

The Researcher

Published by The Refugee Documentation Centre
Refugee_Documentation_Centre@Legalaidboard.ie

Welcome to the June 2008 issue of The Researcher.

About 800,000 people are trafficked across national borders every year according to US Government research. This figure does not include millions trafficked within their own countries. In this issue of The Researcher we feature two articles on the subject of trafficking. UNHCR's Protection Officer in Dublin, Emilie Wiinblad Mathez, looks at the issue from the perspective of human rights violation and the need for protection. Two solicitors from Refugee Legal Service, Grainne Brophy and Bernadette McGonigle, examine whether or not the Immigration, Residence and Protection Bill protects trafficked children. We also feature a number of other issues. Caroline O'Connor, BL writes about rape as persecution in asylum law and policy. Sheena Greene, BL reports on her time working as a volunteer last year with the Kenyan Federation of Women Lawyers. Tiffy Allen writes on asylum and culture shock. Patrick Dowling looks at the fate of India's girl children under the spectre of foeticide. Zoe Melling, RDC Librarian writes about Digital Developments in the Refugee Documentation Centre. Summaries of significant caselaw are provided by John Stanley, BL, Mary Fagan, RDC and Ross Murphy, RDC. We also include Anastasia Stolovitskya's winning article, The Politics of Fighting Windmills, from the 2008 JRS Journalism Competition.

Paul Daly, RDC



The Researcher is published three times a year by:

Refugee Documentation Centre,
Montague Court,
7-11 Montague Street,
Dublin 2

Phone: + 353 (0) 1 4776250
Fax: + 353 (0) 1 6613113

The Researcher is available on the Legal Aid Board website www.legalaidboard.ie and also on the website of the European Country of Origin Information Network, www.ecoi.net

Editors:

Seamus Keating: SJKeating@Legalaidboard.ie
Paul Daly: PPDaly@Legalaidboard.ie

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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.



Aftermath of Cyclone Nargis in Burma/Myanmar



11 families who were displaced by Cyclone Nargis crowded in a small monastery named Sanayaungchi, South Dagon Township, Yangon, Myanmar. UNHCR/ May 2008



Myanmarese displaced by the cyclone find shelter in Mya Ba Go village, Bogalese township in Ayeyarwaddy Division. UNHCR/ May 2008



Trafficking in Human Beings – a Human Rights violation - a need for Protection.



By *Emilie Wiinblad Mathez*, Protection Officer, UNHCR Dublin

In 2004, MTV Europe launched a multi media campaign to create awareness of the fight against trafficking in human beings. Since then that campaign has spread to Asia Pacific and South Asia¹. This is just one of the many new initiatives showing that the issues around trafficking in human beings are getting new attention. More and more government agencies, organisations and private initiatives are grappling with this complex issue. Trafficking in human beings is said to be one of the most lucrative organised crime activities together with drugs and weapon smuggling and is often carried out by people already involved in other cross border crime issues such as smuggling of human beings or goods². Different sources estimate that there are between 500,000 and 800,000 people trafficked each year and that profits reach some USD 4.4 billion annually³. Although trafficking has attracted substantial attention in recent years it is not a modern phenomenon. The current legal framework is built on numerous legal instruments dating back to the late nineteenth century addressing various forms and manifestations of trafficking⁴.

The internationally recognized definition of trafficking is found in the protocol to the United Nations

1 http://www.mtvexit.org/eng/index_flash.html

2 One of the most comprehensive analysis of forced labour and human trafficking is the ILO 2005 report “Forced labour and Human Trafficking: Estimating the Profit” Patrick Belser, DECLARATION/WP/42/2005

3 Ibid. European Parliament statement on trafficking. Swiss Federal Department of Foreign Affairs. US Drug Enforcement Administration.

4 Such documents include: 1910 International Convention for the Suppression of the White Slave Traffic, the 1915 Declaration Relative to the Universal Abolition of the Slave Trade, the 1926 Slave Convention, the 1949 Convention for the Suppression of the Traffick in Persons and of the Exploitation of the Prostitution of Others and the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery.

Convention against Transnational Organized Crime⁵. Article 3 of the Trafficking Protocol reads: “For the purposes of this Protocol:

- (a) ‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs;
- (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
- (c) The recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation shall be considered ‘trafficking in persons’ even if this does not involve any of the means set forth in subparagraph (a) of this article;
- (d) ‘Child’ shall mean any person under eighteen years of age.”

As can be seen, the definition has three distinct elements, which must be fulfilled for a situation to be one of trafficking. There must be *an act* such as transport or recruitment. The act must be done *by means of* for example fraud, deception, abuse of power or outright physical force and finally, it must be *for the purpose of exploitation*.

Trafficking in human beings can take many forms and cover a range of diverse situations. It is worth noting that there is no requirement that a person must have crossed a border. There is also no requirement for the trafficker to be unknown to the victim and the trafficker can therefore be a family member or a friend, as long as the three elements of; act, means and for the purpose of exploitation are fulfilled. For children the definition is broader and only holds two elements; there must be “an act” for the purpose of exploitation.

It must also be noted is that consent in the act of trafficking is irrelevant if the means used include those listed in the definition such as the use of threat, the use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person

⁵ The full name of the protocol is the Protocol to prevent, suppress and punish trafficking in persons, but is often referred to as the Palermo protocol of 2000.

having control over another person. Therefore, a situation which may have started as one of consent to be taken legally or illegally to another country may therefore end up being a situation of trafficking.

On 1st February 2008 the Council of Europe Convention on Action against Trafficking in Human Beings entered into force. The convention covers the issues of prevention, prosecution and protection. It has adopted the same definition of trafficking as was agreed upon in the UN 2000 Convention and outlined above.

The United Nations High Commissioner for Refugees (UNHCR) is concerned with issues of trafficking where it relates to its mandate of refugee protection and with provisions of the 1951 Refugee Convention. There are three relevant areas. Firstly, it is recognised that trafficking issues may overlap with the 1951 Refugee Convention’s refugee definition and therefore trafficked persons may also be refugees. Secondly, persons of concern to UNHCR may be particularly at risk of being trafficked or re-trafficked. And finally, there is a need to be clear about the difference between smuggling of migrants, refugees illegally entering a country and trafficking in human beings, although there are overlaps and in practice the same people may be involved in all three acts.

Smuggling of migrants has been defined in the second protocol to the UN Convention against Transnational Organised Crime, 2000 as “smuggling of migrants shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of person into a State Party of which the person is not a national or a permanent resident:”

Refugees’ illegal entry into a state has been addressed in the 1951 Convention which recognises that refugees may not be able to travel to seek protection using legal means. In practice many refugees have to cross international borders illegally and may have to pay people smugglers to take them out of their country and bring them to safety in another country. Article 31 of the Convention states that countries shall not impose penalties on refugees because of their illegal entry or presence on their territory, when the refugee came directly from a territory where their life or freedom was threatened with persecution⁶.

While there is a clear distinction between smuggling and trafficking, there are in practice many overlaps. A

⁶ For more information on the scope of Article 31 of the 1951 Refugee Convention a number of papers were issued in preparation of the Global Consultations on International Protection 2001. See for instance “Article 31 of the 1951 Convention relating to the Status of Refugees: Non-Penalization, Detention and Protection” prepared by Guy S. Goodwin-Gill for UNHCR

person's journey may have begun as one of smuggling but may end being a case of trafficking in human beings. In such cases the person may end up being a refugee irrespective of whether the initial motivation for leaving the country was one falling within the 1951 Refugee Convention definition. UNHCR dedicated its December 2007 issue of the Refugee Magazine to highlighting the links between migration and refugee smuggling routes and telling the often tragic stories of human suffering at the hands of smugglers.

Turning to the other issue concerning UNHCR where there may be an overlap and interface between trafficking issues and the 1951 Refugee Convention refugee definition, UNHCR has published guidelines on international protection and the application of the refugee definition to victims of trafficking and persons at risk of being trafficked⁷ (hereinafter UNHCR's trafficking guidelines). The guidelines provide for a comprehensive analysis of the trafficking definition and its different elements. They also give clear examples of how the harm related to trafficking can give a well founded fear of persecution and show how this may be linked to one or more of the Convention grounds of nationality, race, religion or membership of a particular social group or political opinion.

Not all victims or potential victims of trafficking fall within the scope of the refugee definition. To be recognised as a refugee all elements of the refugee definition have to be satisfied. UNHCR's trafficking guidelines give examples of three scenarios where a claim for international protection presented by a victim or potential victim of trafficking can arise. The victim may have been trafficked abroad, may have escaped his or her traffickers and may seek the protection of the State where s/he now is. The victim may have been trafficked within national territory, may have escaped from his or her traffickers and have fled abroad in search of international protection. The individual concerned may not have been trafficked but may fear becoming a victim of trafficking and may have fled abroad in search of international protection. In all these instances, the individual concerned must be found to have a "well-founded fear of persecution" linked to one or more of the Convention grounds in order to be recognized as a refugee.

When looking at whether a victim or potential victim of trafficking has a well founded fear of persecution a decision maker must establish what the applicant fears and the persecutory nature of the various acts associated

with trafficking. These often include severe exploitation, abduction, incarceration, rape, sexual enslavement, forced labor, removal of organs, physical beatings, and starvation. Such acts constitute serious violations of human rights, which will generally amount to persecution. Where the applicant has escaped from traffickers the fear is often related to reprisals from the trafficker who may have significant financial interests in the person. Fear may also be related to the treatment from other groups in society, who may discriminate or ostracize the person known to have been trafficked and for instance forced into prostitution. It should be noted that forced prostitution or sexual exploitation is a form of gender-related violence, which may constitute persecution.

Once it is established that the person has a well founded fear of persecution and where the persecuting agent is not related to the state, it is necessary to look at whether State protection is available. In most trafficking cases the persecutory act emanates from individuals such as criminal gangs, friends or family of the victim. Whether the country of origin is able to protect the victims or potential victims depends on the legislative and administrative mechanisms in place to prevent and combat trafficking as well as on the protection and assistance available. Where a State fails to take such reasonable steps as are within its competence to prevent trafficking and provide effective protection and assistance to victims, the fear of persecution of the individual is likely to be well-founded.

When assessing whether a victim or potential victim of trafficking is a refugee establishing the place of persecution may be particularly relevant. A refugee must be outside his or her country of origin or former habitual residence. It is not necessary that the person left because of a well founded fear of persecution as s/he can have become a refugee *sur place*. This means that the person fulfills the refugee definition after s/he left the country of origin or former habitual residence but can no longer return because of a well founded fear of persecution. While the acts of persecution in relation to trafficking may arise in the country of origin, while *en route* and in the country where the person is seeking asylum, the assessment in relation to a refugee claim must be made vis a vis the country of origin or former habitual residence. However trafficking in individuals across international borders gives rise to a complex situation which requires a broad analysis taking into account the various forms of harm that have occurred at different points along the trafficking route.

The well founded fear of persecution must be linked to one of the 1951 Convention grounds. If the persecution is carried out by either the State or a non-State actor for one of the five grounds this is sufficient to establish the causal link to the Convention. If on the other hand the

⁷ Guidelines on international protection: The application of Article 1A (2) of the 1951 Convention and/or 1967 Protocol relating to Status of Refugees to victims of trafficking and persons at risk of being trafficked. 7 April 2006
HCR/GIP/06/07 UNHCR

persecution is carried out by a non-State actor and there is no link to a convention ground then the lack of State protection must be linked to a convention ground. While the prime motivation for trafficking is likely to be one of profit, this does not exclude the possibility of Convention related grounds in the targeting and selection of victims of trafficking. This may especially be the case where one or more groups in society are particularly vulnerable or less effectively protected because of their religion, ethnicity or otherwise. Where there is no link to one of the Convention grounds, but the person is at risk of serious harm, it may be relevant to consider granting a person subsidiary protection.

The Convention grounds are race, nationality, religion, membership of a particular social group or political opinion. A victim or potential victim of trafficking may be targeted because they belong to any of these groups or are perceived to belong to any of the groups. It is the membership of a particular social group which tends to be more difficult to define. The members of the particular social group must share common characteristic other than their risk of being persecuted or they must be perceived as a group within society. Women may form a social group, as may certain subsets of women within society. Depending on the circumstances this could include; single women, widows, divorced women or illiterate women. Likewise certain groups of children may be a particular social group, such as orphans, street children or separated or unaccompanied minors. Former trafficked persons may form a particular social group. The fact of belonging to such a particular social group may be one of the factors contributing to an individual's fear of persecution⁸.

Ireland has signed both the Trafficking Protocol and the Council of Europe Trafficking Convention. The definition from these international instruments has in essence been adopted in the new Trafficking Act of 2008, which will enter into force on 8th June 2008. These legal instruments together with the proposed Immigration, Residence and Protection Act, 2008 will form the legal framework in Ireland for giving protection and assistance to victims or potential victims of trafficking. As the proposed Immigration, Residence and Protection Act, 2008 also has provisions for subsidiary protection and other leave to remain, issues of trafficking may also need to be considered in this regard.

While there are many examples and stories emerging of persons who have been trafficked and their ordeal, this

⁸ For a full analysis of how to consider refugee applications in relation to trafficking I would like to refer to UNHCR's trafficking guidelines and UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, January 1992

woman's story in particular shows, in my view, how the interface between trafficking and refugee issues can occur. The story below was printed in the Refugee Magazine number 148, issue 4, December 2007, UNHCR:

The group of 58 migrants had just been brought into the port on the Italian island of Lampedusa on a coastguard patrol boat. After a five-day trip, during which two women died, they were exhausted but relieved to have been rescued. Many of them seemed happy, even eager, to describe their awful journey. However, a young Eritrean woman called Eden (not her real name) stood silently on the sidelines, a sad, distant look in her eyes. On the second day, Eden began, bit by bit, to unburden herself to a UNHCR official in the island's reception centre. She had left Eritrea because she "didn't want to be a soldier for the rest of [her] life" – in other words, she had deserted from the Eritrean army. She headed north, eventually arriving in a North African country, where she was arrested. "Words cannot explain what our life was like in prison," Eden said of her ten months in detention for entering the country without documents or a visa. "They kept us locked up 24 hours a day. There were 70 women in a 30-square meter room. Food was given to us once a day – plain rice and salty drinking water – and sometimes the guards only threw us a piece of bread straight from the door." Tears began to stream down her face. "I could cope with this treatment, but the real nightmare began once the sun had set," she said. "We were under constant threat of being singled out and raped by the guards... I hated myself for having to live such a life and for not being able to find a solution." The day Eden was released from jail was not the day she became free. "A group of us was handed over to a farm owner," she said. "We were sold for approximately 50 dollars each, like animals." They were forced to work on the farm from dawn to dusk, without any pay. "He could do whatever he wanted to us, especially as far as the women were concerned," she said in her low, flat voice. They were finally freed after their families sent money to the land owner. "I'm already dead," she said, "and nobody will give my life back to me." Laura Boldrini

In this account, it becomes clear how fleeing one's country can expose a person to a series of abusive situations, exploitation and trafficking, but also how refugee protection, subsidiary protection and protection in national legislation of victims of trafficking may supplement each other ensuring that those most vulnerable and in need of such protection can get it.

