awaiting those returned or returning to their country of origin. Documentary evidence, particularly electronically accessible country reports, has a seductive air, often seeming sufficient to decide the case. But like any other material, documentary evidence must still be accessed and put in context, whether it relates personally to the claimant, or to conditions in the country of origin. Information of the latter kind often gives only a general impression, more or less detailed as to what is going on. Like the refugee determination process itself, it has the artificial quality of freezing time, in a way which can lead to single events acquiring greater significance than is their due. Situations remain fluid, however. Recognising that, and drawing the right sorts of inference from evidence acknowledged as credible and trustworthy, are nevertheless the hallmark of sound decisions.”

The Court stated that country of origin information can present a valid and legitimate basis for the drawing of inferences concerning issues like the availability of state protection. However, for such inferences to be legitimately drawn, the conclusions arrived at must be based on evidence and be reasonably open to the decision maker.

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*Ideakhuea v The Minister for Justice*, (Unreported, High Court, Clarke J, 10<sup>th</sup> May 2005)  
*Stefan v The Minister for Justice* [2001] 4 IR 2003  
*VZ v The Minister for Justice* [2002] 2 IR 135  
*Zhuckoava v The Minister for Justice* (Unreported, Clarke J, [2004] IEHC 166)

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#### **G.S. (A Minor) v The Refugee Applications Commissioner & Ors [2008] IEHC 365, Unreported, High Court, Irvine J, 21<sup>st</sup> November 2008**

*JUDICIAL REVIEW – LEAVE - CERTIOARI – REFUGEE STATUS DETERMINATION – REFUGEE APPLICATIONS COMMISSIONER – SECTION 13(5) & (6) REFUGEE ACT 1996, AS AMENDED – SAFE COUNTRY OF ORIGIN – CROATIA – FAILURE TO CONSIDER COUNTRY OF ORIGIN INFORMATION – CONSTITUTIONALITY OF SECTION 12(4) REFUGEE ACT 1996 – CONSTITUTIONALITY OF SECTION 13(5) REFUGEE ACT 1996*

#### Facts

The applicant was born in Ireland to ethnic Serb Croatian citizens seeking asylum in the State. The applicant's claim for asylum was predicated on a fear of persecution by reason of race and religion. The Commissioner interviewed the applicant's mother for the purpose of investigating the applicant's case. The applicant's mother complained that her son would be discriminated against within the Croatian education system, and verbally and physically by Croatian nationalists. The applicant's representatives provided country of origin information that indicated that the human rights situation in Croatia had deteriorated significantly in 2005. The Commissioner recommend against a declaration of refugee status, finding that the applicant had not presented any reasonable grounds to outweigh the general presumption that the applicant was not a refugee. The Commissioner appended to its decision country information less up to date than the country information provided by the applicant. The Commissioner applied Section 13(6)(e) of the Refugee

Act 1996 as amended, as Croatia had been designated as a safe country of origin pursuant to Section 12(4) of the 1996 act. The applicant sought to quash the Commissioner's decision by way of judicial review, claiming (a) that the Commissioner was bound to take into account the most recent information available pertaining to the country of origin, and (b) that the Commissioner, in the face of conflicting country information materials, was obliged to provide a reasoned basis for its conclusions. The applicant also argued that Sections 12(4) and 13(5) of the Refugee Act 1996 were unconstitutional - 12(4) because there was no transparent system to provide for timely reviews of the safe country designation, and 13(5) because it provided an absolute prohibition on the applicant having an oral hearing. The Respondent argued, *inter alia*, that the applicant ought to exhaust his remedy before the Tribunal, rather than seeking judicial review.

#### Decision

The Court granted leave to seek judicial review, finding that the applicant had substantial grounds to be concerned whether the Commissioner fully considered all the up to date country information, and that the Commissioner's decision was perverse on the face of the evidence. The Court held that the claims of statutory unconstitutionality were re remedies of last resort, and preserved the applicant's right to renew the application for judicial review in respect of these arguments as necessary. With regard to the matter of alternative remedies, the Court held that the applicant would be prejudiced if his rights were to be confined to an appeal without an oral hearing, and took the view that it retained a full and free discretion, concluding that the applicant was not disqualified from seeking the relief sought notwithstanding his right of appeal to the Tribunal.

