

# The Researcher

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## Welcome to the February 2008 issue of The Researcher!

The New Year sees the publication of the Immigration, Residence and Protection Bill, 2008. We publish the Minister's speech at the launch of the Bill and also an article by Hilka Becker of the Immigrant Council of Ireland which looks at certain aspects of the Bill. As with the earlier version of the Bill we hope to include a number of viewpoints on this most important legislation over forthcoming issues.

The core business of the Refugee Documentation Centre is researching Country of Origin Information and we are happy to include in this issue a number of articles on the subject. Brian Allen, an Expert Witness writes on 'The Bajuni People of Southern Somalia and the Asylum Process'. David Goggins investigates 'Some Human Rights Issues in Iran'. Patrick Dowling looks at the situation in Sudan in the 1990s through the lens of Kevin Carter, Pulitzer winning photographer. Gábor Gyulai of the Hungarian Helsinki Committee has given us the Executive Summary of his study on COI, 'Country Information in Asylum Procedures – Quality as a Legal Requirement in the EU'. I discuss the question whether UK Home Office Operational Guidance Notes should be used as COI in Ireland.

Elsewhere in this issue, John Stanley, BL provides case summaries of significant caselaw, Bobby Pringle of IOM gives us an update on two Return Information Projects and Sarah Ruedeman writes about the separated child's credibility in the asylum process.

Paul Daly, RDC



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### Disclaimer

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

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## The Bajuni People of Southern Somalia and the Asylum Process



by Brian Allen, Expert Witness.  
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**Brian Allen, born in Dublin, worked as a missionary in Kenya and Tanzania for over twenty years and is a fluent Swahili speaker. He has lived and worked among the coastal people of Kenya and studied their culture, music and anthropology. In the UK he was accepted as an expert witness for Somali Bajuni nationality testing in several appeal courts and the tribunal. He has carried out nationality testing interviews with over 100 Bajuni.**

### The Bajuni Background

The Bajuni tribe is a minority group from Southern Somalia. They live mainly in the town of Kismayo and on the islands off the south coast. Many of them are simple, peace-loving fisherfolk, and few have received any formal education. They are mainly devout Muslims, and most of their children attend *madras*, religious education offered by mosques, where Swahili and Bajuni languages are mixed with the Arabic of the Koran. Their ethnic origins are a mixture of Arab, Bantu, Portuguese and perhaps Malay. They speak a mix of Swahili and Kibajuni, a Swahili coastal dialect. As a minority tribe with features and language that are easily distinguishable from Somali majority clans, they have always been regarded with suspicion and scorn, and demeaning terms such as Tiku (slaves) have often been cast in their direction.

In 1991, an uneasy peace in Somali descended rapidly into anarchy, and the warlords of the southern part of the country, having armed themselves with AK47s and other weapons, had increasing freedom to terrorise and devastate minority communities. From the early 1990s these larger tribes, who were armed, began to attack and raid the defenceless Bajuni people. Since then, they have been increasingly subjected to sudden attacks on their homes: beatings, murders, kidnapping, looting and rape becoming prolific. Many Bajuni at first refused to leave their homeland due to this intimidation, but as the situation has deteriorated and family members been killed or kidnapped, many more have fled, seeking refuge in an outside world largely unknown to them.

Numerous Bajuni have fled to neighbouring Kenya, some since the early 1990s, but their situation there has been uncertain at best. As Somalis are the traditional enemies of Kenya, the presence of the Bajuni refugees is hated by civilians and police alike. Consequently, many Bajuni are in constant fear of attack or extortion from Kenyans, and have been sometimes forced to return to Somalia. This situation has led to a minority, those able to raise sufficient funds, seeking the help of an 'agent' who promised to take them to a safe country. Many Bajuni escape with a small amount of family gold which is often hidden in the home, and this wealth is handed over to the agent without any real discussion of its worth. Although the exact details vary, the 'agents' generally organise all the travel arrangements and abandon their charge once arriving at their destination.

### Bajuni Asylum Seekers

Bajuni refugees from Somalia sometimes find themselves in UK or Ireland. Typically, they will not know which country they are fleeing to, and arrive as extremely vulnerable people who do not speak English, may be illiterate, and have no idea of the legal and social processes that they will be expected to get involved in. They are also often traumatized; many of the women have been raped, many have lost close family members, many have been tortured and had their homes burnt or looted. When they claim asylum, it frequently happens that their claim is refused because of lack of clarity of nationality testing, language difficulties or other misunderstandings.

I began to meet Bajuni asylum seekers when I was asked to interpret for various solicitors in Leeds, England. Having lived and worked on the Kenyan coast, I had been aware of their existence and sometimes met them on Lamu Island, right on the Somali border. Their Swahili was usually very good, and it was not difficult for me to understand some of the Bajuni dialect, having lived and worked with coastal peoples in East Africa for some years. Gradually, I began to piece together the threads of their stories, and realised that many of them were being subjected to terrible injustices through misunderstandings in the asylum system. After consulting with a few legal experts, I decided to do my own research and to see how I could help to bring clarity to a very confused situation.

### The British, Danish and Dutch Fact-Finding Mission

It came to my attention that the report produced by this mission to Nairobi Kenya, dated 17 – 24 September 2000, is used in many of the Bajuni asylum cases. Unfortunately, this report is inaccurate in various aspects. The conclusions of the report are often cited in the refusal letters of those asylum seekers claiming to be Bajunis from Somalia. I therefore decided to write my own report on the sections which produce some confusion. I have included some of my findings here together with the references to the report:

#### 5.1 The report states *'The Bajuni elders described the Bajuni as a united people that are not divided into sub-groups'*.

If this statement means that there is no in-fighting or division among the Bajuni then it is true. But if it is taken to mean there are no sub-clans among the Bajuni people, then it is simply incorrect. The Bajuni sub-clans such as the *Khazarajia*, *Wafailia*, *Wachanda*, *Ausia* are well known. A Bajuni person, when asked, can normally say what clan he or she belongs to, and also name other clans. This misunderstanding of terminology would easily happen if the people conducting the mission were unfamiliar with the languages and customs of the coast of East Africa, and if interpreters were being used. The misunderstanding comes right into court, where sometimes cases have been refused on the basis that a Bajuni asylum seeker names his or her clan.

#### 5.2 *'Most Bajuni speak some Somali'*.

This statement is sometimes used as grounds for dismissing cases where the Somali language is not spoken by the claimant. However, implicit in the statement is that **some** Bajuni speak no Somali at all. My research has indicated that it may well have been true that most Bajuni spoke some Somali when the 'elders' left Somalia in the early 1990s, but since that time, because of hostile attacks, there has been

increasing separation between the Bajuni people and the larger Somali speaking tribes. This meant that a growing number of Bajuni people, especially the younger generation, were not exposed to the Somali language. The result is that some Bajuni know almost nothing of the Somali language. The other flaw in this statement and its interpretation in courts is that it fails to point out that Bajuni women normally lead extremely sheltered lives and would not have been exposed to Somali language. This issue was further investigated in an interview reported by another 'fact-finding mission' in 2004.<sup>1</sup> In this report, Abdalla Bakari, one of the 'elders' (a Kenya resident since the early nineties) suggested that Bajunis from Kismayo would have knowledge of Somali. This statement was not made on the basis of any recent evidence, and runs counter to expert witnesses, academics and other professionals who work regularly with Somalis seeking refuge in UK and Ireland.

### 5.3 The British-Dutch-Danish report states that *'the main language spoken by the Bajuni is Kibajuni'*.

This is certainly not true today, though in the past this was more likely. Kibajuni is a dialect of Kiswahili. Its structure is very similar to Kiswahili but many words are either pronounced differently (eg Mtu 'a man' in Kiswahili is pronounced 'Ntchu' in Kibajuni) or are completely different (eg 'small' is 'Kidogo' in Kiswahili but 'Nkatiti' in Kibajuni). The language now spoken in most Bajuni homes is Swahili. The older generation tend to use and know Kibajuni but young people prefer to use coastal Swahili. This means they are less isolated, and can read newspapers, listen to radio reports and communicate with the many other tribes along the coast of East Africa where Swahili is the main language. The Kibajuni dialect is gradually dying out. The younger generation have no desire or even need to speak it. However, most Bajunis will understand some Bajuni words when they hear them. In 'Ethnologue: Languages of the world', Swahili is listed as the language of the Bajuni people in southern Somalia.<sup>2</sup>

In the light of all the above I believe that the Anglo-Dutch-Danish report is flawed in various areas. In modern East Africa the views of the 'elders' are often out of touch with the realities of modernity, and the life style and world view of the youth who typically constitute well over 50% of the population. This is particularly true when the elders have lived in another country for some time, and those interviewed had been in Nairobi during the recent time of unrest. In today's society, the men known as the 'elders' are frequently less than representative of the cross-section of society. The elders met by the delegation are recorded as having all '*left the Bajuni islands in the early 1990s*'. Only one man had made a brief return visit since that time. Given the turbulent situation, much has changed since the time of their experiences and that of the report. Furthermore, all the elders are recorded as having come from the islands, despite the importance of assessing the situation in Kismayo.

### Conclusion

I have carried out extensive interviews with over a hundred Bajuni, and met with many established refugees and expert

witnesses. I am convinced that a fair and thorough system of nationality testing needs to be introduced to the asylum process in Britain and Ireland in order to avoid the misunderstandings, distress and waste of time and money that have gone into many cases. I appeal to the decision makers in both countries to consider the weight of evidence that exists, and to make a fresh effort to ensure that the Bajuni, a people group that have been victimised and marginalised for many years, be given a chance of a just and truth-based hearing of their cases.



### Address by Brian Lenihan TD, Minister for Justice, Equality and Law Reform at the launch of the Immigration, Residence and Protection Bill 2008

Today marks a most important development in the area of migration into the State. The publication of this Bill is a significant step along the road towards modernising the way we deal with inward migration.

For centuries, this island was synonymous with emigration. Even before the disastrous famines of the middle 19th century, there was a steady outward flow of Irish men and women, mainly to the new worlds being opened up by exploration and colonial expansion. That flow became a flood from the 1840s on, abating a little with the economic pick-up of the 1960s but resuming thereafter. There was of course always some inward migration, but the net figures over the years showed overwhelmingly outward movement of people.

Then came the 90s, and with them a major upturn for the Irish economy. Ireland started to become an attractive place not only for elements of our own diaspora, who began to return home, but also for many others around the world who saw in this country a place where they could either make enough in a short time to give themselves starting capital for projects back home, or else an economy and a society in which they could settle permanently. This influx is testament to the success of the economic policies adopted in the late 1980s and early 1990s. And it was a change that, among other things, our legislation was not best suited to handling.

The second half of the 1990s and the first years of the current decade saw a number of legislative measures brought forward in the areas of immigration and asylum. The Immigration Acts of 1999, 2003 and 2004 were acknowledged by their promoters as primarily stopgap measures designed to address particular aspects of the matter; but plans were even then being made to bring forward a unified code that would eliminate the anachronisms of the Aliens Act 1935. That legislation was very much a product of its time, and by the turn of the century was recognised as being unsatisfactory from the point of view of those who wished to migrate to Ireland as well as limited in the extent to which it provided Government with the tools needed to manage migration in the interests of the Irish economy and society.

So we come to the Bill published today, which represents the fruits not only of lengthy thought and research in my Department and elsewhere, but of a consultation process that has sought to draw out the views of interested people and bodies in this area. The Bill's development has been

<sup>1</sup> Joint Danish, Finnish, Norwegian and British Fact-Finding Mission to Nairobi, Kenya, 7-12 January 2004.

<sup>2</sup> www.ethnologue.com/languagesofsomalia

informed by our experience of immigration matters built up over recent years.