Emilie Wiinblad Mathez is UNHCR's Protection Officer in Ireland. The views expressed are those of the author and do not necessarily represent the views of UNHCR or the UN.



The Immigration, Residence and Protection Bill 2008

- Protecting Children or Traffickers?

By Grainne Brophy and Bernadette McGonigle
Solicitors in Refugee Legal Service

Introduction

The viewpoint expressed by the Council of Europe Commissioner for Human Rights, Thomas Hammarberg⁹ is that:

“Children in migration should get better protection
Migrant children are one of the most vulnerable groups in Europe today. Some of them have fled persecution or war, others have run away from poverty and destitution. There are also those who are victims of trafficking. At particular risk are those who are separated from their families and have no - or only temporary - residence permits. Many of these children suffer exploitation and abuse. Their situation is a major challenge to the humanitarian principles we advocate.” He goes on to state that when dealing with migrant children, “the starting point must be that migrant children are first and foremost children”.

Article 2 of the Convention on the Rights of the Child stipulates that State obligations under the Convention apply to each child within the State’s territory and all children under its jurisdiction. Article 3(1) states that “the best interests of the child shall be a primary consideration” in all actions concerning children. Are the best interests of immigrant children coming to the State a “primary consideration” in the Immigration, Residence and Protection Bill 2008 (IRP Bill)?

Separated Children –Reasons why they come

“Between 2003 and 2006, 599 separated children seeking asylum were presented to, or presented themselves to the Office of Refugee Applications Commission (ORAC), with over 4,500 estimated to have arrived in Ireland over the past decade”¹⁰ There appear to be many reasons why children arrive in the State unaccompanied. The International Committee on the Red Cross (2004) ‘Inter-agency Guiding Principles on Unaccompanied and Separated Children notes that Separation may be either caused accidentally when fleeing from danger or children may be handed into the care of another in the belief that they will have a better chance of survival.¹¹ Other reasons for the arrival in the State may include a wish to be reunified with family members, that the minor is seeking the protection of the Irish State or more sinister reasons like sex trafficking and labour. There are no exact figures as the systems

are not in place to capture this information. However, many of these children are in need of special care and protection.

Child Trafficking

Child Trafficking is unfortunately a reality in Ireland. Geoffrey Shannon in his Report of the Special Rapporteur on Child Protection, a Report submitted to the Oireachtas in December 2007 notes that “there is little known about trafficked children in Ireland but it is widely acknowledged that at least some separated children have been trafficked for labour or sexual exploitation and have been either found by the authorities, escaped their captors or been left by the traffickers. Over 4,500 separated children have arrived in Ireland since 1999, while over 300 have gone missing from their accommodation centres since 2001.¹²

Dr. Ursula Kilkelly in her report commissioned by the Ombudsman for Children¹³ states: “One of the most serious issues facing children in the asylum process is that there are insufficient monitoring and protection mechanisms in place to deter or identify child trafficking. There is no mechanism to identify separated children entering the country who are not referred to the HSE and thus would not be known to any statutory body. In addition, there is little or no follow-up of separated children reunited with family members once in the country. This situation places these children at serious risk of multiple breaches of their rights.”

The IRC in their report (Dr Nalinie Mooten), refer to the invisibility of Separated Children. She notes that over 300 Children have gone missing in recent years, further only a very small percentage of Separated Children are identified at the Border.

The UN Committee on the Rights of the Child note that there is often a link between the situation of Separated Children and trafficking.

Anti-trafficking provisions in the Bill?

The Criminal Law (Human Trafficking) Bill 2007 relates to the Criminal aspect of Trafficking but does not address the protection needs of the victims. As noted by Geoffrey Shannon in his report, the Criminal Law (Human Trafficking) Bill 2007 is “intended to solely deal with the response of the Criminal Law to these offences and not victim support.”

While the 2008 IRP Bill contains specific provisions relating to the protection of suspected victims of trafficking, these provisions do not go far enough in

9 www.coe.int –Viewpoint 2007; 06/08/07

10 Mooten, Making Separated Children Visible (Irish Refugee Council, Dublin, 2006), at p.8.

11 Mooten, Making Separated Children Visible (Irish Refugee Council, Dublin, 2006), at p.9

12 Irish Refugee Council; Statistics for separated children in Ireland; 25/5/2007

13 Dr. Ursula Kilkelly, ‘Obstacles to the Realisation of Children’s Rights in Ireland’ dated 29 August 2007 commissioned by the Ombudsman for Children

relation to trafficked children. In particular the 45 day “recovery and reflection period” prescribed under Section 124 of the IRP Bill and the subsequent 6 months temporary residence permission to remain is predicated on the victim co-operating with the Garda Síochána. A child victim of trafficking may not be in a position to co-operate and the reflection period itself may be regarded as too short.

Current Statutory Framework

The current legal position is set out in s.8 (5)(a) of the Refugee Act, 1996 (as amended) which states that:

(a) “where it appears to an immigration officer or an authorised officer that a child under the age of 18 years, who has either arrived at the frontiers of the State or has entered the State, is not in the custody of any person, the officer shall, as soon as practicable, so inform the Health Service Executive and thereupon the provisions of the Child Care Act 1991 shall apply in relation to the child.”

S8(5)(b) authorises the Health Service Executive to decide whether or not an application for a declaration of refugee status should be made.

The Refugee Act does not define what constitutes a Separated Child. The UNHCR has developed guidelines and policies in relation to best international practice in dealing with unaccompanied minors, which said guidelines include the Statement of Good Practice.¹⁴ Further the United Nations Convention on the Rights of the Child 1989 sets out internationally accepted principles governing the rights of children. The Convention was ratified by Ireland but is yet to be incorporated into domestic law. In the High Court judgment of *Nwole*¹⁵ the court noted as follows;

“The provisions of the Refugee Act 1996 must be construed, and its operation applied by the authorities in accordance with the Convention on the Rights of the Child which has been ratified by Ireland.”

The Separated Children in Europe Programme (SCEP) defines separated children¹⁶ as:

“Under 18 years of age who are outside their country of origin and separated from both parents or their previous/legal customary primary caregiver...they may be victims of trafficking for sexual or other

14 The Statement of Good Practice is principally informed by the UNHCR and two documents: UNHCR ‘s guidelines on policies and procedures in dealing with unaccompanied children seeking asylum February 1997 and the European Council on Refugees and Exiles (ECRE) position on Refugee Children of November

15 Un reported Finlay Geoghegan J 31st October 2003

16 Separated Children in Europe Programme, Statement of Good Practice (UNCHR, Third Edition, 2004), at p.2.

exploitation, or they may have travelled to Europe to escape conditions of serious deprivation.”

However the term “not in the custody of any person” in s8(5) (a) Refugee Act (as amended) would appear to envisage a narrower definition than that defined by the UNHCR guidelines. The Health Service Executive can and do in practice reunite minors with an adult relative who is not their legal guardian. Once this happens the minor is no longer the responsibility of the unit within the HSE who have responsibility for unaccompanied minors. The decision as to whether an asylum application should be made on behalf of the minor then rests with the adult relative.

A report from the Law Society recommended that a uniform definition of unaccompanied minor and separated child should be adopted in legislation to reflect the broader international definition.¹⁷ The difficulty with the current lack of clarity regarding the definition of a minor and the failure to adopt the internationally recognised definition of separated child means that in practice, children are reunited with adults or relatives who are not their legal guardians within the meaning of the Guardianship of Infants Act 1964. This category of children is potentially excluded from protection.

The first report of the Special Rapporteur on Children dated November 2007 recommended that the Separated Children in Europe Programme (SCEP) definition of ‘separated children’ be adopted in Irish legislation along with the introduction of broad protections for such children. However, this recommendation has not been adopted in the proposed legislation. Instead, the provisions applied to unaccompanied minors arriving in Ireland arguably indicate a backward step in child protection.

Immigration Residence and Protection Bill (IRP Bill)

S24 of the IRP Bill states that: “Where ...it appears to an immigration officer that a foreign national under the age of 18 years.....

(a) is not accompanied or to be accompanied by a person of or over that age who is taking responsibility for the foreign national, the officer shall, as soon as practicable, notify the Health Service Executive of that fact..”

There is no provision for the Immigration officer to assess the suitability of the adult claiming responsibility or to consider the ‘best interests’ of the child. This in effect could lead to safe passage for traffickers or those who accompany minors into the state for the purposes

Separated Children in Europe Programme, Statement of Good Practice (UNCHR, Third Edition, 2004), at p.2.

17 Rights based Child Law. The case for reform. March 2006

of exploiting them. There is however provision under s74(8) for the protection application interviewer to inform the HSE where “he or she considers that the accompanying adult is not acting in the best interests of the minor”. However the interview may not take place for several weeks or longer after a protection application has been made. It should be borne in mind that the few statistics available on missing children indicate that most children who has gone missing did so in the early stages of their time in Ireland. The Irish Refugee Council notes that “the HSE reported that 328 migrant children had gone missing from care in the period 2001–2005. Disturbingly, this figure is likely to have greatly increased since then, as, on average, one migrant child a week goes missing in Ireland. It should be recalled that the few statistics available on missing children indicate that most children who has gone missing did so in the early stages of their time in Ireland.”¹⁸

Despite this seeming safeguard, there is however provision for the interview to be dispensed with under s74(10) (b) “where the applicant is a minor, he is she is of such an age and degree of maturity that an interview would not usefully advance the investigation..”

If the case should go to appeal, there is again provision under s 85(8) for the Tribunal Member to inform the HSE in similar circumstances. However, this opportunity for action may not arise for several months or longer.

There are some obvious dilemmas for solicitors acting in such circumstances. There is no provision to make an application to the court for direction as under s45 of the Child Care Act 1991 or to seek to have a *Guardian ad Litem* appointed. If concerns arise about the suitability of the adult accompanying the child, there is no provision to seek that a DNA test be conducted to ensure they are related if this has been asserted. Taking instructions is a clear example of where difficulties may arise; in particular, where there is a conflict between the instructions of the minor and of the adult accompanying them. What happens where the minor wishes to make a protection application but the adult accompanying them instructs that he/she should return to his/her country of origin? Who is the client in this case and who gives the instructions? What if the minor is of an age that he/she is not capable of giving instructions or perhaps capable of understanding the risks to be faced on return?

The Committee on the Rights of the Child General Comment No. 6 notes that:

“33. States are required to create the underlying legal framework and to take necessary measures to secure proper representation of an unaccompanied or separated

¹⁸ Irish Refugee Council; Statistics for separated children in Ireland; 25/5/2007

child’s best interests. Therefore, States should appoint a guardian or adviser as soon as the unaccompanied or separated child is identified and maintain such guardianship arrangements until the child has either reached the age of majority or has permanently left the territory and /or the jurisdiction of the State...” In clarifying that the guardian or adviser should have the necessary expertise; “Agencies or individuals whose interests could potentially be in conflict with those of the child’s should not be eligible for guardianship.” It goes on to state that: “In cases where a child is accompanied by a non-family adult or caretaker, suitability for guardianship must be scrutinized more closely. “ It recommends that review mechanisms should be introduced and the quality of guardianship monitored “to ensure the best interests of the child are being represented throughout the decision-making process and, in particular, to prevent abuse.”¹⁹

The UN Committee on the Rights of the Child issued a recommendation to Ireland as follows;

That children “be provided with the opportunity to be heard in any judicial and administrative proceedings affecting them, and that due weight be given to those views in accordance with the age and maturity of the child, including the use of independent representations (*guardian ad litem*) provided for under the Child Care Act of 1991, in particular cases where children are separated from their parents”²⁰

Accompanied children

The issue of the relationship between a minor and an adult accompanying them claiming to be their parent or sibling is also fraught in that in most such cases, people who flee their countries do not bring identity documentation with them and in the main travel on false documents. Apart from DNA testing therefore, there is no guarantee that the relationship is as stated.

Children not in the State

The IRP Bill provides that a protection application made by a foreign national “shall be deemed to made on behalf of all the dependents of the foreign national who are under the age of 18 years, whether present in the State at the time of the making of the application or born or arriving in the State subsequently.” (s 73 (13))

If a foreign national arrives in the State and unsuccessfully seeks protection status thus rendering his continued presence in the State unlawful and is subsequently joined by a dependent child who fled

¹⁹ Committee on the Rights of the Child; General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children outside their Country of Origin; Paras 33,34,35

²⁰ UNCRC (2006) Consideration of reports Submitted by States Parties under Article 44 of the Convention on the Rights of the Child Concluding Observations; Ireland , page 6.

his/her country of origin due to recent events in that country or a protection claim distinct from the parents (eg female genital mutilation), that child may be effectively barred from seeking protection status. It is intrinsically wrong to expel someone who has not yet been born from making a protection application in the future. Circumstances change and a child may be endangered in later years perhaps when of an age to be regarded as a threat.

Age assessment- Current procedures or lack of

If there is doubt regarding the age of an applicant, ORAC may conduct an age assessment. There are difficulties surrounding this process which is discretionary in nature and which does not allow for a formal appeal. The Law Society report recommended that an objective age assessment procedure with appropriate guidelines and with formal provision for appeal or review should be put in place. The High Court has examined the process currently adopted by ORAC in relation to age assessment and has set out the minimum procedural requirements to be adopted when conducting such an assessment.²¹ These procedures are merely minimal safeguards, however many, purported age assessments conducted fall well short of these minimum standards. Age assessment procedures in other Member States incorporate a variety of methods including *inter-alia*, bone density, dental x-rays, assessment of physical development and psychological assessment.

The Statement of Good Practice states that;

“Age assessment includes physical, developmental, psychological and cultural factors. If an age assessment is thought to be necessary, independent professionals with appropriate expertise and familiarity with the child’s ethnic/cultural background should carry it out. Examinations should never be forced or culturally inappropriate. Particular care should be taken to ensure they are gender –appropriate. In cases of doubt there should be a presumption that someone claiming to be less than 18 years of age, will provisionally be treated as such.”

The Special Rapporteur in his report also recommends that age assessment procedures be introduced.

Access to Court

The rules of the Superior Court require that a minor may not institute proceedings in the courts without the assistance of a next friend. The next friend will sign the affidavit and is liable for costs if same are made by the Courts. Asylum seekers who are separated children experience difficulties with access to the courts due to the absence of a next friend to act on their behalf.