#### Cases Cited

*DVTS v The Minister for Justice, Equality and Law Reform*, High Court, Unreported, Edwards J, July 2007  
*FAA v The Minister for Justice, Equality and Law Reform*, Unreported, High Court, Birmingham J, 24<sup>th</sup> June 2008  
*Laurentiu v The Minister for Justice, Equality and Law Reform* [1994] 4 IR 26  
*NN v Refugee Applications Commissioner*, Unreported, High Court, Hedigan J, 9<sup>th</sup> October 2008  
*O'Keeffe v An Bord Pleanala* [1993] 1 IR 39  
*TG v David McHugh acting as the RAT*, Unreported, High Court, 18<sup>th</sup> Aril 2007  
*VZ v The Minister for Justice* [2002] IR 158

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## MEDICAL EVIDENCE IN ASYLUM CLAIMS

*N.M. v The Minister for Justice, Equality and Law Reform & Anor* [2008] IEHC 130, Unreported, High Court, McGovern J, 7<sup>th</sup> May 2008

*JUDICIAL REVIEW – LEAVE - CERTIORARI – PROHIBITION – SUBSTANTIAL GROUNDS - EXTENSION OF TIME – SECTION 5 ILLEGAL IMMIGRANTS (TRAFFICKING ) ACT 2000 REFUGEE STATUS DETERMINATION – MEDICAL EVIDENCE - CREDIBILITY*

### Facts

The applicant applied for asylum on the basis of a well founded fear of persecution. He claimed that he had been tortured and described the method of torture. In support of his application he submitted three medical reports which tended to show that he was suffering from Post Traumatic Stress Disorder. The RAT found against him on credibility issues. He sought leave to apply for an order of certiorari quashing the RAT's decision refusing him refugee status and an order of prohibition prohibiting the first named respondent from deporting him pending the outcome of the enquiry into his claim for refugee status. He also sought an order extending the time for bringing the application as the proceedings were initiated outside the fourteen day time limit stipulated in Section 5 (2) (a) of the Illegal Immigrants(Trafficking) Act 2000.

### Decision

Held by McGovern J., in extending time for the purpose of applying for review, that it was clear from the affidavit of the applicant's solicitor that the applicant had formed an intention to apply for leave to bring a judicial review within the requisite time limit, that the delay in initiating the proceedings was due to the length of time required to process his application for legal aid, and that in the circumstances the "good and sufficient reason" for extending the time for bringing the application stipulated in Section 5(2) (a) of the Illegal Immigrants (Trafficking) Act 2000 had been established.

That the "substantial grounds" in Section 5(2) (b) of the Illegal Immigrants (Trafficking) Act 2000 which were required for a grant of leave must be weighty grounds or grounds which were not trivial or frivolous, and that the applicant had to establish an arguable case that the second named respondent's decision was amenable to challenge. It was not be open to the Court to act as an appeal body and substitute its own view of the facts for that of the second named respondent. It could only examine the decision to see if the second named respondent had acted improperly or without jurisdiction or in an unfair or capricious manner. The adverse findings on credibility in this case did not make the decision reviewable. The respondent's report gave reasons for his adverse credibility findings which were

supported by the evidence. Moreover, the manner in which he approached the issue of credibility was correct.

The second named respondent was entitled to weigh up the applicant's story and credibility in deciding whether or not to accept the medical reports. Although the applicant's anxiety or post traumatic stress might not have been caused by torture, the medical evidence was significantly supportive of his torture claim. The second named respondent was therefore obliged to deal specifically with the medical reports and give cogent reasons for rejecting same. This he had failed to do. In the circumstances, the applicant had met the threshold required for granting leave to apply for judicial review.

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## CREDIBILITY IN ASYLUM CLAIMS

*H.Y. v Refugee Appeals Tribunal & Anor*, Unreported, High Court, Hedigan J., 16<sup>th</sup> January 2008, Neutral Citation : [2008] IEHC 17.