An important element of that experience has been the business of dealing with claims for the protection of the State made by asylum-seekers. In parallel with the increases in regular migration since the middle 90s, Ireland experienced a remarkable growth in the numbers of people applying for refugee protection. In common with many developed countries, the numbers looking for asylum here increased exponentially up to about 2002, but have been falling off in recent years. As a proportion of inward migration generally, in the State's experience, asylum-seekers have been at most around 10% of the total numbers of non-EU nationals coming here; but the nature of asylum is such that the application process is resource-intensive.

Each case must be looked at in great depth and with great care in case a refusal will result in a person being sent back to personal danger and fear of persecution. Also in common with other developed countries, it has been the Irish experience that a high proportion of claims turn out following investigation not to be based on well-founded fear of persecution back home. Very many of those applying for refugee status are in reality, economic migrants.

While Ireland's asylum determination system has been the subject of favourable comment by a former UNHCR Representative to Ireland, our present processes are not optimally organised, and have been open to abuses over the years. At present, the case of an applicant seeking refugee status is considered, in the first instance by the (statutorily independent) Refugee Applications Commissioner. A negative decision at that stage is appealable to another independent body. It is only when both of those bodies have given a negative response that other elements of the application for leave to remain can be looked at.

This method of looking in series at different aspects of the same case means, that for some applicants at least, the process can be protracted. Delays lead to uncertainties on the part of the applicants and also to greater public expenditure in the provision of lodgings and sustenance. However, delays in finalising cases can occur for a variety of reasons, including giving applicants and appellants the fullest opportunity possible to present their cases and the determination of Judicial Review proceedings, where appellants pursue such a course of action. In order to address this structural problem, the Bill will put in place a system which will allow all aspects of the applicant's wish to remain in Ireland to be looked at in a unified way. In this way, applicant will get, at the end of the first instance process, a complete determination of their case. This is a very important feature of the Bill, providing the necessary speed and clarity for applicants, while ensuring that their human rights are fully respected.

The Bill contains important innovations too for those who seek to migrate in a regular fashion to the State, by availing themselves of the standard immigration processes, applying in advance for a visa, ensuring that they have proper travel documentation and so forth. As well as setting out these processes in statutory form—for the first time, in the case of the visa process—the Bill contains express provisions governing review procedures for many of the points at which decisions can be made.

A significant innovation contained in the Bill is the establishment on a statutory footing of the status of long-term residence. It is unusual, by international comparisons, that the Irish immigration system has for many years been based on the notion of temporary migration to Ireland for a year at a time. Unlike many continental countries, we have not had a formal status of long-term residence. For too long, the Irish immigration system has operated on the concept of temporary migration on a year-to-year basis until one has sufficient residence in the State to be able to make an application for naturalisation.

While many migrants were content to do this, because that was all that was available, it is time we acknowledged in a formal, statutory way the fact that many migrants make an important contribution to the Irish economy and to Irish society generally. In circumstances where, increasingly, Ireland is in competition with other countries for people with sought-after skills and qualifications, we need this status, statutorily guaranteed, in order to be able to tailor immigration packages that make Ireland an even more attractive destination for medium-term and long-term migration. The status of long-term resident will put its holders in a position similar to that of Irish citizens in respect of access to State-funded services and other entitlements. The conditions governing the attainment of this status are designed to ensure that those who qualify are well on the road to integration in their adopted society.

This Bill aims to bring clarity to many aspects of immigration that are at present unclear. One of those aspects of the present law is the question of lawfulness in the State. The Bill addresses this in a manner that means that no foreign national will be in any doubt as to whether he or she is lawfully in the State. If you have a permission from the Minister, you will be lawfully in the State; but if you have not, you will be unlawfully in the State; and unlawful presence brings with it the obligation on the person to leave the State. A person found unlawfully in the State will be liable to be removed without notice, and may be detained for the purpose of ensuring removal from the State.

People will not find themselves in that position unless either they consciously put themselves in that position or else, following a fair process where there was an opportunity to make representations and have those representations carefully considered, their residence permission has been terminated.

Thus, if a foreign national has been given a non-renewable permission to enter the State for, say, eight weeks and doesn't leave on or before that period expires, that person will have put himself or herself in the position of being unlawfully present, and the consequences of that action or omission will follow inexorably. By contrast, a foreign national who is here on a renewable permission will remain lawfully present unless there is a decision to terminate or not to renew the permission. Any such decision will be notified in advance to the permission-holder, and there will be an opportunity for the person to make representations as to why the permission should not be discontinued. The permission will remain in force, and the person will be lawfully present in the State, until the final decision is made at the end of that fair process and notified to the person in question.

The business of managing migration to the State is about making choices. It cannot be the case that we say to everyone who wants to migrate here: "Come on in." I owe a duty to Irish society, which—remember—is made up not just of Irish people living here but also of EU nationals, non-EU nationals and every-one else who is lawfully living here. The duty that I owe is to continue to ensure to the greatest extent possible that Ireland is a safe place to live, with an economy that continues to thrive, and that it is not used as a base for criminality. In the immigration context, I fulfil that duty by making choices about which foreign nationals can come in, which ones can stay and, ultimately, which ones must leave. If legislation did not provide me with effective powers to make those choices and to ensure that they are enforced efficiently, then no management of migration could happen.

I make no apologies for the elements of this Bill that might appear harsh to some. But I challenge those who take that view to come up with better ways of providing for effective and efficient management of migration.

It is worth pointing out that, contrary to popular perceptions, the discretionary powers that rest with the Minister for Justice, Equality and Law Reform in migration matters are used most frequently not to refuse people admission to the State or to require people to leave, but in order to accommodate people who find themselves in difficult positions for one reason or another. I am aware that there are many foreign nationals at present in the State whose situation is irregular, whose papers are for whatever reason not in conformity with present immigration requirements. Many of you will recall the judgment of the Supreme Court delivered just before Christmas relating to persons who did not come within the IBC/05 administrative scheme. That was a scheme designed to deal in a favourable way with a defined category of people who were the parents of Irish citizen children, people whose cases would otherwise have fallen to be dealt with under the deportation provisions of the Immigration Act 1999. In that case, the Supreme Court upheld the right of the Government to put such schemes in place.

This Bill meets many of the commitments in the Agreed Programme for Government, and lays the foundation for us to meet them all within the lifetime of this Government. In particular, within the framework of this Bill, once enacted, I will be able to give effect to policies on family reunification that will be designed to cater for people in a wide variety of immigration situations in Ireland. It is not the case that, in this matter, one policy fits all; and this is an important fact that commentators need to appreciate. But I am working on the development of different policies in this area, and with a view ultimately to providing a transparent system for all categories of migrants, mindful of their interests and those of the rest of society.

One area that I haven't dealt with in this Bill is citizenship. I intend to address this through separate legislation following a review of our current laws, taking into account also the new provisions in this Bill with regard to long-term residence.

I am looking forward now to the parliamentary process that will lead to enactment of this Bill. I have no doubt that the Bill will provoke both debate inside and outside the Houses of the Oireachtas, and I will be glad to consider suggestions for amendments that will improve the Bill's operation.

## 'Access to an Effective Remedy challenging Immigration Decisions'



By Hilka Becker,  
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In the Programme for Government 'Blueprint for Ireland's Future 2007 – 2012', published in June 2007, the Government stated that "*a fair and strategic immigration policy is an imperative to the sustaining of a strong economy*" and specifically welcomed "*legal immigrants who come here to work to support Ireland's development*" promising to "*help them to become full and active participants in Irish life*". As a step towards this, it undertook to ensure a "*visibly independent appeals process*".

The establishment of an independent appeals mechanism to deal with immigration decisions is the only way to ensure access to an effective remedy for migrants seeking to challenge decisions affecting their human rights as protected under the European Convention on Human Rights and Fundamental Freedoms (ECHR), in particular Articles 3 (*prohibition of torture*) and 8 (*right to family life*).

Currently, persons seeking to challenge decisions refusing permission to remain in the State or permission to enter the State – for example for the purpose of family reunification or the preservation of the family unit – are effectively forced to seek judicial review of that decision by the High Court instead of accessing a more efficient and cost-effective 'Immigration Appeals Tribunal'.

Applications for judicial review that do not fall within the remit of Section 5 of the Illegal Immigrants (Trafficking) Act, 2000 can at present be made ex-parte and the normal rules regarding time limits apply. In other words, the Minister for Justice, Equality and Law Reform does not need to be informed in advance of the making of the application for leave to apply for judicial review and the application can be made within three months, exceptionally six months, from the date of the decision to be challenged. However, this is set to change with the coming into force of new immigration legislation introduced in January of this year. If the provisions of the Immigration, Residency and Protection Bill, 2008 become law, all decisions taken under the forthcoming legislation will have to be challenged on notice to the other party and within a strict time limit of 14 days from the date on which the person concerned was notified of the relevant decision.

### Judicial Review an Effective Remedy?

It is of grave concern to those seeking to defend the human rights of migrants and members of their families that already, even where an application may be made ex-parte and within extended time limits, access to justice for migrants is limited in that the High Court, as part of judicial review proceedings, is not in a position to review the merits of a case and cannot deal with questions of fact. Unlike an expert administrative tribunal, the High Court does not have the power to alter or vary an administrative decision.

In the case of *Chahal v. the United Kingdom*<sup>3</sup> the European Court of Human Rights observed that “Article 13 [of the ECHR] guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order”. According to the Court, “the effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief (...)”.

The Court made reference to the cases of *Klass and Others v. Germany*<sup>4</sup> and *Leander v. Sweden*<sup>5</sup> in which it had held that Article 13 only required a remedy that was “as effective as can be” in circumstances where national security considerations did not permit the divulging of certain sensitive information. However, it distinguished these cases from the case at hand, stating that “it must be borne in mind that these cases concerned complaints under Articles 8 and 10 of the Convention and that their examination required the Court to have regard to the national security claims which had been advanced by the Government”. In relation to Mr *Chahal*, the Court held that “the requirement of a remedy which is “as effective as can be” is not appropriate in respect of a complaint that a person's deportation will expose him or her to a real risk of treatment in breach of Article 3, where the issues concerning national security are immaterial”. According to the Court in the *Chahal* case, “given the irreversible nature of the harm that might occur if the risk of ill-treatment materialised and the importance the Court attaches to Article 3, the notion of an effective remedy under Article 13 requires independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3. This scrutiny must be carried out without regard to what the person may have done to warrant expulsion or to any perceived threat to the national security of the expelling State”.

Considering the above, cases regarding the right to family life as guaranteed by Article 8 of the ECHR, the right to freedom of expression protected by Article 10 ECHR and other rights under the Convention may not currently be adequately dealt with by way of judicial review in the High Court, at least where national security considerations are not an issue limiting the exposure of detailed information regarding a case and the relevant government's considerations regarding the matter.

It is also clear from the case law of the Court that the independent scrutiny of claims required by Article 13 of the ECHR does not need to be provided by a judicial authority and in that regard, the establishment of an independent Immigration Appeals Tribunal as we have seen in the UK may well be the most appropriate way of securing the protection of migrants rights in Ireland while at the same time avoiding unnecessary litigation in the High Court as well as cases going to the European Court of Human Rights.

#### **Restriction of Access to Remedies through Time Limits**

While the European Court of Human Rights has accepted that judicial review can constitute an effective remedy for the purposes of Article 13, it has also held that an unduly short

limitation period can, in certain circumstances, give rise to a violation of Article 6 which provides that everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.<sup>6</sup>

This is particularly relevant in the context of the new Immigration, Residence and Protection Bill which, as outlined above, is set to provide that everyone who seeks to challenge a decision made pursuant to the new legislation will have to do so in the High Court by way of judicial review, on notice to the other party and within a strict time limit of 14 days from the date of the relevant decision.