21 Moke v Refugee Applications Commissioner, Unreported; High Court; Finlay Geoghegan J; 6 October 2005

Costs can be awarded against the applicant and/or the legal representative for pursuing the matter in the High Court where the application has been found to be frivolous or vexatious.²²

Detention of children

S 54 of the IRP Bill allows for detention of a foreign national where it appears to an immigration officer or member of the Garda Síochána that they are “unlawfully present” in the State and they may be removed. It does not exclude minors from these provisions but instead states that the person having charge or responsibility for the minor must co-operate in any way necessary to facilitate the removal for the minor and will be guilty of an offence if they do not do so.

S 70 of the IRP Bill also allows for detention of a foreign national who makes a protection application at a frontier where it is “not practicable” to issue a protection application entry permit to him/her. Children are not excluded from these provisions²³. This detention is not subject to court supervision but the continued detention can be authorized simply by the notification of the arrest to the member in charge of the Garda station or the prison Governor or immigration officer in charge as appropriate.²⁴ Minors are however excluded from the arrest and detention provisions set out in s71.

General Comment No. 6 of the Committee on the Rights of the Child notes that :

“Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof.....States should ensure that such children are not criminalised solely for reasons of illegal entry or presence in the country...In the exceptional case of detention, conditions of detention must be governed by the best interest of the child”²⁵

Child’s right to be heard

Article 12 of the UN Convention on the Rights of the Child provides that the child has the right to be heard in all matters affecting him/her with due regard to the child’s age and maturity. However, when assessing a protection application for a minor, there is provision in the IRP Bill to dispense with an interview or oral hearing on appeal where the interviewer or the Tribunal is of the opinion such an interview or oral hearing would not usefully advance the appeal due to the minor’s age and degree of maturity.²⁶ On the one

22 IRP Bill s118 (7) and (8)

23 IRP Bill 2008 s70(1)(b) and s73

24 IRP Bill 2008 s70(4)

25 Committee on the Rights of the Child; General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children outside their Country of Origin. Paras 61,62, 63

26 IRP Bill 2008 s74 (10) and s85(6)(a)

hand, these provisions can be welcomed as they free the minor from the trauma of orally recounting the details of their case, however they can also be seen as a restriction on the child's right to be heard in proceedings relating to him/her.

Role of the Ombudsman for Children

The role of the Ombudsman for Children is unclear in this area as the Ombudsman for Children Act 2002 precludes the Ombudsman from investigating an action "taken in the administration of the law relating to asylum, immigration, naturalisation or citizenship". Therefore, although not entirely clear, the Ombudsman "may examine and investigate complaints concerning the treatment of children, with the exception of complaints relating to decisions made in the asylum, immigration or citizenship context."²⁷

Conclusion

As there appears to be a link between separated children and trafficking for sex and other exploitative purposes, separated children are therefore in need of special protection. It is submitted that the definition of Separated Child should be included in legislation following the recommendations of the Special Rapporteur and in line with international best practice. The appointment of a *Guardian ad litem* should be considered where appropriate.²⁸ The issue of a temporary protection permit to a minor claiming to be a victim of trafficking should not be linked to their cooperation with the authorities.

It is to be hoped that these concerns and others will be taken into consideration in amendments to the IRP Bill as this provides the best opportunity to address the protection needs of the most vulnerable group of people coming to the State. The best interests of the minor should be reflected in and underpin the legislative provisions.

A shorter version of this article was published in the April issue of the Law Society Gazette. We would like to thank the Law Society for their kind permission to reprint this article.



27 Dr. Ursula Kilkelly, 'Obstacles to the Realisation of Children's Rights in Ireland' dated 29 August 2007 commissioned by the Ombudsman for Children

28 The appointment of a *Guardian ad litem* needs to be considered and currently work is being undertaken by the Children's Advisory Board on the role, qualifications, training needs and monitoring of guardians ad litem.

Rape as "persecution" in asylum law and policy

By Caroline O'Connor, BL

Introduction

Within refugee law there is an ongoing and focused attempt to try to mainstream a gender perspective in all aspects of refugee protection. The gender debate in refugee law highlights the challenge faced by those who wish to build fairness into the refugee protection system. In a context where law and practice has been shaped by partial and distorted perspectives it is essential that we make genuine efforts to remedy this. Gender sensitivity is part only of a broader movement of mainstreaming a human rights culture in the heart of the decision-making process. The gender critique has aided this process by demonstrating how precisely we might bring about change in practice. Nevertheless the most significant feature, however, is the acceptance by the human rights movement of the need for human rights instruments to pierce the private veil that shields human rights abuses from public scrutiny and thus accountability. This marks a watershed in progress towards a rethinking about the public/private dichotomy that has traditionally stymied women's voices within the human rights community. As such, the international instruments and documents mentioned above offer women a platform from which to begin to assert where a public/private divide is useful and where it is not. At a normative level, the importance of analysing violence against women as an issue of human rights concern opens up the possibility of "transforming" human rights discourse to embrace issues previously considered beyond its reach. In this piece I will discuss background to international discourse on violence against women, the 1951 Convention and violence against women, the development in the prosecution of rape and crimes against women by international tribunals and case law analysing rape as "persecution".

Background to international discourse on violence against women

The true scale of sexual violence against refugee women is as yet unknown, since numerous incidents are never reported. Sexual violence including rape involves the infliction of both physical and psychological harm.²⁹

It may also carry traumatic social repercussions, which may be affected by a woman's cultural origins or social status. Women who have been raped or sexually abused are often unwilling to report the abuse because they feel degraded or ashamed and/or fear that they would suffer social stigma should they disclose what has been done to them. Thompkins suggests that the key to understanding the injury of sexual violence including rape is to recognise that in many cases the insult may

29 Note Inger Agger "The Blue Room- trauma and testimony among refugee women; a psycho-social exploration" (1992) Zed Books Ltd London and New Jersey

have been intended for men through women.³⁰ It may also be explicitly politically motivated or can occur in situations of generalised violence such as civil war.³¹ Women who are on their own may be particularly vulnerable to this kind of abuse, as are women targeted because of the political activities of absent husbands or other (usually male) family members.

Theoretically, sexual violence, should be one of the least controversial examples of “serious harm” in the context of a definition of persecution. Sexual violence is after all a grave breach of the well-institutionalised human right not to be subjected to cruel, inhuman, or degrading treatment or punishment. These rights are so fundamental that no circumstance whatsoever justifies their derogation under international law. Sexual violence including rape is a grave violation of the right to security of person, including the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.³² It is not, in my view, possible to make a meaningful legal distinction based on clear principles between the sexual violence used against women and other tortures inflicted upon men. This has finally been recognised in the U.S.,³³ where decision-makers are now reminded that “sexual abuse does not differ analytically from beatings, torture, or other forms of physical violence that are commonly held to amount to persecution. The appearance of sexual violence in a claim should not lead adjudicators to conclude automatically that the claim is an instance of purely personal harm”. In this view, whether sexual violence forms the basis for an asylum claim depends upon the context in which the abuse took place, the motives of the abuser, and the level of protection available from the state. However, in some circumstances sexual violence has frequently been characterised as the random expression of spontaneous sexual impulses by individual men toward women or as

30 Thompkins T.L. “Prosecuting Rape as a war crime; speaking the unspeakable” (1995) *Notre Dame Law Review* 70(4) 845-90

31 The systematic rape and sexual abuse of Muslim and Croat women by Serbian soldiers in Bosnia-Hergovinia was characterised as a weapon of war - a calculated move that was part of a larger scheme of “ethnic cleansing” of Muslim and non- Serbs.

32 This right is laid down in, inter alia, Articles 3 and 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant on Civil and Political Rights and in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

33 Memorandum from Phyllis Coven, Office of International Affairs to all INS Asylum Officers and Headquarters Co-Ordinators : Immigration and Naturalisation Service gender Guidelines Considerations for Asylum Officers for Women (May 26 1995) in (1995) 7 *IJRL* 700 (hereinafter referred to as INS Guidelines).

the common (and by implication, acceptable) fate of women caught in a war zone.³⁴

The 1951 Refugee Convention and sexual violence

As stated earlier the 1951 Refugee Convention envisages the protection of women who fear serious harm in their country of origin, where the state is unable or unwilling to protect them. Two requirements for establishing an asylum claim have traditionally given women the most difficulty: establishing that the abuse suffered is a form of persecution and establishing that this abuse is on account of one of the five enumerated grounds. “Serious harm” may include sexual violence and abuse, female genital mutilation, marriage related harm, violence within the family or community and domestic slavery. Survivors of sexual violence for example, often find it difficult to establish that their victimisation was linked to the convention grounds of “race, religion, nationality, political opinion or membership of a social group”. With regard to the latter, once a woman is recognised as constituting as a member of a “particular social group” does not lead inexorably to the consequence that all women are automatically entitled to refugee status. The applicant will still be required to establish that the fear of persecution was well founded, that the nature of the harm inflicted or anticipated rises to the level of serious harm, and that there was a failure of state protection. Therefore, an applicant has established a well-founded fear of persecution if she shows that a reasonable person in her circumstances would fear persecution if she were to return to her home country. An evaluation of what constitutes a well-founded fear of persecution must proceed on a case-by-case basis in the absence of a definition of “persecution” in the convention along with the assistance of gender guidelines.³⁵ Several

34 Kelly Nancy (1993), “Gender related Persecution; assessing the asylum claim of women” 26(3) *Cornell international law journal* 226; for example, citing case law from the US courts, notes that the refusal to accept rape and other forms of sexual abuse as violence, instead of as passion or lust gone wrong is pervasive problem in evaluating the asylum claims of women. As Macklin suggests, “some decision makers have proven unable to grasp the nature of rape by state actors as an integral and tactical part of the arsenal of weapons deployed to brutalise, dehumanise, and humiliate women and demoralise their kin and community” “Refugee women and the imperative of categories” HRQ 17; 213-77, 226).

35 The lack of any agreed upon definition makes the objective assessment of individual refugee women’s claims for asylum highly problematic. The UNHCR Handbook (1979) also notes that there is no universally accepted definition of “persecution” and various attempts to formulate such a definition have met with little success”. Para 51

HYPERLINK
<http://www.unchr.ch/refworld/legal/handbook/handeng/hbtoc.html>

www.unchr.ch/refworld/legal/handbook/handeng/hbtoc.html

factors, including an applicant's credibility, determine whether the individual holds a reasonable fear of persecution. Another important factor, particularly for domestic violence cases, is that the persecution must be countrywide, such that relocation within the applicant's home country would not provide adequate protection. This factor often arises when the persecutor is an individual that the government is unwilling or unable to control, instead of the government itself (as is often the case in instances of FGM). Political opinion and social group, the most commonly claimed grounds require appropriate interpretation to encompass gender related persecution claims. To make a claim of persecution on the basis of political opinion, the claimant would have to show a connection between her political opinions and her fear of persecution. This may be problematic in many cases as women often experience sexual violence, such as rape, for reasons which have no connection with their political opinions. Also, women are much less likely than men to be involved in party politics. This will illuminate the various additional factors that ought to be taken in to account when considering a gender based application for refugee status namely the social context.

European States are urged to develop and implement guidelines³⁶ which would enable the claims of women to be more comprehensively assessed within the refugee status determination system. Irish non-governmental organisations have assisted in the formulation of best practice guidelines and various other initiatives. The adoption of recent Best Practice Guidelines³⁷ are said to be "an exploration of some of the important distinctions and consider steps which may be taken to assist refugees, relevant organisations and the general public". Nations such as the US, Canada and Australia have engaged in remedial action toward the interests of refugee women, both at a judicial and at an administrative level.

36 USA -Memorandum from Phyllis Coven, Office of International Affairs to all INS Asylum Officers and Headquarters Co-Ordinators : Immigration and Naturalisation Service gender Guidelines Considerations for Asylum Officers for Women (May 26 1995) in (1995) 7 IJRL 700.

See

<http://www.uchastings.edu/cgrs/law/guidelines.html>

Canada – See

http://www.cisr.gc.ca/legal/guidline/women/index_e.stm

United Kingdom- See

http://www.uchastings.edu/cgrs/law/guidelines/guidelines_uk.pdf

Australia – See

http://www.uchastings.edu/cgrs/law/guidelines/guidelines_aust.pdf

37 "Women and the refugee experience towards a statement of best practice", Irish Council of Civil Liberties in association with National Consultative Committee on Racism & Interculturalism

Development in the prosecution of rape and crimes against women by international tribunals

The statutes of the two ad hoc Tribunals and the International Criminal Court provide much fuller responses to sexual violence, constructing it, depending on the circumstances, as potentially a crime of genocide, a crime against humanity and a war crime. This recognition was the result of considerable work and lobbying by women's organisations, but its limitations should be noted. In the statutes of the Yugoslav Tribunal and the ICC at least, all three categories of international crimes are concerned only with acts forming part of a widespread, systematic or large-scale attack. Thus, the "new" international criminal law engages sexual violence only when it is an aspect of the destruction of a community. An example of this characteristic was the invitation to the prosecution by a trial chamber of the Yugoslav Tribunal, when reviewing indictments against Radovan Karadzic and Ratko Mladic, to consider broadening the characterisation of the notion of genocide. It stated that "the systematic rape of women . . . is in some cases intended to transmit a new ethnic identity to the child. In other cases humiliation and terror serve to dismember the group."³⁸ This comment suggests that the primary problem with rape is either its effect on the ethnic identity of the child born as a result of the rape or the demoralising effect on the group as a whole. This understanding of rape perpetuates a view of women as cultural objects or bodies on which and through which war can be waged. The decision in the 1998 *Akayesu* case by the Rwanda Tribunal that rape constituted an act of genocide if committed with the intention to destroy a particular group³⁹ also rests on this limited image of women. The emphasis on the harm to the Tutsi people as a whole is, of course, required by the international definition of genocide, and the *Akayesu* decision on this point simply illustrates the inability of the law to properly name what is at stake: rape is wrong, not because it is a crime of violence against women and a manifestation of male dominance, but because it is an assault on a community defined only by its racial, religious, national or ethnic composition. Nevertheless the *Akayesu* decision signals an important message that the international community will press for prosecution of these heinous acts of violence as potentially crimes of genocide, crimes against humanity and war crimes.

38 Prosecutor v. Karadzic and Mladic, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Nos. IT-95-5-R61 and IT-95-18-R61, paras. 94-95 (July 11, 1996), reprinted in (1998)108 ILR 85 .

39 Prosecutor v. Akayesu, Judgement, No. 96-4-T (Sept. 2, 1998) see www.un.org/ictt. The Rwanda Tribunal also found Akayesu guilty of war crimes and crimes against humanity through his encouragement of individual acts of sexual violence.