*JUDICIAL REVIEW – CERTIORARI - REFUGEE APPEALS TRIBUNAL - CREDIBILITY – FAIR PROCEDURES – FAILURE TO CONSIDER – COUNTY INFORMATION - PALESTINE*

### Facts

The Applicant, a Palestinian national from the Gaza strip, received a negative refugee status determination from the Refugee Applications Commissioner, and this was upheld by the Refugee Appeals Tribunal. The Tribunal concluded (a) that it was implausible that the applicant would remain trouble free in Gaza for four years from 2000 to 2004 and that his name should suddenly become the focus of attention, (b) that it was improbable that the Palestinian authority would expel one of its own citizens, (c) that the applicant's account of his escape across such a heavily militarized border was not credible, and (d) that the applicant's account of his journey to Ireland on false documentation in the heightened security situation across Europe was not plausible. The Applicant sought an order of certiorari quashing the Tribunal's decision claiming, *inter alia*, that the Tribunal indulged in conjecture, had failed to consider submissions made, and had implicitly accepted the applicant's evidence of arrest and release, and had acted unreasonably.

### Decision

Held by Hedigan J, in refusing the relief sought and applying the principles enunciated by Clarke J. in *Imafu v Minister for Justice Equality and Law Reform and Ors*, that the assessment of credibility by the Tribunal must be carried out in accordance with the principles of constitutional justice. In this instance the principles had been observed. The Court was of the opinion that even allowing that the Tribunal may have implicitly accepted the evidence regarding arrest and release, the core of the Tribunal's decision focused on the so-called trouble-free years from 2000 to 2004, the applicant's sudden

appearance on a list, his expulsion by the Palestinian Authority, and his account of escape, and that there existed in the country information reports and in the details of the interview the factual basis required to found the Tribunal's conclusions.

#### Cases Cited

*H.O. v Refugee Appeals Tribunal and the Minister for Justice, Equality and Law Reform* (Unreported, High Court, Hedigan J. 19<sup>th</sup> July 2007)

*Imafu v Minister for Justice Equality and Law Reform and Ors.* (Unreported, High Court, Clarke J., 27th May 2005)

*Mubi v Refugee Appeals Applications Commissioner & Ors.* (Unreported, High Court, Hedigan J, 17th May 2007).

*Simo v The Minister for Justice, Equality and Law Reform and the Refugee Appeals Tribunal* (Unreported, High Court, Edwards J., 4<sup>th</sup> July 2007)

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## FAMILY REUNIFICATION FOR REFUGEES

### *P.O.T. v Minister for Justice, Equality and Law Reform, Unreported, High Court, Hedigan J, 19<sup>th</sup> November 2008*

JUDICIAL REVIEW – CERTIORARI – DECLARATION – FAMILY REUNIFICATION – SECTION 18 REFUGEE ACT 1996 - FAIR PROCEDURES - DELAY

#### Facts

The applicant had been granted refugee status and subsequently applied pursuant to Section 18 of the Refugee Act 1996 for family reunification, and for visas for his wife and children. He submitted various documents in support of this application, including a marriage certificate, birth certificates, passports and letters. The marriage certificate, dated 2002, was signed by one Samuel Odei. The applicant had stated in his asylum application that his father, named Samuel Odei, died in 1976. The Minister wrote to the applicant proposing revocation of his refugee status in light of this discrepancy. The applicant replied promptly to the Minister stating that it was not his father, but his step-father, of the same name, who signed the marriage certificate, and furnishing, *inter alia*, a death certificate for his father. The Minister informed the applicant that he accepted the explanation and no longer intended to revoke his refugee status. The Minister then refused the family reunification application, *inter alia*, making findings (a) that the birth certificates were invalid because they contained different holographic stickers and contained inconsistencies, and (b) that the applicant had made no mention of one of the four children during the asylum process. The applicant complained that the Minister had breached fair procedures by failing to raise these concerns with him and in failing to give him an opportunity to respond. The Respondent submitted, *inter alia*, that the Minister was entitled to make a

decision based on the documentation submitted and was not obliged to enter into a debate or engage in correspondence with the applicant, as the Supreme Court set out in relation to the *Bode* case.

#### Decision

The Court granted certiorari and declared that the Minister's decision was unlawful, and held that where an examination gives rise to concern as to the validity of documents submitted in family reunification applications, constitutional justice requires that the Minister must enter into communication with an applicant and afford him an opportunity to explain inconsistencies or dispel doubts. The Court held that the statutory scheme in relation to family reunification in Section 18 of the Refugee Act 1996 was qualitatively different to the administrative IBC/05 scheme that was at issue in *Bode*, and that the principles in that case could not be applied by analogy to the instant case.