In the case of *Stubbings v. UK*<sup>7</sup>, the Court held that in order to be in accordance with Article 6(1) of the ECHR, the limitations applied must not “restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired”.

It is questionable whether the protection of Article 6(1) of the ECHR does extend to immigration decisions. Despite the fact that a decision to deport a person can certainly lead to a violation of his or her rights protected under the Convention, such applications have consistently been rejected as inadmissible by the Court. In the case of *Maaouia v. France*<sup>8</sup>, the Court concluded that “decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him, within the meaning of Article 6(1) of the Convention”.

More recently however, in the case of *Juristic and Collegium Mehreanu v. Austria*<sup>9</sup>, a case brought jointly by an applicant for an employment permit and his prospective employer, challenging inter alia the fact that there had been no oral hearing before the Administrative Court against the refusal of the permit, the Court concluded that “Article 6 of the Convention applies to the proceedings concerning the second applicant's request for an employment permit”. The Court confirmed that “Article 6(1) embodies the ‘right to a court’, of which the right of access, that is, the right to institute proceedings before a court in civil matters, constitutes one aspect”. It went on to hold that “while this right may be subject to limitations; it must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6(1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved”.

While it remains to be seen whether there will be a shift in the Court's assessment of the applicability of Article 6(1) even with regard to decisions affecting family life as protected under Article 8 of the ECHR, it can certainly be argued that the words “civil rights and obligations” in Article 6(1) should be given the broadest possible meaning which, in accordance with their context and in the light of the object and purpose of the Convention, should extend to all

<sup>6</sup> The Law Reform Commission, Report on Judicial Review Procedure (LRC71-2004), 2004.

<sup>7</sup> *Stubbings v UK* (1997) 23 EHRR 213.

<sup>8</sup> *Maaouia v. France* (2001) 33 EHRR 1037.

<sup>9</sup> *Juristic and Collegium Mehreanu v. Austria* (2006)

<sup>3</sup> *Chahal v United Kingdom*, (1997) 23 EHRR 413.

<sup>4</sup> *Klass and Others v. Germany*, (1979-80) 2 EHRR 214.

<sup>5</sup> *Leander v. Sweden*, 26 March 1987, (1987) 9 EHRR 433.

legal rights and obligations of the individual whether *vis à vis* other individuals or *vis à vis* the State.<sup>10</sup>

#### **Fees being awarded against Applicants' Legal Advisors**

The Immigration, Residence and Protection Bill, 2008 is designed to introduce the possibility of the High Court awarding costs against legal representatives in cases where the Court forms the opinion that "*the grounds put forward for contending that an act, decision or determination (...) is invalid or ought to be quashed are frivolous or vexatious, the Court may, by its order, so declare and shall direct by whom and in what proportion the costs are to be borne and paid*"<sup>11</sup>.

This provision will further limit the access of migrants and their family members to effective judicial remedies. It is hoped this provision, if enacted, would only be applied to cases that had no merit whatsoever such that they should not have been brought before the Court. However, in a situation where the same provision will not apply to Respondents' solicitors even if they had sought to defend a decision taken pursuant to the legislation on similarly frivolous or vexatious grounds,<sup>12</sup> this provision seems in breach of basic judicial fairness guaranteed by Article 40.1 of the Constitution and the guarantee of equality of arms as protected by Article 6 of the ECHR.

In the case of *Steel and Morris v. UK*, the European Court of Human Rights reiterated that "*the Convention is intended to guarantee practical and effective rights*" and that "*this is particularly so of the right of access to a court in view of the prominent place held in a democratic society by the right to a fair trial*". In the Court's view "*it is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court and that he or she is able to enjoy equality of arms with the opposing side*".

The proposed provision goes beyond what is already in the Rules of the Superior Courts. Order 99 Rule 7 allows for the making of wasted costs orders against the solicitor of a person on whose behalf costs have been improperly or without any reasonable cause incurred, or where by reason of any undue delay in proceeding under any judgment or order, or of any misconduct or default of the solicitor, any costs properly incurred have nevertheless proved fruitless to the person incurring the same, these apply to both sides and are clearly designed to prevent solicitors breaching their duty to the Court. In the words of Finnegan J. in the case of *Kennedy v. Killeen*, "*the power of the court to make an order under Order 99 Rule 7, whether as to costs as between the solicitor and his own client or an Order that the solicitor personally bear the costs awarded against his own client, depends upon the solicitor being guilty of misconduct in the sense of a breach of his duty to the Court or at least of gross negligence in relation to his duty to the Court*".

Provisions similar to those proposed in Section 118 (7) and (8) of the Immigration, Residence and Protection Bill, 2008 do not apply in any other context and may act as a deterrent

<sup>10</sup> Dissenting Opinion of Judge Loucaides joined by Judge Traja in the case of *Maaouia v. France*.

<sup>11</sup> Section 118(7), Immigration, Residence and Protection Bill, 2008.

<sup>12</sup> See Section 118(8), Immigration Residence and Protection Bill, 2008.

to legal representatives, particularly where they only have 14 days or less to consider the merits of a case.

The provision of access to effective remedies regarding immigration decisions remains a challenge and the Government may well prove to be in breach of provisions of the European Convention on Human Rights as well as the Irish Constitution by not living up to its own commitment to provide a "*visibly independent appeals process*".



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

##### ***Bode and Ors v The Minister for Justice, Equality and Law Reform; Supreme Court, Murray CJ, Denham J, Fennelly J, Kearns J., Finnegan J., 20<sup>th</sup> December 2007; Unreported***

*JUDICIAL REVIEW – CERTIORARI – IBC05 SCHEME – RIGHTS OF IRISH BORN CHILD – APPEAL TO THE SUPREME COURT – MINISTER'S EXECUTIVE POWER – S 3 IMMIGRATION ACT 1999 – 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 this case, the citizen child's mother was granted residency, but the father was not because the Minister found that he had not been continually resident in Ireland from the date of the child's birth. The applicants sought to quash the decision to refuse the applicant father permission to remain, claiming, *inter alia*, that the Minister's failure to consider the rights of the child was in breach of the child's rights under articles 40.3 and 41 of the Constitution, and in breach of the State's obligations under article 8 of the ECHR.

The High Court granted the relief sought and held that the Minister's decision was in breach of the child's Constitutional and ECHR rights, and that the applicants were entitled to an order quashing the Minister's decisions refusing the father's application. The Court stated that there was nothing that precluded anyone who was not continuously resident in the State from the date of birth of their child from making an application. The Court emphasized that, in its view, the citizen child was central to the scheme, and that the Minister was bound to act in a manner consistent with the State's obligation to vindicate, as far as practicable, the personal rights of the citizen child. The Court stated that these rights were qualified, and that the Minister may decide, for good and sufficient reason, in the interests of the common good, that a parent be refused permission to remain, even if this would not be in the best interests of the child, so long as such decision was not disproportionate to the ends sought to be achieved. The respondents appealed the High Court's decision to the Supreme Court.

## Findings

Allowing the appeal, the Supreme Court stated that the State has the power to control the entry, residency, and the exit of foreign nationals, and that this power is an aspect of the executive power to protect the integrity of the State (*Pok Sun Shun v Ireland* noted; *Osheku v Ireland* affirmed and adopted). The Court stated that the inherent power of the State includes the power to establish an *ex gratia* scheme such as the “IBC 05” scheme, and that such an arrangement is distinct from circumstances where individuals’ legal rights may fall to be considered. The Court held that the “IBC 05” scheme was an instance of the State’s exercising of this power, in a generous manner, in addition to the statutory procedures, and in response to a unique situation in relation to a significant number of foreign nationals within the State. The Court stated that those who were unsuccessful under the scheme remained in the same position as they had been prior to their application, that they remained entitled to have the Minister consider all relevant Constitutional and ECHR rights, and that a negative decision did not effect any substantive claim that they could make for permission to remain in the State. The Court stated that the merits of the applicants’ case had not yet been considered in a judicial or statutory procedure.

The Court found that the terms of the scheme were clearly set out, and that one of the stated requirements was for continuous residence within the State since the birth of the Irish born child. The Supreme Court was satisfied that the High Court had erred in holding that there was nothing in the relevant documents that stated that the scheme did not apply to a person who had not been continuously resident. The Supreme Court, however, endorsed the High Court’s finding that the first-named applicant had failed to meet this term of the scheme.

The Court held that the applicants and the High Court were misconceived in their premise that the Constitutional and Convention rights of the applicants were at issue, and that the High Court had erred in the manner in which it analysed the scheme. The Supreme Court was satisfied that the scheme was an exercise of executive power, and that it did not in fact address Constitutional or ECHR rights. Consequently, the Supreme Court was of the view that the High Court had erred, and taken a premature and excessively expansive approach in considering the scheme as an arena for decision making on such rights.

The Court held that the scheme was entirely separate from the Minister’s functions under the Immigration Act, 1999, as amended, and that if the Minister seeks to make a deportation order he must comply with s. 3 of that act, and, in particular, he must consider all the matters set out in s. 3(6). The Court stated that the Minister is required to consider applicants’ Constitutional and Convention rights in this context, and that this has yet to be done in the applicants’ cases (the Court noted that in two related cases, *Ogwekue v The Minister and Dimbo v The Minister*, there were issues relating to the Minister’s decisions on orders of deportation. The Court stated that those matters would be considered and determined in separate judgments).

The High Court had found that the Minister was in breach of fair procedures for failing to inform the applicant by letter that documents were omitted from his application. The

Supreme Court held that the Minister had not breached fair procedures in this regard, as the Minister was not obliged to furnish the applicant with such a letter as there was no general duty on an administrative body to give an opportunity to provide additional material after the closing date for an application. The Court held that the Minister’s obligation was to consider the application within the requirements of the scheme, which he did.

## Obiter

The Court noted that the statutory scheme provides for the revocation of deportation orders under s. 3(11) Immigration Act 1999, and that this allowed people, such as the applicant, to notify the minister of any altered circumstances after the making of a deportation order, and that the minister is obliged to consider such information in determining whether to revoke a deportation order. It was the Court’s view that there was therefore no free-standing right to apply to the Minister for permission to remain, and that the procedures under s. 3 and s. 3(11) are the proper routes for applicants to apply to the minister.

## Cases Cited

*Dimbo v The Minister; Fajujonu v Minister for Justice* [1990] 2 IR 151; *L&O v Minister for Justice* [2003] 1 IR; *O’Keefe v An Bord Pleanala* [1993] 1 IR 39; *Pok Sun Shun v Ireland* [1986] ILRM 593; *Ogwekue v The Minister; Osheku v Ireland* [1986] IR 733.