Analysis: rape as “persecution”

This paper will begin by assessing 2 U.S. cases which considered whether rape could qualify as persecution on the basis of political opinion Sofia Campos-Guardado v. Immigration and Naturalisation Service (INS), 809 (5th Cir. 1987)⁴⁰ and Olympia Lazo-Majano v. Immigration and Naturalisation Service (INS) (9th Cir. 1987),⁴¹ Both Campos-Guardado and Lazo-Majano were denied asylum by an Immigration Judge and the Board of Immigration Appeals (BIA).⁴² The BIA believed that the women were telling the truth, but ultimately, concluded that the threats they faced were ‘personally motivated’ and were not the result of their political opinion or a political opinion attributed to them by their attackers.

These cases dealing with rape also illustrate the problems faced by women asylum seekers in establishing persecution in the U.S.A. For example, in Campos-Guardado v. INS, Sofia Campos-Guardado fled El Salvador and applied for asylum in the United States. She claimed that her family's participation in the agrarian land reform movement, primarily her uncle's activities as chairman of a local agriculture co-operative, motivated her attackers to kill her uncle and cousin using machetes, while forcing her to watch. Some of the attackers then raped her while others shouted political slogans. As a result, Ms. Campos-Guardado had a nervous breakdown and remained hospitalised for over two weeks. Afterwards, one of the attackers repeatedly threatened to kill her and her family in order to keep her silent. The court affirmed the BIA's finding that she failed to establish a well-founded fear of persecution. The court did not focus on the categorisation of rape as persecution, but instead based its holding primarily on her failure to establish that her persecution was “on account of” her political opinion or social group membership. Critics argue that this case reveals the courts' hesitancy to establish rape as a form of persecution, and the courts' broader bias against gender-related claims.⁴³ A possible explanation for the outcome in Campos-Guardado is that the court regarded rape as a personal crime and thus, by definition, a crime that could not be inflicted based on

political motivations or upon an entire social group.⁴⁴ Long observes that “it is hard to avoid the implication that the sexual aspect of the crime led the asylum decision makers to regard the crime as personal rather than political.”⁴⁵ The case has been widely cited as an example where rape was interpreted by the judge as being ‘personal’ rather than politically motivated.

Lazo-Majano ultimately won in the Court of Appeals where the BIA's denial of the petitioner's asylum claim, was reversed and the court held that an abused woman who held the belief that the Armed Forces of El Salvador were responsible for lawlessness, rape, torture, and murder, and whose abuser imputed to her the political opinion that she was a subversive, has suffered persecution on account of political opinion. In this case, a Salvadoran military sergeant repeatedly beat, raped, and threatened to kill Olimpia Lazo-Majano. In finding persecution, the court stated that she had been “singled out to be bullied, beaten, injured, raped, and enslaved.” Thus, the court was willing to find that sexual violence was a harm that constituted persecution. Regarding the perpetrator, the court found that as “a member of the Armed Force, a military power that exercises domination over much of El Salvador ... [he used] his authority and his hold over Olimpia.” Despite this positive outcome, courts continued to deny claims based on sexual violence in subsequent cases. In Klawitter v. Immigration and Nationality Service (INS) (6th Cir 1992)⁴⁶ in which the applicant feared the unwanted sexual advances of a colonel in the Polish secret police, the court decided: “Although the petitioner's testimony recounts an unfortunate situation, harm or threats of harm based solely on sexual attraction do not constitute persecution”.

The *Campos-Guardado* and *Lazo-Majano* cases provide little elaboration on what is meant by persecution within the definition of refugee. The Lazo-Majano court found unequivocally that Ms Lazo-Majano had been persecuted, but did not elucidate under what circumstances rape would amount to persecution. An appropriate conclusion would be in general that rape should be considered a form of persecution for the purposes of the refugee definition when it is used by the State as a form of torture, when there is no system for the woman to prosecute her attacker in her home country, or when bringing the assault to the attention of the authorities would put her life in danger. The argument implies that the State connection requirement should be interpreted broadly so that not only

40 429 809 F.2d 285, 287 (5th Cir. 1987)

41 10813 F.2d 1432 (9th Cir. 1987). overruled on other grounds by *Fisher v. INS*, 79 F.3d 955, 963 (9th Cir. 1996).

42 Cases can be appealed from Immigration Judge to Board of Immigration Appeals.

43 See Kelly, Nancy “Gender-related persecution: Assessing the asylum claims of women” (1993) *Cornell International Law Journal* 26(3) 625-74, 638-41.

Walter C. Long, “Escape from Wonderland: Implementing Canada's Rational Procedures to Evaluate Women's Gender-Related Asylum Claims”, (1994) 4 *UCLA Women's L.J.* 179, 208-10

44 See *ibid.* Kelly at 625, at 638-41 (reflecting upon the tendency of courts to “ascribe personal motivations to persecutors when the harm is sexual”)

45 See note 15, Long at 210

46 [1992] 970 E2d 149 (6th Circuit), In *Gomez v. INS*, 947 F.2d 660, 662 (2d Cir. 1991) (Salvadoran woman repeatedly raped and beaten by guerrillas).

persecution inflicted by the State but also the State's unwillingness or inability to protect the persecuted constitute a State connection. The Campos-Guardado court seems to imply that in the proper case, rape could form the basis of a well-founded fear of persecution. This, however, was found to be an improper case, since Campos-Guardado was considered to have suffered persecution of a 'personal' nature, not on the basis of political opinion. These cases highlight the difficulty accepting rape and other forms of sexual abuse as violence and the tendency to ascribe personal motivations to prosecutors when the harm is sexual.

Conclusion

We traced developments in the field of women's human rights. Notwithstanding this progress much work remains to be done to enhance the human rights of women. Greater emphasis must be placed on the responsibility of states to halt practices amounting to persecution. At the same time we have to ensure that women like men, can exercise their right to seek asylum. The difficulties in perception must be clarified through further, legislative references to gender-based forms of persecution, which will in turn strengthen the protection afforded by the 1951 Refugee Convention.



Asylum and Culture Shock among Refugees and Asylum Seekers



By Tiffy Allen

Tiffy Allen has worked with refugees in Leeds and Dublin since 2000, and was the founder of RETAS Leeds and Welcome to Leeds, two refugee charities. She recently completed an M Phil at the Irish School of Ecumenics and this article is adapted from her dissertation, 'Welcoming the Stranger'.

Abdulla arrived into Dublin airport with an agent who barely spoke a word to him, merely promised to bring him to a safe place and told him to keep his head down and say nothing. He had never been on a plane before, never left the African coast, and never seen such a mix of people or heard such a cacophony of language. He had no idea where he was, he spoke no language but Somali, and his back ached from the beatings he had received the day they attacked his fishing boat and took away his brothers.

"Wait here, I'll be back in five minutes." Mohammed, his only tenuous link with his past life, disappeared into the heaving crowd of strangeness. Abdulla stood still and waited. Minutes passed, the ache in his back got worse, an hour passed, and panic gradually crept up his stomach and chest, into his throat. He began to move around, the slow indefinite movement of someone who has no idea where to go.

Finally someone noticed him, he must have looked suspicious. Signed to him and half pulled him into a small musty office where two men sat in uniforms and extracted from him that he needed a Somali interpreter. He didn't know expressions like 'claiming asylum', 'identity documents', 'direct provision' or 'burden of proof' in any language. All he knew was that he wanted a safe place where people would not burn his home, steal his livelihood and kill him because of his ethnicity.

Maryam's eyes were used to looking in several directions at the same time, reminiscent of nesting blue tits at the end of a garden, with their 24 hour guard over their little brood. It was amazing how she managed to stay so cheerful, so positive. She described her flight from Sri Lanka fairly impassively, her voice cracking only when she mentioned her husband. The insurgents took him and she had no idea whether he was dead or alive. "But I thank God I managed to escape with my three children," she declared, eyes again darting around the sparsely furnished accommodation centre. The children were all beautiful, boys aged 6 and 4 and Angela, the baby girl born in Ireland and named in honour of the divine protection that allowed the birth to happen.

It was much harder at the beginning. Maryam, eight months pregnant, had been given a small room in a dingy hostel, sharing space with homeless people from Eastern Europe and the inner city. She had learned quickly that she couldn't let the boys out of her sight, the danger of needles in the bathroom more immediate than the incessant roar of traffic outside. She believed herself to be resourceful, and was deeply embarrassed that she had failed to attend her first asylum interview. It was mid December and the baby was due in January. Her social worker told her to be at the court by 10am. Maryam had left the flimsy curtains open that night, to be sure of getting herself and the boys ready at first light so that they could walk to the court room in good time. She had no watch, and although her English was not bad, she was not able to read or write. When she arrived, the clerk told her curtly that she was two hours late and her asylum case had been refused. Later, much later, her social worker realised that Maryam worked out the time by looking at the daylight and the sun. No-one had told her that sunrise was at 8.30 on December mornings in Belfast.

Emmanuel had always been a hard worker, determined, single-minded and successful. Successful, that is, until the rebel troops from the east had raided his hospital, fired randomly into the crowds waiting for treatment, burnt the outpatients' wing to the ground, and taken him prisoner. "You are a traitor," they roared. "You've been treating the enemy in your hospital." "I ... we... I treat everyone," he protested. "I have saved many of your people, your own soldiers." In the chaos that followed he managed to escape, and days of trekking through the bush finally brought him to the border.

Life in the accommodation centre, waiting for his asylum case, was a pain-ridden limbo. He longed to find distraction from the incessant worry about his family, his colleagues, and he knew that he could help many of his fellow asylum-seekers, people coming in daily with problems ranging from malaria and AIDS to gun-shot wounds. But he was told tersely, "You can't work or train until you get your papers." He knew that his blood pressure was shooting up as he paced his room or worked on old crossword puzzles, but the disempowerment seeped through to his own ability to care for himself.

Finally, two years later, the magic letter came. Full refugee status. By then he had learnt to pace himself, but on the second day he went into the employment office down the street. "I am a fully qualified orthopaedic surgeon," he explained carefully. "I opened my own hospital in Eastern Congo. I have twenty years experience." The girl looked confused. "Well, I don't think that's much use to you here. I mean, the qualification isn't European. I could refer you to, well, I could find out about how to get through all the exams. But you might be a bit old for all that." In the end, he settled for a job in a warehouse, moving bricks and concrete slabs on a forklift truck.

Culture Shock – a Block to Integration?

During these days when 'integration' has become a buzz word in political, social and even religious circles, cultural adaptation is a quality that we praise as a key to avoiding the polarisation that has often gone with multiculturalism. 'Citizenship' has taken on new implications in the 21st century: a 'British citizenship test' has been introduced for would-be naturalized UK citizens, including quaint questions about 17th century migration and Welsh assembly protocol that would confound most whose birthright is undisputed. In Ireland, immigrants who embrace traditional Irish music, dancing or even the language become national heroes. But as we look at cross-cultural issues, it is important not to forget the very real trauma of culture shock which is often an integral and unspoken part of the experience of arriving in a new country. The examples above, real-life stories with different names, remind us that culture shock is always much more intense for asylum seekers. If we are serious about integration, we will need to think about how we can address these difficulties; first by considering how much we intensify culture shock in the ways we deal with these, the most vulnerable of migrants, then by creative initiatives to help the process of healing.

How does Culture Shock Happen?

Culture shock is primarily experienced by immigrants or newcomers coming into a society and context where they have not lived before. However, it is a term that has also been used to describe the changes experienced by indigenous people when the demographics of their locality changes very rapidly, as in some parts of Ireland. It is therefore the responsibility of society as a whole to consider this experience as a reality and to look for creative ways of addressing it.

Tony Walsh mentions the internal upheaval of finding oneself in a place where the 'world view' and belief systems are radically different:

The world view developed within their home community may need radical re-interpretation...to encompass the world of new realities, beliefs and behaviours encountered in the new milieu...until this can happen, individuals are often cast adrift on a sea where there seems to be no certainties, no values.⁴⁷

There is no way of anticipating the moment when culture shock will hit home. I remember teaching English to a class of Muslim men, mainly asylum seekers from Central Asia and North Africa. Our classroom looked over a mosque with large billboards outside. The culture shock crisis came on the morning advertisements for ladies' swimwear were pasted to the billboards, and some of the men came in trembling with indignation and amazement.

Ward, Bochner and Furnham⁴⁸ give an extensive overview of culture shock, identity crisis and acculturation

47 Walsh, T, The Trauma of Displacement in No Longer Strangers ed. Treacy, B.,2006 P.10

48 Ward, Bochner and Furnham, The Psychology of Culture Shock, Routledge, 2001

in *The Psychology of Culture Shock*. They suggest that a healthy approach to overcoming culture shock and becoming integrated into a new society is to actively seek relationships and activities with the larger society, while maintaining one's own cultural identity and belonging. While this model is a useful starting place, it errs in placing all responsibility on the immigrant, and implies a measure of empowerment in acculturation which does not usually exist in practice, particularly for asylum seekers. It does, however, point us towards a helpful consideration of the possibilities of identity loss, confusion or rejection which often go with culture change and shock, especially if the change has been enforced, sudden or traumatic. They mention several key features which enable or enhance 'cultural learning' for newcomers into a society, including length of residence in the host culture, language or communication competence, quantity and quality of contact with host nationals, friendship networks and cross cultural training.⁴⁹ Once again, a lot of the initiative in these areas of learning depends on the people within the host culture, and in the Irish situation, where immigration is a sudden phenomenon, cross cultural training needs to be made widely available for the host culture also. The importance of this 'culture training' on both sides may be a key to avoiding the long term psychological problems that arise from the sense of disempowerment felt when coming to terms with a new culture. Isolation from the host culture, such as happens for most asylum seekers in Ireland through 'direct provision'⁵⁰, would obviously prevent 'culture learning' from happening, and increase the possibilities of culture shock adding to trauma.

Stages of Trauma for Refugees

Refugees experience extreme trauma and culture shock at several stages of their journey. First of all, the circumstances that cause them to flee their countries frequently include violence, rape, destruction of homes, or witnessing the death of family members. A glance at the list of countries of origin of refugees in Ireland and UK brings up many horrific images we have seen on our news screens over the past decade: Zimbabwe, Iraq, Afghanistan, Sudan, Somalia, Rwanda, Kosovo among the most common. During five years working intensively with refugees from all of these places, I repeatedly heard first-hand accounts of imprisonment, torture, homes and villages burnt out, rape, and murder of a close family member.