#### Obiter

The Court stated that its judgment in no way impacted on the Court's caselaw in relation to the obligations of decision makers in the statutory asylum process who are, in general, under no obligation to enter into a debate or correspondence with an applicant.

The Court expressed considerable doubt as to whether, save for exceptional circumstances, a two year delay in arranging the reunification of a family of a refugee is an acceptable delay in light of Article 8 of the ECHR and constitutional family rights.

#### Cases Cited

*Awe v The Minister for Justice, Equality and Law Reform* [2006] IEHC 6

*Bode v The Minister for Justice, Equality and Law Reform* [2007] IESC 62

*Iatan & Ors v The Minister for Justice, Equality and Law Reform* [2006] IEHC 30

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

*KM v The Minister for Justice, Equality and Law Reform* [2007] IEHC 234

*Nguedjo v Refugee Applications Commissioner* (Unreported, High Court, ex tempore, White J, 23<sup>rd</sup> July 2003)

John Stanley BL



## Relocation, Relocation – The impact of internal relocation on women asylum seekers

by Claire Bennett, *Asylum Aid*

In November 2008 RWRP at Asylum Aid launched a new qualitative research report exploring how the legal principle of internal relocation (or internal flight alternative (IFA)<sup>56</sup> is applied in UK caselaw. The project involved interviewing legal representatives and women asylum seekers to examine the application and appropriateness of internal relocation for women who have experienced gender based persecution.

In circumstances where non-state agent(s) persecute an applicant and their ‘well founded fear of persecution’ is perceived to be located in one area of the country, internal relocation would be considered when assessing whether the applicant is entitled to refugee status. Internal relocation is usually relevant to non-state persecution cases based on the assumption that non-state actors do not have the resources of the state to find and continue their persecution of that person. Internal relocation is not explicitly articulated within the 1951 Refugee Convention and only emerged and started to be applied in UK caselaw from the 1980s. At this time, alongside legal debates regarding its scope within international law, there was also a notable international political shift regarding the accessibility of international protection. From the 1980s onwards, ‘asylum’ and mechanisms to ‘restrict asylum’ became a key political issue in many western states. This research report explores the legal framework and key developments around internal relocation and also places this within the political context, policy shifts and changes in political and public rhetoric.

The prominence of internal relocation within UK caselaw is hugely significant to women asylum seekers as the majority of women’s asylum and human rights claims are based around gender based persecution committed by non-states agents. Many women who have experienced and/or fleeing domestic violence, trafficking, FGM, rape and sexual violence, forced marriage and claims based on people’s sexual orientation for example are usually affected by this principle. In reality this means a woman who has experienced gender based persecution may be denied refugee status on the grounds that she moves (relocates) to another area of her country of origin and lives away from her persecutor(s). This research report highlights the difficulties a single, separated, divorced or lesbian woman (with or without children) would face on her own, with no male or family protection in a relocation area.

The project consisted of five case studies with women who had all, at some point been refused international protection on the grounds of internal relocation. The

<sup>56</sup> The term internal relocation or Internal Flight Alternative (IFA) or Internal Protection Alternative are often used interchangeably within refugee law and refer to the same legal principle

research discusses their practical considerations and anxieties around this principle which they believed placed them in direct risk of future persecution with little (if any) assurances of protection.

The case studies included:

- **A lesbian who had been raped by police officers in Uganda** (where homosexuality is illegal and comes with a mandatory prison sentence).

This woman was denied refugee status on the grounds that if she relocated to a different town away from the police officers who raped her she would be safe. This woman was particularly concerned for her welfare as a lesbian in any town in Uganda.

- **A woman who had experienced sexual violence in detention in South Kivu, Democratic Republic of Congo.**

This woman was denied refugee status on the grounds that she should move to Kinshasa (capital of DRC) where she had never been to and did not speak the local language. She was particularly worried for her safety in Kinshasa as a single woman.

- **A woman who experienced domestic violence (with children) from Yemen**

This woman was granted leave to remain (legacy case) but was originally denied refugee status on the grounds that she could move to a different city away from her husband and his family. This woman discussed the realities of internal relocation for a divorced woman in Lebanon including the fear of losing custody of your children

- **A woman who experienced domestic violence from Pakistan**

This woman has been denied refugee status on the grounds that she can move to her parent’s house in a different city to her ex-husband. This woman discussed the impracticalities of life for a single woman in Pakistan and her terror that her ex-husband will find her.