(The Supreme Court similarly allowed the appeals in the related cases of *Fares v The Minister for Justice; Oviawe v the Minister For Justice; Duman v The Minister for Justice; Adio v The Minister for Justice; Edet v the Minister for Justice*)

*KM v The Minister for Justice, Equality and Law Reform, Unreported*, High Court, Edwards J., 17/07/2007

*JUDICIAL REVIEW – MANDAMUS – RESIDENCY – MARRIAGE TO AN IRISH CITIZEN – DELAY IN DECISION MAKING – CONSTITUTIONAL RIGHTS – EUROPEAN CONVENTION ON HUMAN RIGHTS*

## Facts

The applicants were a married couple living in the State. The second-named applicant was an Irish citizen. The first named Applicant was a non EU national. He applied for permission to remain in light of his marriage. The Department of Justice informed the Applicant that the application would take eleven months to process. The applicants sought an order of mandamus, by way of judicial review, compelling the Minister to determine the residency application within a reasonable amount of time. The Applicants contended that an application for administrative relief is entitled to a decision within reasonable time, that the time frame of eleven months was excessive, and that a time-frame of six months would be appropriate. The applicant cited Article 10.1 of Directive 2004/38/EC which provides that the right of residence of family members of a Union Citizen who are not nationals of a Member State shall be determined no later than six months from the date of application. The applicants contended that the delay had resulted in a breach of their fundamental rights. Accordingly, they sought damages for breach of their rights under the Constitution and the European Convention on Human Rights. The Respondent argued, inter alia, that the resources allocated to process such applications were dependent on the work requirements of the Department’s



Immigration division, and that the Department operated against a background of a significant increase in demands for its services, and that if the Court were to grant the applicants the relief sought that that would constitute an unwarranted interference by the judicial arm of Government into the affairs of a branch of the Executive.

### Findings

The Court was satisfied that the entitlement to a prompt decision is an aspect of constitutional justice, and that the idea of substantive fairness includes a duty not to delay in the making of a decision to the prejudice of fundamental rights. The Court stated that there were two questions. Firstly, has there been a delay in rendering the administrative decision at issue in this case? Secondly, if there has been a delay, is the degree of delay so unreasonable or unconscionable as to constitute a breach of the applicants' fundamental rights? The Court said that the following matters were relevant in considering these issues:

1. The period in question
2. The complexity of the issues to be considered
3. The amount of information to be gathered and the extent of enquiries to be made.
4. The reasons advanced for the time taken and
5. The likely prejudice to the applicant of account of delay.

The Court noted that information had to be gathered, and enquiries made, and that once the Minister had the necessary information, he was entitled to a reasonable time to consider all of the matters that he had to take into account. The Court stated where a delay based upon scarce resources is unreasonable, an argument based upon scarce resources could not be advanced to justify it.

Re prejudice to the applicants, the Court stated that where the State operates a legitimate system of pre-clearance the applicants could not normally validly complain of such hardship, though stated that any undue delay in the decision making process may add to the burden, thereby prejudicing applicants.

The Court did not accept the contention that the process re Directive 2004/38/EC was analogous to the instant case, finding that a greater period of time was required in a situation where the Minister has full discretion. The Court held that six months was an appropriate period for that aspect of the process, and that having regard to the complexity of the issues, the duty to consider the first named applicant's case judicially, and the imperative of promptitude in order to minimise prejudice to applicants, a further period of three to six months was reasonable for the Minister's decision.

The Court held that the degree of delay was not at present such that it could be characterised as being unreasonable and/or unconscionable, but that if the applicant were kept waiting for a decision longer than twelve months the delay would be unreasonable and unjustifiable.

### Cases Cited

*Awe v. The Minister for Justice, Equality and Law Reform* (Unreported, Finlay Geoghegan J., 24th January, 2006); *T.C. v. The Minister for Justice, Equality and Law Reform* [2005] 4 I.R.; *T.D. and Others v. The Minister for Education, Ireland The Attorney General and Others* [2001] 4 I.R. 259; *G.A.G. v. The Minister for Justice, Equality and Law Reform, and Others* [2003] 3 I.R. 442; *Iatan and Others v. Minister for Justice, Equality and Law Reform and others* (Unreported, Clarke J., 2nd February, 2006); *O. and D.L. v. The Minister for Justice,*

*Equality and Law Reform* [2003] 1 I.R. 1; *O'Donoghue v. The Legal Aid Board, The Minister for Justice, Equality and Law Reform, Ireland and the Attorney General* (Unreported, Kelly J., 21st December, 2004); *O'Reilly v. Dublin Corporation* [1989] I.L.R.M. 181; *Philips v. The Medical Council* [1991] 2 I.R. 115; *R. (Mahmood) v. The Home Secretary* [2001] 1 W.L.R. 840; *Udojie v. The Minister for Justice, Equality and Law Reform* 6<sup>th</sup> March, 2007

### ***DVTS. v Minister for Justice, Equality and Law Reform & Anor, Unreported, High Court, Edwards J., 14<sup>th</sup> February 2007***

*JUDICIAL REVIEW – CERTIORARI – REFUGEE APPEALS TRIBUNAL - TORTURE – MEDICAL REPORT - ISTANBUL PROTOCOL – COUNTRY OF ORIGIN INFORMATION*

### Facts

The applicant furnished the Refugee Appeals Tribunal with medical reports that stated that his scars were "consistent" and "highly consistent" with the torture he alleged he underwent as a political dissident in his country of origin. In rejecting the appeal, the Tribunal stated that the Istanbul Protocol defined "consistent with" as meaning that: "the lesion could have been caused by the trauma described, but it is non-specific and there are many other possible causes." The Applicant submitted that the Protocol in fact defined "highly consistent with" as meaning that: "the lesions could have been caused by the trauma described, and there few other possible causes", and argued that the Tribunal had not properly considered the medical information in light of the Istanbul Protocol. The Tribunal also referred to recent country of origin reports that stated that the perpetrators of torture in the Applicant's country of origin were punished by law. The applicant argued that the Tribunal had had used the country information selectively, and had failed to consider all the other country of origin information that the applicant had furnished to the Tribunal.

### Findings

The Court granted the relief sought finding the Tribunal relied upon a significant error of fact in wrongly stating that the injuries in question were "consistent with" the alleged torture when they were "highly consistent with" the alleged torture. The Court held that the Tribunal breached fair procedures in failing to engage with the overwhelming evidence that torture of political dissenters in the country of origin was endemic and systematic, had failed to consider the whole picture disclosed by the country of origin information, and was selective in its use of that information.

### Cases Cited

*Adernerian v. Refugee Appeals Tribunal* (Unreported, Feeney J., 9th February, 2007); *Da Silveria v. The Refugee Appeals Tribunal and Others* (Unreported, High Court, 9th July, 2004, Peart J.); *Horvath v. Secretary of State for the Home Department (United Nations High Commissioner for Refugees Intervening)* [1999] I.N.L.R. 7; *Imafu v. The Minister for Justice, Equality and Law Reform and Others* (Unreported, High Court, 9th December, 2005); *Kramarenko v. Refugee Appeals Tribunal and Anor.* (Unreported, High Court, 2nd April 2004, Finlay Geoghegan J.); *R. v. Immigration Appeal Tribunal ex parte, Sardar Ahmed* [1999] I.N.L.R. 473; *Traore v. The Refugee Appeals Tribunal and Anor.* (Unreported, Finlay Geoghegan J., 14th May, 2004).

*John Stanley, BL*

## Return Information Projects Update



By Bobby Pringle,  
International Organisation for Migration

IOM Dublin has been running two Return Information Projects: the Directory of Return for Asylum Seeker (DORAS) and the Information on Return and Reintegration in Countries of Origin (IRRI CO). These information projects aim to provide up-to-date and reliable information to migrants who are considering returning to their country of origin. The information provided by these projects aims to facilitate migrants to make an informed decision about returning to their country of origin. The Voluntary Assisted Return & Reintegration Programmes offered by IOM Dublin benefits from these information projects, as do other service providers and migrants themselves.

### Directory of Return for Asylum Seekers (DORAS)

The DORAS project covers five countries, Georgia, Nigeria, Moldova, Iran and Zimbabwe and provides detailed information on a broad range of topics including social welfare, education, employment, citizenship, healthcare and accommodation in these five countries. To date the DORAS programme has been extremely successful with the DORAS Country Information Fact Sheets on the IOM Dublin website receiving over 3,000 visitors since they were published in February 2007.

### Information on Return and Reintegration in Countries of Origin (IRRI CO)

IRRI CO aims to gather and consolidate information on countries of origin, which will help legal representatives, social workers and other service providers assisting migrants considering voluntary return with reliable and up-to-date information on return and reintegration possibilities related specifically to their individual circumstances, as well as the broader socio-economic conditions in the country of return, such as housing, health, transport, and social security.

**Geographical Coverage of IRRI CO:** the following countries of origin are currently covered by the IRRI CO project:

• Afghanistan	• Nigeria
• Albania	• Russian Federation
• Angola	• Sierra Leone
• Cameroon	• Sri Lanka
• Guinea	• Ukraine
• Iran	• Zimbabwe

Participating countries in Europe include the United Kingdom, Belgium, Ireland, the Netherlands, Portugal and Switzerland.

**Individual queries**, tailored to potential returnees, can be responded and stored in the databank accessible to IOM participating Missions, who can facilitate the provision of information to potential returnees via return counsellors and partner agencies assisting the voluntary return of irregular migrants and asylum seekers. This can consist of either a confirmation of needs for a specific profession/vocation, or specific social/ economic aspects in the country of return.

**Future plans:** The European Commission has recently agreed for the expansion of the IRRI CO project to cover a wider range of countries or origin, which will provide for a broader geographical scope of available information. Further information on the development of IRRI CO II will be available from IOM Dublin, who can be contacted at: 01 8787 900, or through our website: [www.iomdublin.org](http://www.iomdublin.org).

The DORAS & IRRI CO Return Information Projects are available online at the IOM Dublin website [www.iomdublin.org](http://www.iomdublin.org).



## Country Information in Asylum Procedures – Quality as a Legal Requirement in the EU

by Gábor Gyulai,  
Hungarian Helsinki Committee

Gábor Gyulai of the Hungarian Helsinki Committee has recently published this study on COI in the framework of the COI Network III – Training Master Class, Good Practice.

The full study is available on Refworld at

<http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=479074032>

and ECOI.NET at

[http://www.ecoi.net/news/file\\_upload/432\\_1200660145\\_coi-in-asylum-procedures-final-web-version.pdf](http://www.ecoi.net/news/file_upload/432_1200660145_coi-in-asylum-procedures-final-web-version.pdf)

We publish below the Executive Summary.

### Executive Summary

In recent years, country information (COI) has become one of the main issues on the European asylum agenda, partly as a result of the spectacular advancement of information technologies. Far from its supplementary role in the nineties, its key importance as being always-available objective evidence is widely recognised by all actors in this field. The UNHCR, non-governmental organisations and the judiciary have elaborated guidelines summarising main quality standards and requirements related to COI, while EU member states are currently in the process of finalising their guidance document. In addition, professional standards have gradually taken root in national and community asylum legislation as well as in jurisprudence in the Union.

As the first such trans-national initiative, this study aims to draw a complex picture of how substantive quality standards of researching and assessing COI appear in the form of legal requirements within the present system, either as binding legal provisions or guiding judicial practice. As such, the study intends to provide a tool and a set of concrete examples for policy- and law-makers, advocates, judges and trainers active in this field. The four standards selected to determine the construction of the present report have been established in the practice of the Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD) and the Europe-wide “COI Network”.

#### 1. Relevance

*Standard:* COI must be closely related to the legal substance of an asylum claim (i.e. fear of being persecuted/risk of suffering serious harm and lack of protection) and must objectively reflect (confirm or disprove) the important facts related thereto.

*Main findings:* Legal relevance at present is scarcely reflected as a legal requirement in the EU, as only Austria and Hungary provide a compact definition of what should be understood as relevant COI in their national asylum legislation. Far from such a comprehensive interpretation, the Qualification Directive sets two criteria that may somehow be linked to this norm: that of individualised processing of claims and that of assessing actual legal practices instead of merely looking at law in the books in the country of origin. Both of these binding standards are now reflected in the jurisprudence of some senior European courts dealing with asylum cases. Nevertheless, the reference to individualisation is significantly more frequent than the other criterion, and on

certain occasions it is even explicitly connected to an individualised assessment of COI (as opposed to the use of only general, not case-specific information).