Second, the journey from their home to Ireland usually involves fear, parting with loved ones, extremely difficult travel conditions and disempowerment. Among the refugees I have known, many have described to me endless journeys in the backs of lorries, the only break a brief midnight stop in a cold isolated forest. Others experienced being left alone and disoriented in a strange country where they did not know the language. Most

refugees have no chance to prepare for their journey and no say in how they will travel or where they will end up.

The third cause of trauma is the experience of arriving in Ireland or UK and the asylum system. Walsh tells the story of a sixteen-year old African boy who

*Arrived in Dublin alone and vulnerable on a freezing February day. He spent three nights sleeping in a phone box, because he did not know where or how to find help.*⁵¹

Language difficulty, cold, disorientation, disempowerment, battling with a harsh and legalistic asylum system and racism are all common experiences for newly arrived refugees.

Direct Provision easily leads to further disempowerment, social exclusion and often is a trigger for depression. 'Beyond the Pale', a report by Fanning, Veale and O'Connor shows and exemplifies the ways that the present system causes poverty and exclusion for asylum seeking families and children,⁵² particularly emphasising the cultural and psychological vulnerability of asylum seeking children:

...it can be particularly stressful for children as it is a transient status, with an uncertain outcome and an unforeseeable future.

Tony Walsh states:

*To become a refugee is to become dislocated, often separated violently from home, loved ones, community, and from all that is familiar and predictable. Physical, cultural, psychological and emotional trauma is at the heart of the experience.*⁵³

Ward, Bochner and Furnham state that the culture change stress is magnified for refugees:

*Although refugees encounter many of the same ...pressures as do other acculturating groups, their traumatic pre-migration experiences and the involuntary 'push' into alien environments distinguish them from sojourners and immigrants...both depression and post-traumatic stress disorder are frequently diagnosed in refugee populations*⁵⁴.

A fourth experience of culture shock may well happen when asylum seekers receive refugee status and begin to look for work. For many, the concept of receiving social welfare payments is deeply shameful and the months or years of waiting not only for a decision from the government but also for permission to use their skills to work and earn their own keep adds to the sense of disempowerment. Many of the refugees coming to Ireland and UK are highly skilled professionals: doctors, teachers,

51 Walsh, T, *The Trauma of Displacement in No Longer Strangers* ed. Treacy, B., 2006, P.12

52 Fanning, Veale and O'Connor, *Beyond the Pale: Asylum Seeking Children and Social Exclusion in Ireland* Irish Refugee Council, 2001.

53 Walsh, T, *The Trauma of Displacement in No Longer Strangers* ed. Treacy, B., 2006

54 Ward, Bochner and Furnham, P. 244

49 Ward, Bochner and Furnham, P.37

50 Direct Provision was introduced in Ireland in April 2000. The system means that asylum seekers are housed in hostels and reception centres with an allowance of 19 Euro per week.

engineers, lawyers and others. The process of requalification is usually convoluted, expensive, discouraging and shrouded in mystery. Some succeed returning to their area of expertise, but far more drop out of the process, and have to face a life of working in an unskilled job and the ignominy of having to let their families know that their hard earned qualifications are not worth the paper they are written on.

Addressing Culture Shock

These difficulties are real and all around us. The people whose stories are told at the start of this article have all moved on, and would say that they have now integrated. They were helped by knowing that there were friends from the new culture, people who were willing to listen to their story, see with their eyes, and advocate for them. No legislation can replace the personal touch, and it is undoubtedly human relationships that can help asylum seekers and refugees recover from the culture shock they experience. However, the governments of receiving countries like Ireland and England may need to review their methods of receiving asylum seekers if integration is really at the core of their national strategy. The assumption behind isolating asylum seekers in direct provision, asking them to subsist on 19 Euro a week, denying them access to education and work, seems to be that they will not be accepted as refugees, and that it is better to keep them away from mainstream society. European experience, however, suggests strongly that failure to address culture shock and cultural isolation could lead to generational misunderstanding and resentment, and any government desiring to create an intercultural and integrated society would do well to consider ways of addressing and avoiding the trauma of long term culture shock among refugees.



Kenyan Women Lawyers Federation.

By Sheena Greene, BL



Last summer I spent three weeks in Kenya working as a volunteer with the Kenyan Federation of Women Lawyers (FIDA Kenya). FIDA is a not for profit, non partisan NGO established in 1985, whose aim is the creation of a Kenyan society free from all forms of discrimination against women on the basis of gender. It focuses attention on enhancing and empowering women's rights and on the provision of free legal aid to women in need.

The existence of voluntary legal organisations such as FIDA is vital to many women in Kenya, which lacks a free legal aid service and where the legal system has frequently failed to protect and uphold their human rights. Women and girls are most disadvantaged and vulnerable to the effects of poverty, poor education and violence of all types. Traditional lack of positive female role models and poor participation by women in politics and public life has proven challenging to the elimination of gender based violence and discrimination. FIDA believes that ensuring women are empowered to combat and overcome violence and discrimination is fundamental to human dignity and reaching their potential in the sustainable development and social harmony of any just and fair society.

The executive director Jane Onyango oversees FIDA Kenya and it's dedicated team of committed professionals, the majority of whom are postgraduate experienced lawyers. The organisation is structured into four teams from three main offices, the headquarters based in Nairobi and two branch offices in Mombasa and Kisumu. The teams comprise legal aid services, strategic leadership, advocacy and human rights and finance. Financial support and funding is provided for by up to 30 donor agencies and is efficiently and rigorously supervised by the finance section so that the all monies expended on individual projects fully accountable.



I worked in the Nairobi office with the Women's Rights Monitoring and Advocacy Team and was given an excellent overview of the dynamic work engaged in creating awareness on gender and legal rights through advocacy and legal reform. Christine Ochieng former Senior Program Officer led and focused the team's activities and skills so that participation by the individual team members on different projects was maximised. Alice Maranga, Hilary Muthui, Moses Otsieno, MaryFrances Lukera and Goretty Osur work on programs addressing discriminatory constitutional and legislative provision⁵⁵ and also the evaluation of implementation of new laws prioritizing elimination of violence⁵⁶. The team focuses on developing dialogue

55The Constitution of Kenya contains prohibition of discrimination under article 82(4 b & c), but notes that the prohibition against discrimination is subject to various limitations, exceptions and qualifications in article 82 (1 & 2). Article 90 of the Constitution stipulates that the father's nationality determines that of his spouse and children. The Law of Succession governing inheritance rights terminates the inheritance rights of widows if they remarry. A widow can not be the sole administrator of her late husband's estate except with the consent of her children. The law also permits the Ministry of Justice to exempt certain communities from the succession laws in deference to their customary or religious beliefs. This can result in the female family members being disinherited or inheriting a percentage of that of their male relatives. See Shadow Report to the 5th and 6th Combined Report of the Government of Kenya, on the International Convention On The Elimination Of All Forms Of Discrimination Against Women (CEDAW) presented by FIDA to the 39th Session of the UNITED NATIONS COMMITTEE in New York 23 July-10 August 2007.

56The Sexual Offences Act was enacted in 2006 and despite the appointment of a task force to implement the act, many law enforcement officers were not trained, or ignored the new law. Implementation remains limited, and sexual offences remain largely underreported. While police records for 2006 reported rape figures nationally at 2736, human rights organisations put this figure at 16,000. The new law does not specifically prohibit spousal rape. See Kenya U.S. Department of State Country Report on Human Rights Practices 2007.

with government officials and legislators, providing training sessions, giving interviews to and doing opinion pieces for the media, participating in panel discussions. FIDA also coordinates the use of gender mainstreaming strategies to counterbalance prevalence of negative stereotyping by looking beyond partisan considerations to promote the greater interests of women as a whole. The team produces annual reports on the legal status of women to ensure that FIDA's advocacy and lobbying initiatives towards gender parity are valid and adequately informed. Monitors are trained across the country on specific areas of concern and they observe women's rights violations in their localities and submit monthly reports for evaluation. These areas of concern have included programs targeted at eradicating harmful cultural and traditional customs and practices such as child marriage⁵⁷ and bride price, polygamy, female genital mutilation⁵⁸, gender and domestic violence⁵⁹, widow inheritance⁶⁰ and reproductive health⁶¹. Sometimes these activities and reports are conducted in conjunction with national partner organisations or international donor bodies. Topics focus on creating awareness on harmful practices that have received limited exposure or scrutiny to date.

57While the Marriage Act forbids marriage under the age of 16 for a girl and 18 years for a boy, customary and Islamic laws generally allow adolescents who have reached puberty marry regardless of their age. There is a widespread practice of forced child marriage among certain communities both due to traditional customary beliefs and poverty where bride price will have the dual advantage of bringing small revenue and one less mouth to feed to an impoverished family.

58The Children's Act 2001 outlaws performing FGM on girls under 18 years but not to women. According to 2003 Kenya Democratic Health Survey (KDHS) 32% of the women interviewed indicated that they had been circumcised.

59 Domestic violence remains a serious problem. The 2004 KDHS indicated that 40% of women interviewed had experienced domestic abuse between the age of 15 and 49 years. See Gender Series: Domestic Abuse in Kenya Tony Johnson 2002. Gender Series: Sexual abuse of Kenyan women & girls Tony Johnson 2003.

60Certain communities practice wife inheritance, in which a man inherits the widow of his brother or other close relative, irrespective of her wishes. Although poor and uneducated women are more likely to be inherited or suffer from property and inheritance discrimination, prominent and educated women are also victims. Another widespread problem for women married under customary law is the fundamental proof of marriage report to CEDAW see 1 above.

61Estimates from a study on magnitude and consequences of unsafe abortion in Kenya in 2003 estimated that 300,000 unsafe abortions occur each year. Further estimates suggest that of the 20 000 women who are treated with abortion related complications account for 30%-40% of maternal death rates. 2003 Kenya Demographic and Health Survey. Those estimates combined with the rising rates of rape and sexual violence are forcing the need for dialogue on this very contentious subject.

Projects aim at changing harmful behavioural practices by raising public awareness of their detrimental consequences. During my weeks at FIDA's offices team members were engaged in a variety of projects; including the creation of a police training manual and course on Gender and Human Rights, a research project on human rights violations against sex workers in Kenya and various other proposals for new projects. FIDA conducts ongoing legal training programs with leaders and chiefs of tribal and minority communities, in different provinces, to equip them with legal knowledge of women's rights in areas such as education, healthcare, marriage and succession law. It has advocated constantly for the education of women at all stages; seeing it as the key to their advancement and participation in an inclusive, just and fair society.

The Legal Aid Teams core aim is the provision of legal aid clinics to vulnerable and disadvantaged women in three locations; Nairobi, Mombasa and Kisumu. Each of these clinics work with the disparate challenges posed by local conditions of cultural, ethnic, religious and linguistic variety. Nairobi's legal aid clinic reflects the urban problems of any modern metropolis and diversity of its inhabitants who have left their rural homeland to seek a living there. It is the international regional hub for many companies, international aid organisations and foreign journalists reporting on the East Africa region; although Nairobi's favourable climate and proximity to excellent safari trips might also be a factor in this. It is also home to two of the largest slum dwellings in East Africa, Mathare and Kibera. I spent one week in Kibera prior to joining FIDA and saw at first hand the level of deprivation and determination of the many of the estimated one million slum dwellers who struggle everyday for basic survival. I also observed the determination of local primary schoolchildren to maximise their only opportunity for education by arriving hours before school classes begin so that they could avail of the school's electricity to do their homework⁶².

Mombasa and the coastal region have a large Muslim population who are subject to Islamic law⁶³, which is enshrined in the Kenyan Constitution; in matters relating to personal status, marriage, divorce or inheritance. As the Kenyan coast develops it's tourist

⁶²The introduction of free compulsory primary education up to 8th grade in 2003 transformed opportunities for children of many poor Kenyan families and has been a major step in gender mainstreaming by eliminating the need to choose which child should benefit from a basic education.

⁶³Article 66(1-5) of the Kenyan Constitution provide for the establishment of Kadhis' Courts to apply personal status law for Muslims by way of the Kadhis' Courts Act 1967. Muslim law applied by the Kadhis' Courts where "all parties profess the Muslim religion" relating to personal status, marriage, divorce or inheritance.

industry, so too does the legal aid section of the Mombasa office expand to assist the growing number of foreign or migrant clients and child victims of the international sex industry. The Mombasa office has been particularly pro active in facilitating children who have experienced abuse by having child friendly facilities within the office and also by forging links with the Children's Court and social services. It has also introduced family mediation and ADR services.

The individual offices also participate in a referral system with counselling services, relevant government departments and pro bono lawyers' networks nationwide. The use of pro bono lawyers is particularly important in a geographical base as large as Kenya⁶⁴. The lack of a national legal aid system has resulted in the provision of access to legal services being largely left to the limited resources of NGO's such as FIDA. While potential clients might not be able to travel large distances to one of the FIDA offices, they are still able to access their legal services through outreach programs or through referral to local pro bono lawyers. Each clinic receives an average of 100 clients per day, seen by a total of 9 in house lawyers. The clinics are so busy that FIDA's manpower is overburdened. One practical and effective solution to this has been the introduction of training courses on self representation and advocacy skills. Obviously these courses have to be tailored to the educational levels of the recipients. The legal aid offices also use mediation and ADR and have found this to be extremely positive in reaching swift resolution in cases and having the additional benefit of reducing litigation. FIDA is widely recognised by both men and women throughout Kenya as a legal organisation which represents, supports and redresses injustices suffered by women on the basis of their gender, in the home, workplace or throughout the educational system. This is significant as Kenya has approximately 42 different ethnic communities and countless local languages. Frequently there are stories of women using the threat of contacting FIDA's services as a method of defence to domestic abuse.

Over the last 23 years FIDA has grown from a small grassroots legal organisation to gaining national recognition as a leading force influencing policy on law reform, legal education and focused litigation. It has retained it's core values of providing legal services to the most needy and vulnerable members of Kenyan society. FIDA lawyers are becoming increasingly involved in public interest litigation, as their experience is that precedent judgments result in greater and more visible effects than the addressing of individual cases.

⁶⁴Kenya is 580,367 km² or approximately 6 times the size of Ireland. It is estimated that 80% of the 35 million population still live in rural areas.

FIDA Kenya gained an international profile by providing a shadow report on Kenya's implementation of all the articles of the Convention on the Elimination of All Forms of Discrimination against Women to the CEDAW Committee last summer in New York. In April 2007 the University of California honoured FIDA for its provision of exemplary mediation services in Kenya and FIDA was granted observer status with the African Commission in May 2007. In September 2007 the organisation was appointed, along with other civil society organisations, to undertake voter education by the Electoral Commission of Kenya for the general elections.

It was a fascinating and invaluable experience on the merits of bringing universal principles of human rights to bear, with courage and vision, to create a flexible and varied solution balancing the influence of multiple cultures and traditions. Recent post election violence in Kenya has emphasised its ongoing challenges.