- **A group interview with three lesbians from Jamaica.**

Issue of internal relocation were pertinent to all three women. The women discussed where, in such a small island they can relocate to and given the accepted high levels of violence directed towards lesbians, what protection they would need.

The Key findings from interviews with legal representatives included:

- How internal relocation is being simplistically applied without sufficient evidenced based analysis. Legal representatives believed that the complex nature and likelihood of risks for single, separated, divorced and lesbian women is not being given due consideration and scrutiny.

- Some UK Border Agency personnel and immigration judges place significant assumptions on the existence of entities (eg refugees, shelters and NGOs) without assessing whether such entities can offer the level of protection assumed.
- The application of internal relocation by the judiciary within UK caselaw has moved away from the guidelines set out by the UNHCR. This shift raises significant questions regarding the role of UNHCR's international frameworks within the UK.
- The removal of the IAA Gender Guidelines (2000) has had a detrimental impact on women asylum seekers by restricting debates and limiting the scope of legal arguments.

The key findings from interviews with women asylum seekers included:

- Women asylum seekers felt internal relocation placed them at direct risk of further abuse, exploitation and attack. A lack of protection mechanisms in place, an increased social exposure and an inability to hide were identified. This questioned whether internal relocation was a viable alternative to international protection.
- No monitoring and protection instilled a genuine fear regarding what would happen to women upon return to a new relocation area. Moreover, the women discussed how the police were not considered agencies of protection and offered no practical assurance of safety.
- The lesbian case studies questioned the practical realities of being 'discreet' about their sexuality as advised by the UK Border Agency and some immigration judges.

The report concludes with a series of recommendations for the Judicial Studies board, the Asylum and immigration tribunal and the UK Border Agency.

The full report is available to download on Asylum Aid's website at:

[http://www.asylumaid.org.uk/data/files/publications/89/Relocation\\_Relocation\\_research\\_report.pdf](http://www.asylumaid.org.uk/data/files/publications/89/Relocation_Relocation_research_report.pdf)

For further information or for a hardcopy of the report, please contact report author Claire Bennett

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This article first appeared in Issue 79 of Women's Asylum News and has been reprinted with kind permission of the author. The book is available to borrow from the Refugee Documentation Centre library.



## Research on errors of recall by asylum seekers

*Edited by Paul Daly, RDC*

Occasionally in the Refugee Documentation Centre we come across articles or studies which we think are worth bringing to the attention of legal representatives and decision makers in refugee status determination. The two studies below are research on errors of recall by asylum seekers.

***Should discrepant accounts given by asylum seekers be taken as proof of deceit?***<sup>57</sup> (Jane Herlihy, DCLinPsych and Stuart Turner, MD, BChir, MA, Torture Journal, Volume 16, No. 2, 2006)

Dr Jane Herlihy is a Chartered Clinical Psychologist in the Trauma Clinic in London. Dr Stuart Turner is a general adult psychiatrist and immediate past President of the International Society for Traumatic Stress Studies.

### Abstract

**Background:** In order to recognise a refugee in a receiving state, decision makers have to make a judgment based on background information and the account given by the individual asylum seeker. Whilst recognising that this is a very difficult decision, we examine one of the assumptions made in this process: that an account which is inconsistent is probably fabricated for the purposes of deceitfully gaining asylum status.

We review some of the psychological processes at work when a person applies for asylum, and report a study offering empirical evidence of some of the reasons why accounts of traumatic experiences may be inconsistent.

**Methods:** In the study reported, 39 Kosovan and Bosnian (UNHCR) program refugees in the UK were interviewed on two occasions about a traumatic and a non-traumatic event in their past. They were asked specific questions about the events on each occasion.

**Findings:** All participants changed some responses between the first and second interview. There were more changes between interviews in peripheral detail than in the central gist of the account. Changes in peripheral detail were especially likely for memories of traumatic events. Participants with higher levels of Post Traumatic

Stress Disorder (PTSD) were also more inconsistent when there was a longer delay between interviews.

**Interpretations:** We consider this and similar studies in the light of asylum decision making, proposing that these decisions, often a matter of life and death to the applicant, must be based not on lay assumptions, but on established empirical knowledge.