#### 2. Reliability and balance

*Standard:* Given the inevitable bias of sources, COI has to rely on a variety of different types of sources, bearing in mind the political and ideological context in which each source operates as well as its mandate, reporting methodology and the intention behind its publications.

*Main findings:* This norm is now firmly anchored in both asylum-related legislation and jurisprudence in the EU. Its main concrete incarnation is the requirement of using a variety of different sources of COI as foreseen by the Procedures Directive and echoed by the European Court of Human Rights and several senior courts. Presently, Hungarian law provides the most concrete requirement in this respect, while the Romanian asylum legislation sets forth a list of suggested types of COI sources.

#### 3. Accuracy and currency

*Standard:* COI has to be obtained and corroborated from a variety of sources, with due attention paid to finding and filtering the relevant and up-to-date information from the sources chosen and without any distortion of the content.

*Main findings:* This methodological norm has gradually appeared in both legislation and jurisprudence in EU member states. Being fairly more “technical” than that of relevance and reliability, this standard is more limited in its scope to general requirements (such as “precise and up-to-date information” as set forth by the Procedures Directive), rather than concrete methodological guidance. Currency is a key element of accuracy, interpreted both by the Qualification Directive and the European Court of Human Rights as the requirement of assessing facts related to the country of origin “at the time of taking a decision”. Furthermore, the standard of currency is largely covered in the jurisprudence of several senior European courts, even if – quite understandably – is referred to in rather general terms.

#### 4. Transparency and retrievability

*Standard:* Given its role as decisive evidence, COI has to be – as a general principle – made available for all parties involved in refugee status determination, principally through the use of a transparent method of referencing. Original sources and reports should therefore be retrievable and their content and meaning should not be distorted in the process of paraphrasing or translating.

*Main findings:* This may be the most debated quality standard among those presented in this report. A transparent system of processing and referencing country information in decisions and case files has become a widely supported and respected norm in COI professional circles. Meanwhile, EU member states have neither elaborated a joint position on rules and systems of referencing, nor have they determined common standards with regard to information transparency in refugee status determination. The Procedures Directive, however, sets forth some important basic requirements (such as the justification of asylum decisions in fact and in law, and the access of counsellors to the information included in their client’s file, if liable to be examined by appeal authorities). Going much further than law-makers, senior courts in several member states have established clear and specific standards in this respect.

## The Separated Child's Credibility in the Asylum Process

By Sarah Ruedeman, University of Tulsa

**Sarah Ruedeman worked in the Refugee Documentation Centre during the summer of 2007 as a legal intern from the University of Tulsa. She researched the issue of separated children while she was here and wrote the following article.**

Cultural norms between two or more countries create the basis for many credibility issues.<sup>13</sup> Separated children applying for asylum in a country distant from their homeland is an instance in which these credibility issues, based especially on cultural norms, arise. In many instances separated children, children under the age of 18 unaccompanied by a guardian<sup>14</sup>, have fled all familiarity in fear of their lives or persecution, and in some instances during this process, have lost more than just the comfort of their known environment and cultural norms as they have lost the essential ability of communication.<sup>15</sup> For many, they know nothing of this new 'safe' country, its people, or its environment yet for them returning home is no longer an option. Therefore, as they seek asylum, which they must, they will enter into the formal atmosphere of the asylum process, and into a situation, where their fears will be questioned, and the need to be viewed as credible essential to their continued safety. As a result, it is the duty of the 'safe' countries to provide a system attuned to their needs. This article explains Ireland's current asylum process and then turns to suggestions that could be used to enhance the 'child friendliness' of the Irish process.

### The Asylum Process

Ideally, the asylum process begins when a child reaches the port of entry as the child is identified as a separated child. Section 8(5)(a) and (b) of the Refugee Act 1996 as amended provides

- (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 board in whose functional area the child is and thereupon the provisions of the Child Care Act, 1991, shall apply in relation to the child.
- (b) Where it appears to the health board concerned, on the basis of information available to it, that an application for a declaration should be made by or on behalf of a child referred to in paragraph (a), the health board shall arrange for the appointment of an officer of the health board or such other person as it may determine to make an application on behalf of the child.

<sup>13</sup> Montgomery, C., Rousseau, C., Shermarke, M. (2001). *Alone in a Strange Land: Unaccompanied Minors and Issues of Protection*. Canadian Ethnic Studies, 33, 102-119.

<sup>14</sup> Office of the United Nations High Commissioner for Refugees Geneva (1997) *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*.

<sup>15</sup> Montgomery, C., Rousseau, C., Shermarke, M. (2001). *Alone in a Strange Land: Unaccompanied Minors and Issues of Protection*. Canadian Ethnic Studies, 33, 102-119.

The Health Service Executive (HSE) will decide whether or not to make an application for asylum on behalf of the child. In the event that an application is made, the HSE then assists the minor throughout the asylum process, including accompanying them to their interview and assigning a social worker.<sup>16</sup> The initial age assessment, Refugee Legal Service (RLS) states, is completed by the immigration officer or the authorised officer. Only if the social worker has doubts regarding the age will they send the person back to the immigration officer or the authorised officer (mostly this will be ORAC) for an age re-assessment.<sup>17</sup>

The social worker/project worker assigned is there to provide assistance to the child in obtaining the appropriate documents. They assist by writing letters on behalf of the child, making telephone calls, or contacting the Red Cross. The RLS representative can also make enquiries on behalf of the child, write letters etc., which is done frequently. All this is discussed at the pre-questionnaire or pre-interview consultation. There are, however, reasons why a child does not obtain or refuses to obtain these needed documents such as fear of being detected.<sup>18</sup>

The interview is conducted at the Office of the Refugee Applications Commissioner (ORAC). The guidelines pertaining to the determination of the applications of separated children have been established by ORAC based on past experience, UNHCR guidelines and advice, as well as the EU *Children First Programme*.<sup>19</sup> Whereas most applications received by ORAC from separated children are in respect of children of 16 or over, a small number of applications are received from very young children (12 years of age and under). As a result, guidelines and appropriate facilities have been established to provide a suitable response to the receipt of applications from very young children, including where the child is accompanied by an adult but has an independent or separate claim for asylum.

Pertaining to the facilities, ORAC has a number of 'child friendly' rooms, which have walls adorned with posters of television cartoons and world maps in which the children interviews are held when possible. Additionally, ORAC states it is aware that certain applicants or groups of applicants in the asylum process may have special needs, including in particular separated children. In order to deal with these applicants in a fair and appropriate manner, they have developed procedures which take into consideration any specific factors and circumstances arising in these cases.<sup>20</sup>

In order to ensure the special needs of this group of applicants are properly taken into account, a group of experienced interviewers has received additional specialised training facilitated by the UNHCR to assist them in working on cases involving separated children. This training involves presentations from a number of child care experts, with a focus on issues such as psychological needs, child specific aspects of the refugee process, the role of the social worker and other issues particular to refugee determination for

<sup>16</sup> Office of the Refugee Applications Commissioner

<sup>17</sup> Anke Boehm, Refugee Legal Service

<sup>18</sup> Ibid

<sup>19</sup> Ibid

<sup>20</sup> Office of the Refugee Applications Commissioner

separated children.<sup>21</sup> Additionally, ORAC also recognizes that some minors may manifest their fears in ways different from adults, and they may not be able to fully elucidate the reasons why they left their country of origin. In the examination of these claims, greater regard is given to certain objective factors such as country of origin information to determine whether based upon these factors a minor may be presumed to have a ‘well-founded’ fear of persecution.<sup>22</sup>

Furthermore, ORAC, in conjunction with additional agencies dealing with separated children, believe in the advantages of adopting a multi-agency approach in the training of practitioners in this area. As a direct result of this, the specialised training programme, currently provided by the UNHCR, is also attended by representatives from the Health Boards, Refugee Appeals Tribunal and the RLS. Also, ORAC and other relevant departments and agencies responsible for dealing with separated children further participate in the inter-agency Working Group on Unaccompanied Minors, whereas RLS and HSE arrange regular operational meetings to deal with practical issues as they arise in the processing of the cases of separated children. Furthermore, additional interagency training was organised by ORAC in conjunction with UNHCR for officials from the Refugee Appeals Tribunal, RLS, HSE and officials from ORAC that would be involved in interviewing very young children and determining their status. As a result, an approach designed to put the child in the interview at ease and facilitate their comfortable participation in the interview process was adopted to establish such an environment.<sup>23</sup>

Ireland requires the separated child to be accompanied in this room by a social worker and when necessary an interpreter. Refugee Legal Service states that there is always a representative from the RLS present at the interview, either a solicitor or a paralegal. The ORAC interviewer advises at the beginning of the interview that the legal representative is only there as ‘observer;’ however, they do intervene when they consider it necessary. The child receives legal advice before the interview.<sup>24</sup> The HSE will arrange a consultation between the social worker, RLS legal representative and child in advance of every interview. The HSE will insist that an interview with a child in their care will not proceed unless the legal representative is in attendance. Legal representatives or the HSE Representative can make submissions in advance of the interview or at the end of the interview. Under the ORAC guidelines, the circumstances of any case can be discussed by the caseworker of the ORAC and the Health Board representative before the interview where necessary.<sup>25</sup>

The interviewer will then begin to question the child regarding the answers provided on the questionnaire and type (or in some instances write) the child’s answers to the oral questions. This continues until either the interview process is finished or else the social worker may end the interview early if the child becomes uncomfortable with the situation. The

child must then wait for a ruling as to whether he or she has been granted asylum.<sup>26</sup>

The interviewer, who received the same UNHCR training as the social worker and solicitor, will then consider and recommend whether the child should be granted asylum having regard to the following: the child’s statements and their account of what happened to them, Country of Origin Information, the legislation, the Convention and Irish and international jurisprudence<sup>27</sup>. Here, the interviewer looks at many different criteria, but one of the most important is the credibility of the child. In order to establish good credibility or to be believable, the child needs to provide a reasonable story or account that could constitute his or her reasonable apprehension<sup>28</sup> and where appropriate a “reasonable explanation” as to why asylum was not immediately claimed<sup>29</sup>.

ORAC indicate that they recognise and consider in the examination and investigation of the factual elements of claims from children, circumstances such as:-

- the minor’s stage of development,
- his/her possibly limited knowledge of conditions in the country of origin, and
- his/her special vulnerability.<sup>30</sup>

As stated by the Law Society of Ireland in 2006, the burden of proving the minor is actually a minor and unaccompanied is on the separated child.<sup>31</sup> The assessment of credibility requires certain criteria be met such as the possession of “valid identity documents, a reasonable explanation of why asylum was not immediately claimed if any amount of time elapsed between entering the country and claiming asylum, and proof that Ireland was the first ‘safe’ country to which the child arrived.”<sup>32</sup>

Because children, especially those who were unaware of their flight from their country, do not carry with them on a regular basis valid documents of identification and may not have a copy of their itinerary proving- in black and white - where they left their country and entered Ireland, their credibility may be harder to prove than the adult planning to seek asylum. Additionally, as the ages of children are hard to discern especially those in latter teenage years, in my view a fifteen-year-old child could be mistaken for nineteen or older and be denied the process and protection that is to be afforded to him/her without proper age documentation. ORAC do not agree with this view and state that the benefit of the doubt would always be given in favour of the child in assessing the age of the applicant. The position regarding persons who present at ORAC and claim to be under 18, but appear older, continues to be a cause for concern, not least in relation to child protection issues.

<sup>26</sup> Anke Boehm, Refugee Legal Service

<sup>27</sup> Office of the Refugee Applications Commissioner

<sup>28</sup> Goodwin-Gill, G. (1996). *The Refugee in International Law*. Oxford: Oxford University Press.