Information on the work of FIDA is available on www.info@fida.co.ke



Recent Developments in Immigration and Refugee Law.

Oguekwe v The Minister for Justice, Equality and Law Reform; Unreported, Supreme Court, 1st May 2008

JUDICIAL REVIEW – CERTIORARI – DEPORTATION OF PARENT OF IRISH CHILD – RESIDENCY - IBC05 SCHEME – RIGHTS OF IRISH BORN CHILD – APPEAL TO THE SUPREME COURT – SECTION 3 IMMIGRATION ACT 1999 – ARTICLE 40.3 OF THE CONSTITUTION – ARTICLE 8 EUROPEAN CONVENTION ON HUMAN RIGHTS

Facts

In December 2004 the Minister announced a scheme for processing claims from non-national parents of Irish children for permission to remain in Ireland. A notice setting out details of the scheme was published in January. The notice invited applications for permission to remain in the State from non-national parents of Irish born children before the end of March 2005. This became known as the "IBC 05" scheme. In the instant case, the Minister granted the child's mother residency, but refused the application from the child's father who was found not to have been continually resident in Ireland from the date of the child's birth. The child's father had also been issued with a deportation order. The Minister's report recommending deportation accepted that the Irish born child was entitled to citizenship, stated that all papers on file had been read, and stated that the rights of the child as referred to in *L&O v The Minister for Justice* had been considered. The applicants sought to quash the decision to refuse

the applicant father permission to remain, and the decision to make a deportation order against the child's father, claiming, *inter alia*, that the Minister's failed to consider the child's Constitutional and ECHR rights.

The High Court granted the relief sought and held that the Minister's decisions were in breach of the child's Constitutional and ECHR rights, and that the applicants were entitled to orders quashing the Minister's decisions. The Minister appealed the High Court's decision. Accordingly, two issues were before the Supreme Court: an appeal from the High Court's decision to quash the Minister's refusal of residency to the father of an Irish child under the "IBC05" scheme, and an appeal from the High Court's decision to quash the Minister's decision to make the deportation order.

Findings

The Supreme Court allowed the Minister's appeal on the first issue for the reasons set out in the decision of *Bode & Ors v The Minister for Justice, Equality and Law Reform*. The IBC05 scheme was an administrative scheme by the Minister exercising executive power. The parameters of the scheme were clear and included the requirement of continuous residence. On the evidence the applicant was not continuously resident during the material time and did not meet the criteria. It was therefore open to the Minister to find as he did.

The Supreme Court dismissed the Minister's appeal on the second issue, and affirmed the decision to quash the deportation order. The Supreme Court agreed with the High Court that the discretion given to the Minister by Section 3 of the 1999 Act is constrained by the obligation to exercise that power in a manner consistent with constitutional and ECHR rights of people affected. The Court held that if the Minister was to take a decision to deport the parent of an Irish child he must (i) consider the facts relevant to the personal rights of the citizen child protected by Article 40.3 of the Constitution, if necessary by due enquiry in a fair and proper manner, (ii) identify a substantial reason which requires the deportation of a foreign national parent of an Irish born child, and (iii) make a reasonable and proportionate decision.

The Court held that the Minister's consideration should be fact specific to the individual child, his or her age, current educational progress, development and opportunities, and that consideration should relate not only to educational issues, but also to the other matters referred to in Section 3 of the 1999 Act. The Court stated that the extent of the consideration will depend on the facts of the case, including the age of the child, the length of time he or she has been in the State, and the part he or she has taken in the community. The Court found that the High Court had erred in holding that the Minister was required to take account of the educational facilities and other conditions in the country

of return. The Court held that the Minister's decision is required to be proportionate and reasonable on the application as a whole, and not on the specific factor of comparative educational systems.

On the application of the ECHR, the Court affirmed the High Court's decision, but held that the formal approach set out by the High Court was not necessary so long as the general principles are applied to the circumstances of the case. In the exercise of his discretion the Minister is required to consider the Constitutional and Convention rights of the parents and children and to refer specifically to factors he has considered relating to the position of any citizen children.

Obiter

The Court set out a non-exhaustive list of matters relevant for consideration by the Minister when making a decision whether to deport a parent of an Irish born child:

- 1 The Minister should consider the circumstances of each case by due inquiry in a fair and proper manner as to the facts and factors affecting the family.
- 2 Save for exceptional cases, the Minister is not required to inquire into matters other than those which have been sent to him by and on behalf of applicants and which are on the file of the department.
- 3 Where a parent has residency, facts relating to the personal rights of the Irish born citizen child, and of the family unit, are relevant.
- 4 The facts to be considered include those expressly referred to in the relevant statutory scheme, i.e., the Immigration Act 1999, so far as they appear or are known to the Minister.
- 5 The potential interference with rights of the applicants, including the nature and history of the family unit
- 6 The Constitutional rights, including the personal rights, of the Irish born child. These rights include the right of the Irish born child to (a) reside in the State, (b) be reared and educated with due regard to his welfare, (c) the society, care and company of his parents, and (d) protection of the family, pursuant to Article 41. The Minister should deal expressly with the rights of the child in any decision. Specific reference to the position of an Irish born child of a foreign national parent is required in decisions and documents relating to any decision to deport such foreign national parent.
- 7 The Convention rights of the applicants, including those of the Irish born child.
- 8 Neither Constitutional nor Convention rights of the applicants are absolute.
- 9 The Minister is not obliged to respect a couple's choice of residence.
- 10 The State's rights require also to be considered. The State has the right to control the entry, presence, and exit of foreign nationals, subject to the Constitution and international agreements. Thus the State may consider issues of national security, public policy, the integrity of the Immigration Scheme, its consistency and fairness to persons and to the State. Fundamentally, also, the Minister should consider the common good, embracing both statutory and Constitutional principles, and the principles of the Convention in the European context.
- 11 The Minister should weigh the factors and principles in a fair and just manner to achieve a reasonable and proportionate decision. While the Irish born child has the right to reside in the State, there may be a substantial reason, associated with the common good, for the Minister to make an order to deport a foreign national who is a parent of an Irish born child, even though the necessary consequence is that in order to remain a family unit the Irish born child must leave the State. However, the decision should not be disproportionate to the ends to be achieved.
- 12 The Minister should consider whether in all the circumstances of the case there is a substantial reason associated with the common good which requires the deportation of the foreign national parent. In such circumstances the Minister should take into consideration the personal circumstances of the Irish born child and the foreign national parents.
- 13 The Minister should be satisfied that there is a substantial reason for deporting a foreign national parent, that the deportation is not disproportionate to the ends sought to be achieved, and that the order of deportation is a necessary measure for the purpose of achieving the common good.
- 14 The Minister should also take into account the common good and policy considerations that would lead to similar decisions in other cases.
- 15 There should be a substantial reason given for making an order of deportation of a parent of an Irish born child.
- 16 On judicial review of a decision of the Minister to make an order of deportation, the Court does not exercise and substitute its own discretion.

Cases Cited

Abdulaziz & Ors v UK [1989] 7 EHRR 471; *Berrehab v The Netherlands* (1989) 11 EHRR 322; *Boujlifa v France* [2000] 30 EHRR 419; *Bode & Ors v The Minister for Justice, Unreported, Supreme Court, 20th*

December 2007; Cirpaci v The Minister for Justice [2005] 2 ILRM 547; *Dimbo v The Minister; Fajujonu v Minister for Justice* [1990] 2 IR 151; *L&O v Minister for Justice* [2003] 1 IR; *Ryan v The AG* [1965] 1 IR 294; *Poku v UK* 1996) 22 EHRR CD 94; *R (Mahmood) v The Secretary of State for the Home Department* [2001] 1 WLR 840; *The Illegal Immigrants Trafficking) Bill 1999* [2000] 2 IR 360;

(The Supreme Court similarly allowed the appeal in the related cases of *Dimbo v The Minister for Justice*. See also the summary of the Supreme Court decision in *Bode & Ors v The Minister for Justice* in the February 2008 issue of *The Researcher*, and the discussion relating to the High Court's decision in the same matter in the December 2006 issue)

John Stanley BL



***Metock & Ors v MJELR*, Unreported, High Court, Finlay Geoghegan J., Interim Decision, 14th March 2008, Neutral Citation: [2008] IEHC 77**

ARTICLE 234 EC TREATY—PRELIMINARY RULING—DIRECTIVE 2004/38/EC— EUROPEAN COMMUNITIES (FREE MOVEMENT OF PERSONS (NO.2) REGULATIONS 2006- ACCELERATED PROCEDURE-ARTICLE 104a OF THE RULES OF PROCEDURE OF THE COURT OF JUSTICE

Facts

The applicants are married couples consisting of an EU citizen of a Member State other than Ireland residing and working in Ireland and a non-EU national. Three of the non-EU nationals arrived in Ireland independently of the EU citizens, two of them before their future spouses. All married in Ireland subsequent to the arrival of the EU citizens in Ireland. The non-EU spouses applied for residence cards from the respondent as spouses of Union citizens residing and working in Ireland. Three of the applications were refused on the grounds of the failure of the non-EU spouse to furnish evidence of lawful residence in another EU Member State prior to arrival in Ireland as required by article 3(2) of the European Communities (Free Movement of Persons) (No.2) Regulations 2006. The fourth was refused on the basis that the non EU spouse could not avail of the provisions of the 2006 Regulations as he was an illegal resident in Ireland at the time of his marriage to the EU citizen. The applicants challenged the validity of the respondent's decision refusing the applications and sought *inter alia* orders of certiorari. By consent an order of certiorari was made in the fourth case. It was contended that the prior lawful residence requirement contained in the 2006 Regulations implementing Directive 2004/38/EC was inconsistent with the Directive and therefore *ultra vires* the powers of the respondent and void. The applications were regarded as test cases and were heard simultaneously. Judgements were reserved but one interim decision on all four proceedings was given.

Findings

Held by Finlay Geoghegan J. that a preliminary ruling on the interpretation of Directive 2004/38/EC was necessary to enable judgment to be given. The determination of the applications for orders of certiorari hinged upon whether the single reason given by the respondent for the refusals was one which was permissible under the Directive. If article 3(2) of the 2006 Regulations was inconsistent with the Directive, then it was *ultra vires* the powers of the respondent in making the regulations to give effect to the Directive in Ireland and void. *S.K. & Anor v Minister for Justice Equality, and Law Reform & Ors* had held that the prior lawful residence requirement in article 3(2) of the 2006 Regulations was consistent with the Directive and lawful and gave effect to the Directive and the decision of the Court of Justice in *Secretary of State for the Home Department v Hacene Akrich*. Furthermore, the Directive was intended to apply to families which were established in a Member State prior to the move to the host Member State. While this was a decision of a court of equal jurisdiction and not binding, it should only be departed from if found to have been wrongly decided in accordance with the principles set out in *Irish Trust Bank v Central Bank of Ireland*. What was decided by the Court of Justice in *Yungying Jia v Migrationsverket* especially in relation to the application of its decision in the *Hacene Akrich* case could not be left to one side in determining the proper meaning of the Directive and the validity of the lawful residence requirement in article 3(2) as had occurred in *S.K. & Anor v Minister for Justice, Equality and Law Reform & Ors*. Accordingly, the decision in *S.K. & Anor* on the interpretation of the Directive and the validity of article 3(2) of the 2006 Regulations should not be followed but rather a preliminary ruling should be sought from the Court of Justice on whether the Directive permits a Member State to have a general requirement that a non-EU national spouse of a Union citizen must have been lawfully resident in another Member State prior to coming to the host Member State in order to avail of the provisions of the Directive.

If following the preliminary ruling on the aforementioned question, orders of certiorari were granted and the applications were remitted to the respondent, it was clear that there would be a legal issue in dispute between the parties as to proper interpretation of the requirement in article 3(1) of the Directive that the family member "accompany or join" the Union citizen. It would appear appropriate that the Court should determine this issue before remittal to the respondent. Otherwise, there would be uncertainty as to the meaning of any order made by the Court that the application "be determined in accordance with Directive 2004/38/EC" Further judicial reviews would be inevitable if the respondent applied the Directive in accordance with the legal meaning for which he contended, given the legal submissions made by the applicants. To give judgement on this dispute, a preliminary ruling by the Court of Justice should be sought on whether a non-EU national being a spouse of an EU citizen who resides in the host Member state with a

right of residence for longer than 3 months pursuant to article 7(1) of the Directive and is then residing in the host Member State as a spouse with that Union citizen irrespective of when or where the marriage took place or when or how the non-EU national entered the host member state, comes within the scope of article 3(1) of the Directive and if not, whether a non -EU national spouse who has entered the host member state independently of the Union Citizen and subsequently married the Union citizen in the host member state and is residing in the host member state as a spouse of an EU citizen with a right of residence in excess of 3 months, comes within the scope of article 3(1).

The ruling on the prior lawful residence requirement would apply to many other cases. It was probable that applications for judicial review would continue pending the ruling with significant costs and expenses for parties and court resources. The amounts in the claims for damages against the respondent would increase with the length of the period prior to final judgement. For these reasons and given the present personal circumstances of the applicants, a preliminary ruling by the Court of Justice was a matter of exceptional urgency and the President of the Court of Justice was requested to apply an accelerated procedure to the ruling pursuant to article 104 a of the Rules of Procedure of the Court of Justice.

Cases Cited

S.K. and Anor v The Minister for Justice ,Equality and Law Reform and Ors [2007] I.E.H.C. 216, *Secretary of State for the Home Department v Hacene Akrich* (Case C - 109/01) [2003] ECR.I-9607, *Irish Trust Bank v Central Bank of Ireland* [1976 -7] I.L.R.M.50, *Yungying Jia v Migrationsverket* (Case C- 1/05) [2007] ECR. I - 1, *Minister voor Vreemdelingenzaken en Integratie v R.N.G.Eind* (C-291/05) (Unreported, European Court of Justice, 11th December, 2007), *Movement Contre le Racisme, l'antisémitisme et la xénophobie ASBL (MRAX) v Belgian State* (Case C -459/99) [2002] ECR.I - 6591), *Commission of the European Communities v Spain* (Case C-157/03) [2005] ECR. I-2911

Epilogue

The President of the Court of Justice has ordered that the reference for the preliminary ruling be dealt with by way of the accelerated procedure. The oral hearing will take place in Luxembourg on 3 June 2008. In the course of the judgement it was held that it was apparent from Article 104a that at the request of a national court the President of the Court may exceptionally decide to apply an accelerated procedure to a reference for a preliminary ruling where it can be established that the ruling is a matter of exceptional urgency.