<sup>57</sup> The full paper can be read in Torture Journal, Volume 16, No. 2, 2006 at

<http://www.irct.org/Default.aspx?ID=1038>

## Extracts from Full Paper

### Inconsistency in the asylum process

There are broadly two reasons why there may be inconsistency. The event may be recalled accurately but there is some *barrier to disclosure*. Alternatively it may arise from a *failure to recall a traumatic event* in the same way on successive occasions...

### Barriers to disclosure

#### *The interview*

We see examples of immigration interviews in the UK where details have been elicited about one period of detention but the individual was not asked if there were any other detentions. Consequently, later interviews would appear to be uncovering further material – thus producing apparent discrepancies or new disclosures – whereas the interviewee may be giving details of a different period of detention to the one first described...

There may also be insensitivity to gender and cultural issues... In some cases the presence of a female claimant's husband can inhibit disclosure of rape, due to the cultural imperatives placed on the family in such a situation. Men also have to disclose being raped, a matter which also requires a high level of sensitivity...

#### *Trust*

...[A] degree of mistrust of, or at least a marked ambivalence of feeling towards state officials of whatever country would be entirely understandable... It is often the experience of clinicians that one meeting is insufficient time for an individual to take the risk of trusting his/her interviewer. Where an individual has been submitted to torture, which directly or indirectly targets the breaking down of trust in others, this effect can be significantly stronger...

#### *Avoidance*

People have often learned over time to avoid thinking about traumatic events in order to minimise the fear and other emotional responses to what happened to them... A study of people diagnosed with PTSD [Post Traumatic Stress Disorder] following a history of torture, found that where there is a history of sexual torture, the avoidance symptoms of PTSD<sup>12</sup> (e.g. trying not to think about the event, avoiding triggers, emotional numbing, psychogenic amnesia) are much more prominent than is the case after other forms of torture. This survival strategy has to be suppressed in order to tell all in an asylum interview and this may be very hard, very distressing, and possibly detrimental.

#### *Dissociation*

A common correlate of traumatic experiences is the experience of episodes of dissociation. Dissociation is defined as “a disruption in the usually integrated functions of consciousness, identity, memory and perception”. This is a psychological condition that may be evident during severe stress (perhaps as a psychological protection mechanism) and later there may be a psychogenic amnesia for some, or all, of the trauma. However, it may also recur with memories of the incident, especially at times of high

arousal, such as during the retelling of an account. There may be a large impact on performance in spite of the fact that often these phenomena are relatively subtle...

#### *Shame*

The person being interviewed by the Home Office or appearing in court might be ashamed to disclose some of the worst events in their lives. Typically, experiences of forced betrayal and sexual assault (including rape) are often associated with the dominant emotion of shame rather than fear. There are some experiences that sometimes simply cannot easily be shared with anyone.

### Memory for Trauma

#### *PTSD and depression symptoms*

Both in PTSD and Depression, impairment of concentration is a common symptom. The DSM-IV<sup>13</sup> diagnostic manual lists “inability to recall an important aspect of the trauma” and “difficulty concentrating” as two of the characteristic elements of PTSD. Similarly, it identifies a “diminished ability to think or concentrate, or indecisiveness” as a characteristic of depression (Major Depressive Disorder). There is an established literature on the effect of depression on memory – the bias towards recalling events with negative meaning for the self and a difficulty remembering specific events, preferring instead general descriptions of past periods. As noted above, many of these difficulties may be experienced without necessarily reaching the full criteria necessary to receive a psychiatric diagnosis.

#### *Autobiographical memories – normal and “traumatic” memory*

The characteristic of traumatic memories is that they are fragments, usually sensory impressions; they may be images, sensations, smells or emotional states. Importantly, probably because of the nature of the memory store in which they are held, they do not seem to carry a “time-stamp” so they are often experienced as if they were not memories of the past at all, but current experiences. These types of memories are usually not evoked at will, as a normal memory can be searched for and produced, but they are provoked by triggers, or reminders of the event. This means that when someone is interviewed and asked about an experience that was traumatic, and has only, or largely, memories of this fragmentary type, they are unlikely to be able to produce a coherent verbal narrative, quite simply because no complete verbal narrative of their experience exists. Because these memories are triggered, and are not subject to simple conscious control, it is likely that different aspects will be recalled depending on the triggering events in the interview. The interviewee will report only fragments and impressions, which are likely, incidentally, to evoke the feelings that were felt at the time of the original experience – which may be fear, distress, shame, humiliation, guilt or anger.