<sup>29</sup> Mooten, N. *Making Separated Children Visible*. Dublin: Irish Refugee Council

<sup>30</sup> Office of the Refugee Applications Commissioner

<sup>31</sup> Law Society of Ireland (2006), (The Law Society’s Law Reform Committee). *Rights based Child-law*.

<sup>32</sup> Mooten, N. *Making Separated Children Visible*. Dublin: Irish Refugee Council

<sup>21</sup> Ibid

<sup>22</sup> Ibid

<sup>23</sup> Ibid

<sup>24</sup> Anke Boehm, Refugee Legal Service

<sup>25</sup> Office of the Refugee Applications Commissioner

At the present time, an assessment is made by ORAC staff following an interview with the person and by reference to their account of their background and their apparent intellectual and physical maturity. They also recognise and consider in the examination and investigation of the factual elements of claims from children, circumstances such as the minor's stage of development, his/her possibly limited knowledge of conditions in the country of origin, and his/her special vulnerability.<sup>33</sup> Due to the considerable difficulty of determining age with any certainty, benefit of the doubt is applied, particularly where it *appears* that the person might be within a few years of 18. The applicant or their legal representative can request that the age assessment be appealed. ORAC state that the procedures in place are in line with those suggested by the High Court in the *Ande Moke* judgment<sup>34</sup>.

### **Making a more 'child-friendly' process**

While Ireland has greatly improved and enhanced its asylum process and created a more 'child friendly' one by supplying the separated child with a social worker, a legal representative and 'child friendly' rooms, there are still things, however, which could enhance the child friendliness of the asylum process. Those considered helpful in enhancing this process are as follows: decreasing the social worker's workload, creating the position of guardian and general suggestions for the interview process.

#### *The Social Worker*

Ideally, one social worker would have at most four separated children at once, depending upon the personal need of each separated child. Unfortunately, this is not the ideal world. Today, many separated children either have infrequent or no contact with their social worker. This is due to the very low ratio of social workers to separated children, which may be as disproportionate as one social worker to thirty children.<sup>35</sup> Because of the lack of contact related to the low ratio it is possible that some of the children feel as though they are fighting their asylum battle alone. As a result, neither a rapport nor trust is built with anyone.

However, if the ratio was decreased, the social worker would possess the ability to build a rapport with, gain insight into, as well as learn the behavior and idiosyncrasies of the child. This rapport between the child and the social worker would provide the social worker with a greater ability to guard the child's best interests, which is their job. It is important for the child to see the social worker as a confidante and be comfortable in the social worker's presence. Furthermore, if there was a point during the interview where the child became upset or agitated, the social worker would respond quicker to the child and if needed end the interview earlier. Because the child would feel as though someone was 'in their corner,' he or she would most likely be more comfortable in the interview and with communicating with an Irish adult. As a greater comfort level would be experienced in the situation, the separated child's credibility would not be hindered greatly by environment or situational anxiety.

<sup>33</sup> Office of the Refugee Applications Commissioner

<sup>34</sup> Office of the Refugee Applications Commissioner

<sup>35</sup> Kanics, J. (2007). Missing children should be a call to action – not indifference!" [www.irishrefugeecouncil.ie/press07/action.html](http://www.irishrefugeecouncil.ie/press07/action.html).

#### *The Guardian*

Because currently social workers are overburdened, it seems as though the only option aside from employing additional social workers would be to appoint each separated child with a guardian or adviser. This appointment has been suggested by the Separated Children in Europe Statement of Good Practice<sup>36</sup>. In this Statement, it is advised that the guardian would ensure that all decisions taken were in the best interests of the child (including those pertaining to housing education and language support), ensure the child had appropriate legal counsel when necessary, and consult with and advise the child where necessary.<sup>37</sup> As this person would be appointed to the separated child at the beginning of the process when the social worker is appointed, this person would continue to ensure that the child received the appropriate care and an additional rapport, one between the guardian and the child, would develop.<sup>38</sup>

The support provided to the separated child by the rapport between the two would then create much the same effect as that previously mentioned between the social worker and the child. The child would become comfortable with the guardian and at ease within his or her presence. Because the guardian would be included in all proceedings regarding the asylum claim, the child would have at least one person in the room with whom a level of comfort and security was felt, leading to less environmental or situational anxiety and an increased openness to answering the interviewer's oral questions. Pertaining to how the interview is conducted, one of the most critical components to conducting an interview with a child is that a rapport is developed between the child and the interviewer.<sup>39</sup> This can easily be established by the interviewer conversing about a neutral subject with the child before beginning oral questioning regarding their written answers to the questionnaire. This period of neutral conversation also provides the interviewer with insight as to the specific behavioural skills and linguistic ability of the individual child, which provides a basis for the interviewer to evaluate the child's answers once the interview begins.<sup>40</sup> I am advised that training is provided on issues such as these to ORAC interviewing staff, in the specialised training they receive on Separated Children.

#### *The Interview Process*

Additional suggestions for interviewing children include an explanation of both truth and deception, and encouragement should always be given for the child to tell the truth. In these situations, children, in fear that their asylum claim will be denied and they will be left with no 'home' as returning home

<sup>36</sup> Separated Children in Europe Programme (2004). Statement of Good Practice (3<sup>rd</sup>) [Electronic version]. [www.separated-children-europe-programme.org](http://www.separated-children-europe-programme.org)

<sup>37</sup> Separated Children in Europe Programme (2004). Statement of Good Practice (3<sup>rd</sup>) [Electronic version]. [www.separated-children-europe-programme.org](http://www.separated-children-europe-programme.org)

<sup>38</sup> Separated Children in Europe Programme (2004). Statement of Good Practice (3<sup>rd</sup>) [Electronic version]. [www.separated-children-europe-programme.org](http://www.separated-children-europe-programme.org)

<sup>39</sup> Coolbear, J. (1992). Credibility of young children in sexual abuse cases: Assessment strategies of legal and human service professionals. *Canadian Psychology*, 33, 151-167.

<sup>40</sup> Coolbear, J. (1992). Credibility of young children in sexual abuse cases: Assessment strategies of legal and human service professionals. *Canadian Psychology*, 33, 151-167.

may no longer be an option- can be led to lie or embellish the truth in order to tell the interviewer what the child believes will lead to a grant of asylum. In order to add additional safeguards against this, it may be helpful to remind the separated child of the other protection and leaves to stay that can be afforded to them in the event that their asylum claim fails.<sup>41</sup>

Once the rapport has been established and the interviewer has a good idea of the behaviour and linguistic skills of the child, the interview should proceed in a non-leading and non-confrontational manner. Finally, it would be helpful for the interview to end with a period of open-ended questions allowing the child to clarify answers, which the interviewer may not have initially fully understood. However, the questions should never be phrased such as “I don’t believe you” or “I don’t understand how this could be true,” etc., as the child will immediately be put on guard and any comfort or ease previously established with the situation, interview, and interviewer will be lost.<sup>42</sup>

On this particular issue, ORAC has provided that RSD workshops have addressed issues such as when to ask open and closed questions. The inter agency training facilitated by the UNHCR, received by ORAC interviewers also includes a module on how to ask questions of children provided by a child psychotherapist.<sup>43</sup>

In my view all interviews with children should be videotaped, and the interviewer should not hand write the child’s answers to oral questions although short notes should be taken in instances for which further clarity at a later time will be asked. These suggestions are made for two reasons. If the interviewer is engaged in the conversation, the child is more likely to engage fully within the conversation as the interviewer is engaged in active listening and his or her focus is directed solely upon the child. Also, videotaping the interview allows the interviewer to review the child’s behaviour and answers during the period of time when the decision on the separated child’s asylum is being considered. It also eliminates the necessity of repeated questioning and allows the conversation to flow freely between the child and the interviewer.<sup>44</sup> ORAC are of the view, however, based on significant experience in interviewing Separated Children since 2000, that the informal approach suggested by the writer is in no way impacted upon in a negative way by the current systems of recording applicants’ interviews, provided a child friendly setting is maintained at all times.<sup>45</sup>

Also, the Office of the United Nations High Commissioner for Refugees, Geneva recommends in their guidelines that the interviewer be “professionally qualified and specially trained persons with appropriate knowledge of the psychological, emotional and physical development and behaviour of the

children and when possible such experts should have the same cultural background and mother tongue as the child.”<sup>46</sup> This would be helpful as nothing would be lost in interpretation and the interviewer, with whom the decision as to asylum solely lies, would be accustomed to the specific cultural norms of the child’s home country and certain behaviours would not negate the child’s credibility.

Again, ORAC provides these issues are covered in the specialised training given to caseworkers facilitated by the UNHCR.<sup>47</sup>

Finally, something as innately simple as moving the position of the interviewer’s chair could enhance the ease the child feels with the situation and the interviewer. Children, in general, do not respond well and are not comfortable in situations where they must deal with authority. The allure of authority is created, especially in situations where no rapport has been created, where the child is in a room sitting across a table from an authority figure. However, it has been shown through multiple studies that if the authority figure sits merely to the side of the table instead of directly in front of the child that the child’s fear and uneasiness with the situation will be reduced. Once this fear is reduced, the child, generally, will be more comfortable and open during conversation and establishing credibility will be less of an issue.<sup>48</sup>

ORAC also comments on this by stating the current seating arrangements for interviews with separated children involve the chairs around a table in a circle and that their goal is to, at all times, maintain a ‘child friendly’ setting through the availability and lay out of its ‘child friendly’ interview rooms.<sup>49</sup>

Unfortunately, as long as there are wars and persecution, there will be separated children - children separated from family, life, and familiarity seeking asylum and safety in another country. While the countries to which these children flee cannot be asked to simply open the borders of their country to anyone seeking asylum, the countries can be asked to create as much as possible a ‘child friendly’ asylum system. In order to continue to be ‘child friendly’ and to ensure the child’s ability to present a credible front, the system currently in place in Ireland needs to continue to be reviewed and modified. Any of the above suggestions, if implemented, should increase the child’s comfort with the asylum process and the interviewer’s familiarity with the behaviours and abilities of the specific child under review and directly decrease the gap between cultural norms and the child’s feeling of situational and environmental anxiety. Therefore, as comfort and understanding is increased between the interviewer and the child especially, the child will have fewer unnecessary elements negating his or her credibility and have a greater potential of being viewed as credible and worthy of asylum.

<sup>41</sup> Coolbear, J. (1992). Credibility of young children in sexual abuse cases: Assessment strategies of legal and human service professionals. *Canadian Psychology*, 33, 151-167.

<sup>42</sup> Coolbear, J. (1992). Credibility of young children in sexual abuse cases: Assessment strategies of legal and human service professionals. *Canadian Psychology*, 33, 151-167.

<sup>43</sup> Office of the Refugee Applications Commissioner

<sup>44</sup> Coolbear, J. (1992). Credibility of young children in sexual abuse cases: Assessment strategies of legal and human service professionals. *Canadian Psychology*, 33, 151-167.

<sup>45</sup> Office of Refugee Applications Commissioner

<sup>46</sup> Office of the United Nations High Commissioner for Refugees Geneva (1997). Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum.

<sup>47</sup> Office of the Refugee Applications Commissioner

<sup>48</sup> Thompson, C.L., Rudolph, L.B., & Henderson, D. (2004). *Counseling Children* (6th ed.) Pacific Grove, CA: Brooks/Cole Publishing.