According to the Court's settled case law, the right to respect for family life within the meaning of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 is among the rights protected in Community law. In the main proceedings from which the reference arises, three of the non-EU spouses are not permitted to work thus depriving

their wives of the opportunity of leading a family life with a working spouse. The fourth non-EU national has been deported thus depriving the couple of any family life. The Court's ruling on the interpretation of Directive 2004/38 with regard to the prior lawful residence requirement will remove the uncertainty affecting the situation of the applicants and therefore their family lives. A speedy reply would bring a swifter end to that uncertainty which is preventing the applicants leading a normal family life. In these circumstances and without examining the other grounds relied on by the Irish Court the condition of exceptional urgency has been met.

Mary Fagan RDC.



N. & Anor -v- Minister for Justice Equality and Law Reform, Unreported, High Court, Chareilton J., 25th April 2008; Neutral Citation: (2008) IEHC 107

Immigration – Leave to seek Judicial Review - 110 Subsidiary protection-Serious harm- fair procedure

Facts

The applicants *Em, N. and O.* were Nigerian nationals who had been unsuccessful in their claims for refugee status and had also been refused subsidiary protection by the Minister of Justice Equality and Law Reform. They sought leave to seek judicial review against the Minister's decision.

Ms. N claimed she feared persecution from her family for her refusal to become the head of an occult shrine and feared her daughter would be forced to undergo FGM. Her psychological state was assessed and it was found that she was traumatised, stressed and depressed.

Ms. *Em* claimed she had been brought to Italy by a woman called "Madam Iron Lady" after she had agreed to go to work in a factory in Italy however she was forced to work as a prostitute. She took an oath at a pagan shrine promising that she would repay her travel expenses and wouldn't run away from the woman. She feared breaking the oath would cause her "to go mad or die." She also feared that Madam Iron Lady would be able to track her down if she was returned to Nigeria.

Ms. *O.* claimed she had travelled to Italy with a woman named Madam Vivian where she was forced to work as a prostitute. She claimed to have also taken an oath at a shrine that she would not run away from Madam Vivian. She feared that Madam Vivian would be able to track her down if she was returned to Nigeria.

The applicants argued that a fair consideration of country of origin information during the process should include a right to have submissions heard after the letter denying subsidiary protection had been sent.

They also argued that subsidiary protection was a right that arose under Irish and European law as opposed to it being merely a discretionary power vested in the Minister for Justice, Equality and Law Reform.

Findings

In denying the leave sought, *Charleton J* stated that the primary focus on an application for subsidiary protection is any risk which the appellant alleges he or she is subject to upon return to their country of origin considered in light of the situation in terms of peacefulness and the functionality of ordinary protection in that state. In the cases of *Ms. Em* and *Ms. O* he was satisfied that there was nothing stopping them from returning safely to Nigeria and living quietly in another part of the country. In the case of *Ms. N* he was satisfied that she could seek state protection in one of the territories in Nigeria that FGM was banned in and also that there was nothing to suggest that she would be discriminated against because of her condition of depression.

During the judgment *Charleton J.* considered the nature and importance of human rights and concluded that subsidiary protection was a right to be enjoyed under Irish law by non-citizens rather than a discretionary power of the Minister. He also found that the standard of review in challenging subsidiary protection decisions should not be the normal test where the question asked is whether the decision flew in the face of common sense and reason. Instead, relying on Council Directive 2005/85/EC and the

Kouaype case, he stated that a decision on the country of origin information and the applicability of state protection should only stand upon judicial review if it is rational and fairly supported by country of origin information.

With regard to the issue as to what constitutes “serious harm” under the Irish and EU regulations *Charleton J.* concluded that the regulations focus on attacks or threats by human agency and that health and welfare were not within the remit of S.2 of the Regulations. Therefore they exclude the state of an applicant’s health, be it physical or mental, and it instead “involves someone in their country of origin executing them, subjecting them to torture or degrading treatment or, more generally, an applicant on return being placed in a situation of violence by reason of civil or international war”. *Charleton J.* also noted that the concept of subsidiary protection does not apply to the individual circumstances concerned with the commission of a crime against an applicant unless there is a lack of state protection and internal relocation is not available to the applicant.

On the issue of the procedure for subsidiary protection *Charleton J.* was of the opinion that the primary focus for decision making under Directive 2005/85/EC was to ensure that the most up to date country of origin information was used and it is not necessary for the Minister to engage in correspondence with or seek further submissions from the applicant.

Cases Cited:

Imafu v. Minister for Justice, Equality and Law Reform (Unreported, Peart J., High Court, 9th December, 2005)

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Kouaype v. Minister for Justice, Equality and Law Reform [2005] IEHC 380

Kozhukarov v. Minister for Justice, Equality and Law Reform [2005] IEHC 424

Izevbekhai v. Minister for Justice, Equality and Law Reform [2008] IEHC 23

H. and Ors. v. Minister for Justice, Equality and Law Reform [2007] I.E.H.C. 277

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Ross Murphy RDC



“We as a society cannot continue killing girls”

The fate of India’s girl children under the spectre of foeticide⁶⁵



By Patrick Dowling, RDC

Introduction

After being dumped unknown in an orphanage, Bhavia was named and cared for. Other children have been “...dumped outside police stations, some in railway toilets, crowded fairgrounds, or the dark corners of bus stations”.⁶⁶ The orphanage where Bhavia was left has a specially built basket outside the grounds where children who are abandoned can be tracked by an in-built alarm. “The weight of a child here will set off an alarm, alerting...staff to a new arrival”.⁶⁷ The children are not necessarily abandoned children for reasons of destitution. “Some have been found with a neatly packed bag containing a change of clothes, milk formula and disposable nappies”.⁶⁸ And not all will share Bhavia’s fate. Babies can be “...left in the cold to contract pneumonia

⁶⁵ Title derives from a comment by a campaigner in the following article by Randeep Ramesh, (30 March 2006), “Jailing of doctor in Indian sting operation highlights scandal of aborted girl foetuses”, *The Guardian*, <http://www.guardian.co.uk/world/2006/mar/30/india.gender/print>

⁶⁶ Raekha Prasad & Randeep Ramesh, (28 February 2007), “India’s missing girls”, *The Guardian*, <http://www.guardian.co.uk/world/2007/feb/28/india.raekhaprasa/d/print>

⁶⁷ *Ibid*

⁶⁸ *Ibid*

and perish".⁶⁹ The baskets and cradles such as where Bhavia was found are part of a government initiative "...to set up a network of cradles around the country where parents can leave unwanted baby girls...It is the latest initiative to try to wipe out the practice of female foeticide and female infanticide".⁷⁰ This article focuses on the issue of female foeticide in India and will cover the reasons for the practice addressing areas such as the primeval and ongoing discrimination against females, the concurrent advance and availability of technology and what this means for girls such as Bhavia.

Ancient discrimination

For girls such as Bhavia it has "...never been more dangerous to be conceived female".⁷¹ Mothers and newly-born daughters can be treated brutally for not continuing the male line in Indian families.⁷² Many other girl children are cast out, even into rubbish dumps; and while some "...are found and revived, most die".⁷³ Other methods of eradicating "...girl babies after birth include poisoning, throat splitting, starvation, smothering and drowning".⁷⁴ There exists an ancient prejudice against having daughters in India, "...where tradition dictates that when she is married a woman's family must pay the groom's family a large dowry. By contrast a son is considered an asset. Even leaving aside the wealth his bride will bring, a boy will inherit property and is seen as a way of securing parent-care in old age".⁷⁵ The age-old discrimination against women may come from "...the time India was a predominantly agrarian society [and] boys were considered an extra pair of hands on the farm".⁷⁶ Traditional concepts such as 'paraya dhan' persist which dictate that a girl is not seen as "...a permanent member of her birth family; that by giving her a share in the family property/ assets, these assets will move away from the family after her marriage; that she will cost the family a great deal of money in terms of dowry...".⁷⁷ The dowry in contemporary India "...translates into an evermore expensive gift list of consumer goods. Decades ago, a wealthy bride's father would have been expected to give gold bracelets. Today it is jewellery, fridges, cars and

foreign holidays - and the bride's family may end up paying the bill for the rest of their lives".⁷⁸ The girl child is therefore seen as a burden, as "...an investment without return. A favourite Hindi saying translates as: "Having a girl is to plant a seed in someone else's garden." One of the results is that women themselves face immense family pressure to get rid of the girl in their womb".⁷⁹ And female feticide is on the rise "...because of the availability of technologies like ultrasonography and amniocentesis to determine the gender of fetuses at the request of the parents".⁸⁰

The rise of technology

The combination in contemporary India that makes is so perilous for a girl child is "...the lethal cocktail of new money mixed with medical technology that makes it possible to tell the sex of a baby while it is still in the womb".⁸¹ Ultrasound equipment to determine the sex of an unborn child was initially introduced into India in 1979 and "...has now spread to every district in the country".⁸² On a daily basis clinics commence "...offering amniocentesis and ultrasound, scientific advances that are capable of predicting the sex of a foetus".⁸³ This widespread diffusion nationwide "...meant that the necessary equipment to perform sex determination was available in almost all localities (such as market towns frequently visited by villagers)".⁸⁴ The consequence is that "...every small town now has a doctor who illegally will test your baby's sex and abort it for a fee".⁸⁵ Sex-selection technology is also mobile, further increasing availability.⁸⁶ This availability is spread through local cognisance, as for example sex-selection abortions were a rarity a generation or so ago.⁸⁷ One ultrasoundographer says "...You will find an ultrasound machine even in a village which has a road over which only a bullock cart can go, and electricity to run the machine and nothing else..."⁸⁸ And while the

⁷⁸ Raekha Prasad & Randeep Ramesh, *op.cit.*,

⁷⁹ *Ibid*

⁸⁰ Nita Bhalla, (31 August 2007), *Rise in India's female feticide may spark crisis*, Reuters, <http://www.reuters.com/article/healthNews/idUSDEL22936620070831>

⁸¹ Raekha Prasad & Randeep Ramesh, *op.cit.*,

⁸² Scott Baldauf, (13 January 2006), *India's 'girl deficit' deepest among educated, Study: Selective-sex abortion claims 500,000 girls a year*, The Christian Science Monitor, <http://www.csmonitor.com/2006/0113/p01s04-wosc.htm>

⁸³ Raekha Prasad & Randeep Ramesh, *op.cit.*,

⁸⁴ Christophe Z Guilmoto, (undated), *Characteristics of sex-ratation imbalance in India, and future scenarios*, 4th Asia Pacific Conference on Reproductive and Sexual Health and Rights, October 29-31, 2007, Hyderabad, India, UNFAP, <http://www.unfpa.org/gender/docs/studies/india.pdf>

⁸⁵ Randeep Ramesh, (3 March 2008), "India to pay poor families to bring up girls", *The Guardian*, <http://www.guardian.co.uk/world/2008/mar/03/babies/print>

⁸⁶ Scott Baldauf, *op.cit.*,

⁸⁷ Christophe Z Guilmoto, *op.cit.*,

⁸⁸ B R Siwal, (2005), *Preventive Measures For Elimination Of Female Foeticide*, Eldis, http://www.eldis.org/fulltext/PREVENTIVE_MEASURES_FOR_FEMALE_FOETICIDE.pdf

⁶⁹ US Department of State, (11 March 2008), *India, Country reports on human rights practices 2007*,

<http://www.state.gov/g/drl/rls/hrrpt/2007/100614.htm>

⁷⁰ BBC, (18 February 2007), *Cradles plan for unwanted girls*, http://news.bbc.co.uk/2/hi/south_asia/6373043.stm

⁷¹ Raekha Prasad & Randeep Ramesh, *op.cit.*,

⁷² Crin, (2007), *A Girl's Right To Live, Female Foeticide and Girl Infanticide*, Working Group on the Girl Child, NGO Committee on the Status of Women, 200,7

<http://www.crin.org/docs/Girl's%20infanticide%20CSW%202007.txt>

⁷³ *Ibid*

⁷⁴ *Ibid*

⁷⁵ Randeep Ramesh, (28 July 2007), "Foetuses aborted and dumped secretly as India shuns baby girls", *The Guardian*,

<http://www.guardian.co.uk/world/2007/jul/28/india.randeepramesh/print>

⁷⁶ BBC, *op.cit.*,

⁷⁷ Ministry of Women and Child Development, (undated), *Sub Group Report, Girl Child in the Eleventh Five Year Plan (2007-2012)*, <http://wcd.nic.in/>

technology was initially expensive, cost decreased as competition in "...the private health sector developed".⁸⁹ Competition was in turn fuelled by "...the insatiable demand for a male child."⁹⁰ A campaigner working against female foeticide says " " Every small town doctor can get one and more families can afford the test" ".⁹¹ Since the mid 1990s the market for Ultrasound equipment has increased and every "...three years the market doubles, and sales of scanners are thought to be running at 10,000 a year".⁹² And although legislation exists against the sale of "...scanners to unregistered clinics and quack doctors, the campaigner Sabu George talks of a widespread "indifference of ethics". He says 16m illegal ultrasound scans have been conducted since India's law was introduced".⁹³ According to the Indian Medical Association "...five million female fetuses are aborted each year...".⁹⁴ This has led to a "...a new discriminatory regime in India, which is responsible today for the dramatic sex-ratio situation in many of its regions. What primarily distinguishes the combination of scan and abortion from older methods is its high level of efficiency in terms of outcome".⁹⁵ The government ban on the use of "...pre-natal sex determination for the purpose of abortion -- a penal offence -- led to the commercialization of the technology...Advertisements appear blatantly encouraging people to abort their female fetuses in order to save the future cost of dowry. The portable ultrasound machine has allowed doctors to go from house to house in towns and villages. In a democracy it is difficult to restrict right to business and livelihood if the usual parameters are fulfilled".⁹⁶ And one survey suggest the difficulty of policing the purveyors of ultrasound equipment, noting "...registered owners with no qualification to operate the ultrasound machine, individual doctors associated with a large number of units, mobile units likely to escape registration, possible under-reporting of customers, etc".⁹⁷ Another survey reveals that the hanker for male children remains strong and that "...female foeticide was highest among women with university degrees".⁹⁸ The result of this is that female infanticide has in many areas of India been replaced by female feticide.⁹⁹ Unscrupulous medical practitioners with portable ultrasound equipment have applied this technology "...with almost industrial

efficiency, to depress the female birth rate".¹⁰⁰ The result of this as noted by UNICEF is that "...7,000 fewer girls are born in India every day than the global average would suggest...".¹⁰¹ It means according to the UN that "...an estimated 2,000 unborn girls are illegally aborted every day in India".¹⁰² The UN citing government sources says "...as many as 2 million foetuses are aborted each year for no other reason than they happen to be female".¹⁰³ The resulting increase in the gender gap has resulted in a change from 1990, where males outnumbered females by 25 million to 35 million by 2001.¹⁰⁴ And while "...gender-based abortion is illegal, parents are choosing to abort female foetuses in such large numbers that experts estimate India has lost 10 million girls in the past 20 years. In the 12 years since selective abortion was outlawed only one doctor has been convicted of the crime".¹⁰⁵ The situation for the girl child is getting worse says a researcher in the area who says that the "...sex ratios in the country...are getting worse "day by day..." ".¹⁰⁶