***Errors of Recall and Credibility: Can Omissions and Discrepancies in Successive Statements Reasonably be Said to Undermine Credibility of Testimony?***

(Dr Juliet Cohen, *Medico-Legal Journal*, 69 (1): 25-34, 2001)

Dr Juliet Cohen is Head of Medical Services at the Medical Foundation. The Medical Foundation, a registered charity in the human rights field, works exclusively with survivors of torture and organised violence, both adults and children.

**Extracts from the Conclusion of the Paper**

When assessing the credibility of asylum seekers what should we regard as reasonable degrees of error or omission? How many are acceptable? Classes of error may be categorised as: calendar errors, detail differences from one period of detention to another similar one, errors of definition or translation –e.g. soldiers/police/men and numbers of men present during torture, telescoping and expansion of time-frames, omissions of rape and other deeply traumatic incidents. It is possible that some of these can be explained by the potential for variability of true memories...

Current research on memory shows that stories can change for many reasons and the changes do not necessarily indicate that the narrator is lying. In the real world we know that the most rigidly reproduced accounts may be so because they have been memorised from a script. Conversely, those with certain discrepancies may be genuinely reconstructed from autobiographical memories. Yet we encourage consistency in all testimony because it “keeps it simple”...

In Britain we give witnesses their statements to read before going into court, to ensure that they are happy to swear to them on oath and to make sure they do not depart from the “established” story. Presumably this is based on the assumption that they are likely to do so. This does not mean we are suggesting they lie, just that experience in the courts has shown it is almost impossible to maintain absolute consistency, especially if it is a long time since the events to be recalled. Yet this latitude is not given to asylum seekers who are repeatedly judged and found not credible on this very issue. The application of dual standards is iniquitous.

There are strong grounds for arguing that lack of consistency *per se* can not be used to give any negative weight to the assessment of credibility...In the case of asylum seekers, especially, it is clear that great caution needs to be exercised in denying credibility. The normal variability of memory is likely to be exacerbated by the medical factors reviewed above and a general impairment of recall is to be expected as a result of their traumatic experiences and physical and mental state...

[T]his review concludes that credibility assessment by the determination of accuracy and reproducibility of an asylum seeker’s recall is not a valid component of asylum decision making.

**Book Review - Handbook on Immigration and Asylum in Ireland 2007**

*Quinn, Emma; Stanley, John; Joyce, Corona; O’Connell, Philip J. (2008) The Economic and Social Research Institute Dublin.*

At the launch of the *Handbook on Immigration and Asylum in Ireland 2007* Manuel Jordão, UNHCR Representative in Ireland, said that this was the kind of book that he would have liked to have had presented to him at the start of his time here in order to read the legislative and policy background to asylum and immigration in Ireland. It is certainly true that this handbook fills an important gap in the market because much of the information in the book can be found nowhere else.

The book is divided into five main sections: statistics; policy; legislation; case law; organisations, agencies and researchers. Chapter 2 gives an overview of available statistics on flows and stocks of immigrants and also looks at the demographic, ethnic, religious and employment-related characteristics of non-Irish nationals in Ireland. Chapter 3 contains a discussion of the large number of new domestic policies such as family reunification, the habitual residency condition for applying for social welfare and various asylum procedures. Chapter 4 provides information on the domestic legislation introduced in response to the new inflows which includes of course EU law. Chapter 5 contains summaries of important decisions of the High Court and Supreme Court, the European Court of Justice and the Refugee Appeals Tribunal. Chapters 6 and 7 give information on researchers from State and non-governmental organisations who investigate the social and economic implications of immigration. Chapter 8 lists recent and current research.

Although the book has 2007 in its title, it provides valuable updates on 2008 legislation such as the Criminal Law (Human Trafficking Act 2008) and proposed legislation such as the Immigration, Residence and Protection Bill 2008. I understand that it is proposed to publish subsequent editions of this handbook in the future to take into account new developments. This edition, however, is simply invaluable to everyone working in the asylum and immigration areas.

The Handbook is available free online at <http://www.esri.ie/UserFiles/publications/20081218125059/RS005.pdf> .

A print copy of the publication is available at a price of €50.00 from the ESRI.

*Paul Daly, RDC*