<sup>49</sup> Office of the Refugee Applications Commissioner

“...haunted by...vivid memories of killings &...starving children...”<sup>50</sup>

## The fate of Kevin Carter and a photo taken near a small village in war-torn Sudan



By Patrick Dowling, RDC

“The image presaged no celebration: a child barely alive, a vulture so eager for carrion. Yet the photograph that epitomized Sudan's famine would win Kevin Carter fame - and hopes for anchoring a career spent hounding the news, free-lancing in war zones, waiting anxiously for assignments amid dire finances, staying in the line of fire for that one great picture”.<sup>51</sup> When Carter...received the Pulitzer Prize he...wrote...to his parents saying "I can't wait to show you the trophy. It is the most precious thing, and the highest acknowledgment of my work I could receive".<sup>52</sup>

### Introduction

The second civil war in Sudan since independence from Britain began in 1983 and lasted for almost twenty years; one of the reasons for the beginning was a mutiny in Ayod in the South. Ten years later in 1993 photographer Kevin Carter visited that region intent on capturing images of the war, part of his role as a photographer; what transpired was an image taken in Ayod by Carter becoming renowned across the world, transporting him to fame including a Pulitzer prize for that photo and changing his life forever. It is a story of racism, war, famine, fame and suicide. It is a story which includes a fateful visit to Sudan; it is a story of a crawling starving child in Ayod; it is a story which begins and ends in South Africa.

### South Africa

Carter joined with other white colleagues, Ken Oosterbroek, Greg Marinovich, & Joao Silva for protection to become known as the 'The Bang-Bang Club' as dubbed by a magazine which often used their pictures, “as in 'We're going to the bang-bang', meaning the front line”<sup>53</sup> of the increasing violent South African townships. Everything from AK-47s to spears were used in the black factional violence between the ANC and the Inkatha Freedom Party and Silva describes a typical encounter: "At a funeral some mourners caught one guy, hacked him, shot him, ran over him with a car and set him on fire,..." "My first photo showed this guy on the ground as the crowd told him they were going to kill him. We

were lucky to get away”<sup>54</sup> The Bang-Bang club “...put themselves in face of danger...[and] were arrested numerous times, but never quit.”<sup>55</sup> Marinovich took a photograph in September 1990 of a Zulu being stabbed to death by A.N.C. supporters which would win him a Pulitzer. A few years later Carter's turn came. Meanwhile the images of apartheid and repression and protest Carter captured appeared in South African publications but more frequently internationally due to local apartheid restrictions and Carter was noted for his audacious and daring coverage and it was said that "Few journalists saw as much violence and trauma as he did".<sup>56</sup> He had graduated into a profession that shone a mirror on the depravity of apartheid. And as a photographer he came into conflict with those white authorities who sought to uphold the system. His parents' acceptance of apartheid was anathema to Kevin. "The police used to go around arresting black people for not carrying their passes," his mother recalls. "They used to treat them very badly, and we felt unable to do anything about it. But Kevin got very angry about it. He used to have arguments with his father. "Why couldn't we do something about it?" “.<sup>57</sup> He had dropped out of college and was conscripted into the South African Defence Force becoming part of the regime he despised. An example of his conscience being tested came when once he took the side of a black mess-hall waiter and “...some Afrikaans soldiers called him a kaffir-boetie ("nigger lover") and beat him up”.<sup>58</sup> Afterwards Carter went absent without leave and became a disc jockey though was fired. Carter was ashamed and made an attempt on his life, before returning to finish his time with the SADF. After finishing his military service he became a photographer.

### The photograph

In March 1993 Carter paid his own way to southern Sudan, intent on documenting the local rebel movement from a conflict he felt the world was overlooking. He arrived near the village of Ayod which was known locally as the 'hunger triangle' because of the famine raging amidst the civil war and with colleague Silva from the Bang-Bang club he took photographs of the starving thousands at an overwhelmed feeding centre. He was distressed at what he witnessed and took a walk away from the masses of refugees. He would then hear a sound that would change his world. Wandering alone in the bush he heard a low whimpering cry and then seen a tiny emaciated girl crawling along in the dirt, trying desperately to make her way to the feeding center.<sup>59</sup> She then stopped. “She didn't have the energy to stand and...stood little chance of survival. If the plight of this little girl couldn't stir the world into action nothing would, as Carter knew instinctively and immediately. He crouched with his camera, ready to frame an eye-level shot”.<sup>60</sup> While in this position a vulture landed behind the girl. Carter waited for twenty minutes “...waiting for the patient vulture to spread its wings.

<sup>50</sup> Scott MacLeod, (12 September 1994), “The life and death of Kevin Carter”, *Time*

<http://www.time.com/time/printout/0,8816,981431,00.html>

<sup>51</sup> *Ibid*

<sup>52</sup> *Ibid*

<sup>53</sup> Peter Martin, (16 March 1994), “‘I'm Really Sorry I Didn't Pick The Child Up’”, *Mail on Sunday*

[http://www.lexisnexis.com/uk/nexis/results/docview/docview.do?risb=21\\_T2765581947&format=GNBFI&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29\\_T2765581950&cisb=22\\_T2765581949&treeMax=true&treeWidth=0&csi=138794&docNo=7](http://www.lexisnexis.com/uk/nexis/results/docview/docview.do?risb=21_T2765581947&format=GNBFI&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29_T2765581950&cisb=22_T2765581949&treeMax=true&treeWidth=0&csi=138794&docNo=7)

<sup>54</sup> Scott MacLeod *op.cit*

<sup>55</sup> *Ibid*

<sup>56</sup> Elizabeth Valk long, (12 September 1994), “To our readers”, *Time*

<http://www.time.com/time/magazine/article/0,9171,981437,00.html?promoid=googlep>

<sup>57</sup> Scott MacLeod *op.cit*

<sup>58</sup> *Ibid*

<sup>59</sup> *Ibid*

<sup>60</sup> BBC, (3 May 2007), “Kevin Carter Photojournalist”

<http://www.bbc.co.uk/dna/h2g2/A22083301>



It didn't, and he took the photograph as it was. - a hopeless child crawling in the dust, a hungry vulture waiting patiently, absolutely certain that it would have carrion soon".<sup>61</sup> He then watched as the little girl resumed her desperate struggle and chased the vulture away.

### Publication

Carter's photo of the starving Sudanese child first appeared in *The New York Times* on 26 March 1993. The photo of the stricken child captured the world's imagination and became iconic, syndicated around the world. It was an image that captured the full horror of the famine in Sudan and an example of the potency of photojournalism. Carter became famous and *The New York Times* became inundated with queries over what had happened to the child, wondering if the photographer helped the photographed and if the latter lived or died. Carter faced fierce criticism for leaving the child to her fate where starvation and vultures prevailed.

### Ayod

Vultures are a silent spectre upon the human suffering at Ayod. Watching. "When only one person dies, villagers bury the body. More, and tradition in this part of the country is to lay them out for the vultures. Only the vultures are well fed in Ayod".<sup>62</sup> This observance was recorded in April 1993 one month after Kevin Carter's photo appeared before the worlds press. In the same month it was noted the danger of relief operations in that area. "In Sudan, the UN has scaled down relief operations to the famine-hit southern region of the country after a sudden upsurge in fighting between rival rebel factions put aid workers' lives at risk. The head of the UN's Operation Lifeline Sudan, Philip O'Brien, said yesterday aid workers had been pulled out of the towns of Waat, Ayod, and Yuai where an estimated 75,000 people are totally dependent on food handouts".<sup>63</sup> *The New York Times* article of March 1993 where Carter's photo first appeared noted the prevailing conditions in southern Sudan at the time. "More than a million people are at risk of starvation in the swampy southern Sudan, the relief workers say. The people of the south, mostly Christians and animists, have been forced from their homes both by famine and by the Islamic fundamentalist Government's offensives in 10 years of fighting".<sup>64</sup> It is an isolated region made inaccessible for much of the year due to the impact of rains and government restrictions on access.<sup>65</sup> And Ayod was impacted by these years of war and famine. "In its third consecutive year of calamity, Ayod's mechanisms for coping have collapsed. A system of kinship rights once sustained many, permitting the needy three nights of shared resources with any relative. But all resources are

<sup>61</sup> Everything, ( 6 March 2000), *Kevin Carter*

[http://everything2.com/index.pl?node\\_id=822511](http://everything2.com/index.pl?node_id=822511)

<sup>62</sup> Peter Hillmore, (4 April 1993), "Out of the dust, the corpses walk: While Sudan's tribes fight on, the desperate people the lucky ones, that is eat lilies",

*The Observer*

<http://www.lexisnexis.com/uk/nexis/search/newssubmitForm.do>

<sup>63</sup> D Buckley, (2 April 1993), "Somalis Go Home To Start Anew", *Courier-Mail*

<http://www.lexisnexis.com/uk/nexis/search/newssubmitForm.do>

<sup>64</sup> Dontalla Lorch, (26 March 1993), "Sudan Is Described as Trying to Placate the West", *New York Times*

<http://www.lexisnexis.com/uk/nexis/search/newssubmitForm.do>

<sup>65</sup> *Ibid*

now depleted and aid is still limited. Even though the World Food Programme has 30 distribution points in Ayod, those who are merely "malnourished" must feed themselves on alternate days on wild fruit: lalob, wild cucumber, tamarind and wild fig".<sup>66</sup> 60,000 displaced people were existing on little more than wild foods "...with malnutrition peaking at more than 40 percent".<sup>67</sup> There was a dearth of medical supplies. "...There is no medicine left, except for a few boxes of Aspirin and antacid tablets".<sup>68</sup> In January 1993 two months before the Carter photograph there was "...only one relief worker for the 100,000 people in the Ayod region".<sup>69</sup> Those who survive wait in the exhausting heat outside feeding centers to see if they will live and the only "...water pump in Ayod has been broken for years...".<sup>70</sup> "Those lucky enough to reach a feeding centre "...receive[d]...one cup of wheat or sorghum a day.[And Ayod]... a collection of huts made from sticks and grass - is racked by disease and malnutrition".<sup>71</sup> The area is one of the "...most critically affected by the famine,"<sup>72</sup> and the scrawny children arrive as "motionless, wizened scraps...appear beyond hope".<sup>73</sup> And then comes the night. "Hundreds of children and adults have no clothing or blankets to protect them from the long, cold nights. At night, there is only the sound of children crying".<sup>74</sup> One of these starving children was in Carter's photo as she struggled to find her way to a feeding centre attempting to cater for the hungry multitudes. "In Ayod...The malnutrition rate of children under five was 40 percent by late January, 1993. The situation in Ayod was "critical, with daily arrivals of more displaced in search of food. Families in the area have little or no food...The situation worsened in March..."<sup>75</sup> and this is when Carter took his photograph. And in March 1993 many villages in the region had few children left.<sup>76</sup> Two months later Ayod was decimated. "Ayod no longer exists. Every home has been burned. Circles and rectangles of charred earth are all that remain".<sup>77</sup>

The region of Ayod-Waat-Kongor became known as the 'hunger triangle' and as the epicentre of famine and in the

<sup>66</sup> Julie Flint, (17 march 1993), "Aid Gnaws At The Edges Of The Hunger Triangle", *The Guardian*

<http://www.lexisnexis.com/uk/nexis/search/newssubmitForm.do>

<sup>67</sup> John Prendergast, (15 March 1993), *Helping Sudanese End Their Civil War*, Christian Science Monitor

<http://www.lexisnexis.com/uk/nexis/search/newssubmitForm.do>

<sup>68</sup> Geoffrey York, (23 January 1993), "Death and starvation stalk the town of Ayod", *Globe and Mail*

<http://www.lexisnexis.com/uk/nexis/search/newssubmitForm.do>

<sup>69</sup> *Ibid*

<sup>70</sup> *Ibid*

<sup>71</sup> *Ibid*

<sup>72</sup> AFP, (2 April 1993), *Fighting halts relief flights to two Sudanese towns*