Abortion clinics

The distorted sex ratio in India is exemplified by practices in individual clinics and a news report is illustrative commenting on the finding of the "...remains of dozens of babies [who] were exhumed from a pit outside an abortion clinic in Punjab. According to investigators, that clinic was run by an untrained, unqualified retired soldier and his wife. To dispose of the evidence, acid was use to melt the flesh and then the bones were hammered to smithereens".¹⁰⁷ Another story says that a "...hundred yards from a school playing field on the edge of Nayagarh, a small town in eastern India, is an innocuous damp circular patch covered with what appears to be sticks and stones. A closer look reveals that the debris is shards of tiny skulls and bones, all that remains of more than 40 female foetuses - aborted because of their sex and then dumped in a disused well".¹⁰⁸ Another news story on doctors who were prepared to carry out illegal terminations of girl foetuses found that many "...weren't bothered about the foetus's age, just that it was a girl that

¹⁰⁰ BBC News,(18 August 2007),*Girls at risk amid India's prosperity*,

http://news.bbc.co.uk/2/hi/south_asia/6934540.stm

¹⁰¹ Randeep Ramesh,(19 February 2007), "India to open orphanages to take thousands of unwanted girls who would otherwise be killed",*The Guardian*,

<http://www.guardian.co.uk/world/2007/feb/19/india.randeepamesh/print>

¹⁰² Nita Bhalla,*op.cit.*,

¹⁰³ Patricia Leidl,(11 October 2005),*Silent Spring: The Tragedy of India's Never-Born Girls*,UNFPA,

<http://www.unfpa.org/news/news.cfm?ID=690>

¹⁰⁴ Crin,*op.cit.*,

¹⁰⁵ Randeep Ramesh,(28 July 2007), "Foetuses aborted and dumped secretly as India shuns baby girls",*The Guardian*,

<http://www.guardian.co.uk/world/2007/jul/28/india.randeepamesh/print>

¹⁰⁶ Raekha Prasad & Randeep Ramesh,*op.cit.*,

¹⁰⁷ *Ibid.*,

¹⁰⁸ Randeep Ramesh,*op.cit.*,

⁸⁹ Christophe Z Guilmoto,*op.cit.*,

⁹⁰ Chetan Sharma and Divya Jain,(18 May 2005),*Technology and its Impact on Female Feticide in India*, Government Technology,

<http://www.govtech.com/gt/articles/94065>

⁹¹ Randeep Ramesh,(28 July 2007), "Foetuses aborted and dumped secretly as India shuns baby girls", *The Guardian*,
<http://www.guardian.co.uk/world/2007/jul/28/india.randeepamesh/print>

⁹² Raekha Prasad & Randeep Ramesh,*op.cit.*,

⁹³ *Ibid.*,

⁹⁴ B R Siwal,(2005),*op.cit.*,

⁹⁵ Christophe Z Guilmoto,*op.cit.*,

⁹⁶ Chetan Sharma and Divya Jain,*op.cit.*,

⁹⁷ Christophe Z Guilmoto,*op.cit.*,

⁹⁸ Raekha Prasad & Randeep Ramesh,*op.cit.*,

⁹⁹ B R Siwal,(2005),*op.cit.*,

could be got rid off".¹⁰⁹ Sex determination tests remain "...illegal under the 1994 Pre-Natal Diagnostic Techniques Act".¹¹⁰ But officials in India admit to the law not being implemented nationwide.¹¹¹ Moreover according to a reporter doctors are "...millionaires in India. They are politically and socially well-connected. Powerful people [who] can slow and stop investigations" "¹¹² The same article says some "...doctors, it seems, will do anything for a fee".¹¹³

Conclusion

All over India "...the elimination of girl children, either through sex-selective abortion or infanticide, goes largely uncensured, undetected, unpunished and unmourned".¹¹⁴ The Indian government has sought to curtail the practice of endemic female foeticide by establishing orphanages nationwide.¹¹⁵ A minister is quoted as saying that " "What we are saying to the people is have your children, don't kill them. And if you don't want a girl, leave her to us,"...adding that the plan envisaged each regional centre would get an orphanage. "We will bring up the children. But don't kill them because there really is a crisis situation," she said".¹¹⁶ The crisis is the consequent reduction of the female population. This remedy means a condoning of the "abandonment of female babies".¹¹⁷ For girls like Bhavia who end up abandoned into one of India's orphanages however, there is a related concern regarding the continuing sex ratio imbalance.¹¹⁸ It is a country where there already exists "...a lot of sexual violence and abuse against women and children..."¹¹⁹ And a UN representative says that sexual violence "...increases or decreases depending on the number of girls in a given society. I ask you, could you send your young daughter out into the street happily if there were nothing but young men around?"¹²⁰ The UN note that the rise of "...female foeticide in India could spark a demographic crisis where fewer women in society will result in a rise in sexual violence and child abuse....".¹²¹



¹⁰⁹ Raekha Prasad & Randeep Ramesh,*op.cit.*,

¹¹⁰ US Department of State,*op.cit.*,

¹¹¹ Christophe Z Guilmoto,*op.cit.*,

¹¹² Raekha Prasad & Randeep Ramesh,*op.cit.*,

¹¹³ *Ibid.*,

¹¹⁴ Patricia Leidl,*op.cit.*,

¹¹⁵ Randeep Ramesh,(19 February 2007),"India to open orphanages to take thousands of unwanted girls who would otherwise be killed",*The Guardian*,

http://www.guardian.co.uk/world/2007/feb/19/india.randeep_ramesh/print

¹¹⁶ *Ibid.*,

¹¹⁷ Raekha Prasad & Randeep Ramesh,*op.cit.*,

¹¹⁸ *Ibid.*,

¹¹⁹ Nita Bhalla,*op.cit.*,

¹²⁰ Patricia Leidl,*op.cit.*,

¹²¹ Nita Bhalla,*op.cit.*,

The Politics of Fighting Windmills

Danish Asylum Story

Anastasia Stolovitskaya

First prize in the 2008 JRS Journalism Prize went to Anastasia Stolovitskaya from Russia for 'The Politics of Fighting Windmills'. Anastasia is a Russian national studying in Denmark.

Zina comes running to pick me up from the gates of Sandholm Foreigners' Detention Center 25 km north of Copenhagen. The iron-barred fence takes a while to open so we greet each other impatiently through the paling.

"I am sorry for being late," - she says smilingly, - "I was giving a hand in the local second hand shop on the campus, which is also our social hot spot in here. There is not much else to do for us here."

Traditional Iraqi hospitality fills a cozy room and I comfortably place myself on a sofa behind a coffee table in abundance with snacks as I scrutinize the decorations on the walls.

"This one is from Jordan, and this is from Egypt," - Zina explains as she follows my look. "I have tried to make the place as cozy as possible with the little we have left," she claims. A single piece for every place lived at and visited, often involuntarily, in their past life.

Salam, Zina's husband, is pointing at the TV screen as he serves coffee. "They have just had elections in Pakistan," he says. Forced to be idle with no permission to stay or work in Denmark, he is performing his casual all-day routine by watching the world outside on TV and surfing the Internet.

"Back at home I was a cook. I wish I could open a kiosk or a restaurant here, start my own business," he says dreamingly. "Inactivity stresses me out. I have had health problems. Most of the people in here do."

Salam, 49, and Zina, 41, both Catholic Christians, fled Iraq for Jordan with their two-year old daughter Meena in 2000. A careless joke to a friend about Saddam Hussein's regime cost Salam his family's security and turned him into a victim of blackmail. Eventually they were forced to leave their home in fear for their lives and hit the road on a costly cross-border journey of 10.000 dollars and no guarantee of being safe.

Salam's story

Salam was the first of the three to seek asylum in Denmark in 2000, while Zina stayed illegally in Jordan with their daughter Meena.

"My brother's family is in Denmark," explains Salam, "and the first impulse you have when you don't have a place to go is to go to your family. We have no one left in Iraq."

Salam's single request for asylum got a final refusal in 2004, when the war was raging on the streets of Iraq.

"You can go home now. Saddam is no longer in power, they told me," Salam recalls. "If it is such a free country as you say it is then come with me," he answered.

Right until this very day, as for the past eight years in various refugee camps, Salam and Zina have been obliged to register with the police twice a week. The same question in spite of the war rends the air over and over again at every single turnout; when they will leave the country.

Zina's story

Escape from Iraq was a costly endeavor for the family, so Zina stayed with little Meena in Jordan while Salam was trying his luck in Denmark. She was eventually deported back to Iraq by the Jordanian authorities on the grounds of her illegal stay. Five years put her on the run again, back to where she fled from.

By 2005 the Iraq war was at its peak and the gap between religious denominations got considerably bigger even within the majority religion, Islam, not to mention a precarious situation for the Christian minorities.

"They would have killed us if we did not escape, I am sure," - Zina claims. She knew that another run would be the only way to save their lives. This time the destination was clear: Denmark.

"I came five years after Salam, when the war in Iraq was already on and I was shocked to get a refusal to my asylum application," she recalls. "Well, at least they stopped telling my husband to go back to his wife," she adds with a sad smile.

"They want us to go back. Go back to what? We have nothing there: no family, no house...how will I send my daughter to school without being scared? There are explosions everywhere in Iraq," - she exclaims as she points at the TV.

"I asked the judge personally why I was refused asylum," she recalls. "He is a good man like most Danish people we know. He told me he really wanted to give me a positive answer but he could not."

Indefinite captivity

Zina gets introspective as she gazes outside the window at a green field through the fence of the camp.

"Sometimes deer come to the window and look at us from the outside and I cannot help thinking: they are free, and we are in captivity," - she claims with a sigh.

"We don't think about the future. For now, there is just hope. It is worse than a prison here. At least any prisoner has a timeframe; we don't," - she goes on.

"Meena is shy to invite her school friends over. She asks me how she can bring friends over to an asylum center."

Our conversation turns to a recent highly debated law proposal to grant a residence permit in Denmark to the asylum-seeking families with children that have been living in the refugee centers for more than two years. For Zina it is a step forward for the Danish system to accept asylum seekers. However, it will not change much, she says.

"Even if I get a stay permit, I will still have no work permit though I am a chemical engineer by profession. Years of idleness make me lose my skills. And we still have to register with the police twice a week."

Zina's eyes begin to sparkle as she speaks about Denmark. "I want to study Danish," she claims, "but they revoked any right for tuition as soon as we got asylum refusals. I feel I should speak the language of the country I live in. Denmark is *my* country. I want to get closer to the Danish people and show them who I am."

"They offered us 30.000 Danish crowns (4000 Euro) to take back to Iraq. I would not go back for one million dollars! It is not about money," she claims emotionally.

Unfortunately, Zina's insatiable hope and optimism for the country she calls her own is barely reciprocated by the system. For a country that faces a lack of labour force with a fast ageing population in the upcoming years pushing people like Zina and Salam away seems to be nothing but fighting windmills. Zina finds strength to coping with the situation within herself:

"I pray to God every single day. Without God I would go crazy."

As I get on the bus to get back to the city I see a dark haired nine year old Meena with a pink school bag on. I get on the bus as she gets off, so there is no contact between us. But as I gaze out of the bus window watching her walk away I wonder what the future reserves for her.



Digital Developments in the Refugee Documentation Centre



Zoe Melling, RDC Librarian

Eight months on from the launch of our new Electronic and Digital Library last September, the system is now well established in the RDC and should be familiar to users of our services. There's been an excellent response to our comprehensive end user training programme, with more than 40 sessions held to date, both in the RDC and offsite. Ongoing training is available for all asylum agencies included in our client base, and can be tailored to suit individual user needs.

Established as part of the Asylum and Immigration Strategic Integration Programme (AISIP), the integrated Library and Document Management System was designed to meet COI needs for key agencies involved in the asylum process. The system provides a common interface for online access to the RDC Library catalogue and digital collections, including full text COI documents, anonymised RDC query responses, serial contents and case law digests. Legal Aid Board employees including RLS staff also have access to the LAB library collection of materials, focusing on civil law in Ireland. Logging in to the E-Library allows users to renew items, recommend items to order, submit queries and request interlibrary loans. The system also includes a staff client containing acquisitions, cataloguing and circulation modules, which has allowed us to streamline work processes in the library. The previous Lotus Notes based LMS and COI database were discontinued in April.

The Electronic and Digital Library is still under development, and work is ongoing to update content, standardise subject categories and tidy up any anomalies in existing catalogue records. An in-house subject structure has been developed to enable easier browsing of the COI and Query Response collections in the Digital Library, and the International Thesaurus of Refugee Terminology is being used for subject classification of corresponding catalogue records. Work to create a common subject taxonomy for country folders in the COI collection has just been completed and documents relating to subsidiary protection are now being added in anticipation of future COI needs after the introduction of the proposed single procedure. Our Query Response collection is also being updated, with the subject structure mirroring that of the COI folders.

A Legal Materials collection was established earlier this year, and includes case law summaries.

Further enhancements planned for 2008 include the implementation of a portal solution called EPS/Rooms which will allow greater customisation of the E-Library home page, and consolidated access to a variety of electronic resources, including external COI sources such as Refworld and Ecoi.net. Subject-based virtual 'rooms' of content from a range of sources can be created to suit user needs, and we welcome suggestions for possible content and layout. The new interface will include an enhanced search facility with federated, "fuzzy" and faceted search functions. Federated search is the simultaneous search of multiple online databases, allowing results to be displayed in a unified interface. "Fuzzy" search logic helps avoid limitations of search results due to misspellings of queries, with exact matches ranked higher in the results list. Faceted search technology provides an intuitive way to refine search results by category, by "drilling down" into hierarchical results lists. Additional end user training will be provided when the new portal is implemented.

Contact us

Please let us know if you have any queries, suggestions, or problems relating to the E-Library, or if you wish to book a training session.

Email:

Refugee_Documentation_Centre@legalaidboard.ie

Telephone: (01) 477 6250 (General number for RDC and LAB Library)

Fax: (01) 661 3113

Postal Address:

Refugee Documentation Centre
Montague Court
7-11 Montague Street
Dublin 2

You may also contact me directly at

zxmelling@legalaidboard.ie

Ph: (01) 4776214