<http://www.lexisnexis.com/uk/nexis/search/newssubmitForm.do>

<sup>73</sup> Julie Flint *op.cit*

<sup>74</sup> Geoffrey York *op.cit*

<sup>75</sup> HRW, (1 June 1994), *Civilian Devastation, Abuses by All Parties in the War in Southern Sudan*

<http://www.hrw.org/reports/1993/sudan/>

<sup>76</sup> Press Association, (16 March 1993), *Famine in Southern Sudan*

[http://www.lexisnexis.com/uk/nexis/results/docview/docview.do?risb=21\\_T2765746759&format=GNBFI&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29\\_T2765746762&cisb=22\\_T2765746761&treeMax=true&treeWidth=0&csi=8170&docNo=1](http://www.lexisnexis.com/uk/nexis/results/docview/docview.do?risb=21_T2765746759&format=GNBFI&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29_T2765746762&cisb=22_T2765746761&treeMax=true&treeWidth=0&csi=8170&docNo=1)

<sup>77</sup> HRW, *op.cit*

year that Carter took his photograph of the haggard child, where "...rates of malnutrition in Kongor were amongst the highest ever recorded in the world in what had previously been a food-surplus area".<sup>78</sup> Previously in 1991 and 1992 massacres were committed on civilians in this area and food resources appropriated.<sup>79</sup> Warfare in the region included "...burning homes, villages, community structures, and grain, and killing women and children. These types of abuses have been the proximate cause of several famines in recent years".<sup>80</sup> Many of the victims "...were elderly, weak, sick or for other reasons could not run fast enough; they were among those who burned to death inside huts the soldiers knowingly set on fire".<sup>81</sup> During this time of affliction "It was impossible to move without stumbling on corpses and skeletons".<sup>82</sup> What happened in this region claimed over 20,000 Sudanese lives and conditions were so ferocious to be considered impossible to ever happen again.<sup>83</sup> What Carter had seen and shown to the world from the region of Ayod in March 1993 was similar to the conditions prevailing in Somalia the previous year. "The scenes of death and starvation in southern Sudan are strikingly similar to those in Somalia last year, before the U.S.-led military coalition arrived to rescue the Somali people. The images are the same: adults with skeletal figures, gaunt children with distended stomachs and match-stick arms, old people too weak to stand, starving refugees who straggle into the town after walking for several days from the villages. The main difference is that there are no television cameras here. The people of Ayod say they have never seen a television camera. They have no idea what CNN or ABC is. Many had never seen a white person until a few weeks ago".<sup>84</sup> One of those white people was a world weary photo-journalist.

### Suicide

Osterbook a colleague of Carters in the 'Bang-Bang club and a close friend was killed in April 1994 at work photographing a gun battle in a South African township. Carter covered yet another violent photographic session in South Africa the previous month. "Carter was covering the unsuccessful invasion of Bophuthatswana by white right-wing vigilantes intent on propping up a black homeland, a showcase of apartheid. Carter found himself just feet away from the

<sup>78</sup> Mark Bradbury, Nicholas Leader and Kate Mackintosh, (March 2000), *The 'Agreement on Ground Rules' in South Sudan, Study 3 in The Politics of Principle: the principles of humanitarian action in practice*, Humanitarian Policy Group

<http://www.odi.org.uk/hpg/papers/mbprinciples.pdf>

<sup>79</sup> Iain Levine, (May 1997), *Promoting humanitarian principles: the southern Sudan experience*, RRN

[http://www.sheltercentre.org/shelterlibrary/items/pdf/HumanitarianPrinciples\\_SouthernSudan.pdf](http://www.sheltercentre.org/shelterlibrary/items/pdf/HumanitarianPrinciples_SouthernSudan.pdf)

<sup>80</sup> Norwegian Refugee Council, (26 March 2002), *Profile of internal displacement: Sudan*

[http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/1CB20D45F73AF03F802570B50054D818/\\$file/Sudan-March+2002.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/1CB20D45F73AF03F802570B50054D818/$file/Sudan-March+2002.pdf)

<sup>81</sup> Human Rights Watch *op.cit*

<sup>82</sup> *Ibid*

<sup>83</sup> Korwa G. Adar, (2000), *Conflict Resolution in a Turbulent Region: The Case of the Intergovernmental Authority on Development (IGAD) in Sudan*, Accord, African Journal on Conflict Resolution, Vol 1 No. 2

[http://www.accord.org.za/ajcr/2000-1/accordr\\_v1\\_n2\\_a3.pdf](http://www.accord.org.za/ajcr/2000-1/accordr_v1_n2_a3.pdf)

<sup>84</sup> Geoffrey York, *op.cit*

summary execution of right-wingers by a black "Bop" policeman. "Lying in the middle of the gunfight," he said, "I was wondering about which millisecond next I was going to die, about putting something on film they could use as my last picture" ".<sup>85</sup> A number of other assignments went wrong including a session at a Nelson Mandela rally; a cancelled interview with Nelson Mandela; he lost film photographing the UN in Mozambique; covering French President Francois Mitterrand's state visit to South Africa, he missed the deadline. He had financial problems. His relationship had fallen apart and he was temporarily homeless. When he took that photograph in March 1993 relief agencies assessing mortality in Ayod noted "...the prevalence rates of severe undernutrition in Ayod were among the highest ever documented".<sup>86</sup> And that photograph he took of the starving Sudanese child lingered. Amidst all this he was told he won the Pulitzer. "As jubilant [New York] Times foreign picture editor Nancy Buirski gave him the news, Carter found himself rambling on about his personal problems".<sup>87</sup> The news of his Pulitzer prize was clouded by protests surrounding the circumstances in which he took his photograph of the starving Sudanese child." It's the eternal dilemma for journalists - do you just record what's going on or do you get involved as well?" ".<sup>88</sup> The criticism deeply affected Kevin. " 'Few people knew how badly the Sudan had affected him. Just in the small area where he'd been working, people were dying at the rate of 20 an hour and he was there to compose pictures of those grisly scenes' ".<sup>89</sup> A colleague in the Bang-bang club Silva noted that " '[a]fter the Sudan, seeing what he'd seen, he'd been in bad shape..' ".<sup>90</sup> Kevin "...lived with the pressure to be first where the action is, the fear that his pictures were never good enough, the existential lucidity that came to him from surviving violence again and again".<sup>91</sup> And in July 1994 over a year since he took the photograph, a few months after winning the Pulitzer, and after a lifetime of photographing horror, he took his life. Driving out to a place in Johannesburg where he had played as a boy he poisoned himself in his car. Johannesburg he said "...was so damn full of bad memories and absent friends".<sup>92</sup> A suicide note addressed to his "parents and to Silva...[said that] "...he was "depressed . . . without...money for rent . . . money for child support . . . money for debts...[and] I am haunted by the vivid memories of killings & corpses & anger & pain . . . of starving or wounded children, of trigger-happy madmen...of killer executioners . . ." ".<sup>93</sup> Earlier that day Kevin had seen Osterbrook's widow and told her of his troubles but she was still recovering from her husband's recent death and "...in little condition to offer counsel".<sup>94</sup>

<sup>85</sup> Scott MacLeod *op.cit*

<sup>86</sup> HR, *op.cit*

<sup>87</sup> Scott MacLeod *op.cit*

<sup>88</sup> Peter Martin *op.cit*

<sup>89</sup> *Ibid*

<sup>90</sup> *Ibid*

<sup>91</sup> Scott MacLeod *op.cit*

<sup>92</sup> *Ibid*

<sup>93</sup> *Ibid*

<sup>94</sup> *Ibid*

## Conclusion

Carter confided to friends after he had taken the photo in Ayod that he wished he had intervened and helped the child; the convention for journalists at the time was to never to touch famine victims for fear of disease.<sup>95</sup> And he was alert to a dilemma of his profession. "I had to think visually," he said once, describing a shoot-out. "I am zooming in on a tight shot of the dead guy and a splash of red. Going into his khaki uniform in a pool of blood in the sand. The dead man's face is slightly gray. You are making a visual here. But inside something is screaming, 'My God.' But it is time to work. Deal with the rest later. If you can't do it, get out of the game"<sup>96</sup> And a colleague notes "Every photographer who has been involved in these stories has been affected. You become changed forever...It is very hard to continue"<sup>97</sup> The horror and "...violence seemed to affect Carter more than it did other colleagues...Returning from particularly upsetting assignments, he would often cry, or try to drink or drug himself into oblivion. Friends grew used to his 3 A.M. phone calls, rambling about suicide...I couldn't distance myself from the horror of what I saw [he said]".<sup>98</sup> Kevin was unable to leave behind that horror of what he saw when doing his job. And he added on that photo in Ayod that "This is the ghastly image of what is happening to thousands of children. Southern Sudan is hell on earth, and the experience was the most horrifying of my career"<sup>99</sup> A critic of Carter's photograph chastised him for not helping the famished child while he captured her agony. "The man adjusting his lens to take just the right frame of her suffering might just as well be a predator, another vulture on the scene".<sup>100</sup> [When they criticised his inaction after taking that photo of the starving girl in Ayod] "Carter's morality was being called into question by people who could not have understood what it was like to be there in the Sudan".<sup>101</sup> Though Carter's own child, his daughter, looked at this from a different point of view, saying "...I see my dad as the suffering child. And the rest of the world is the vulture".<sup>102</sup> Carter gained fame because of that photo but was open to the world's opprobrium. After that photograph he "sat under a tree, lit a cigarette, thought about his daughter, prayed to god, and cried".<sup>103</sup> Affected and distraught he confided in Bang-Bang club colleague Silva "...and explained what had happened, wiping his eyes and saying 'I see all this, and all I can think

of is Megan [his daughter]. I can't wait to hug her when I get home"<sup>104</sup> "He was depressed afterward," Silva recalls. "He kept saying he wanted to hug his daughter"<sup>105</sup>

It remains unknown the fate of that child in the photo; but the photo captured by Carter made the world hold its breath as the vulture landed behind the emaciated child who was one of many starving in Ayod in 1993. And each day that time death was taking its toll. "Every day, an average of 10 to 15 people die from hunger and disease in the Ayod district".<sup>106</sup> And each day the vultures waited. "Often they are not buried. Their bodies are dragged into an empty field, where the ground is littered with the skulls and bones of the dead. Vultures circle in the sky".<sup>107</sup> The girl from the photo in Ayod would never be known though her image would resonate; the man behind the lens would be known and lost. In August 1994 one month after Carter took his life in South Africa, the 10,000 to 15,000 thousand people in Ayod were living on food handouts distributed by the World Food Program.<sup>108</sup> A starving Sudanese mother describes what it is like: "I came here when I heard there was food, because I was hungry. I used to eat seeds and the leaves of fig trees," says Nyatin Machok, stirring a pot of sorghum outside her family's straw hut...Her three children...have bloated stomachs. Mrs Machok walked for two days to reach Ayod. "I have nothing," she says, "and if we do not get food, we will die"<sup>109</sup>

The owner of the copyright of Kevin Carter's photograph is Corbis and their website is [www.corbis.com](http://www.corbis.com).



<sup>95</sup> Frank Von Ripper, (29 December 2000), "Pulitzer Pictures: Capturing the Moment", Camera Works, *Washington Post*  
<http://www.washingtonpost.com/wp-srv/photo/galleries/essays/001229.htm>

<sup>96</sup> Scott MacLeod *op.cit*

<sup>97</sup> *Ibid*

<sup>98</sup> Judith Matloff, (November 1994), *Legacy of Kevin Carter: Eye on apartheid*, Columbia Journalism Review  
<http://backissues.cjrarchives.org/year/94/6/apartheid.asp>

<sup>99</sup> Reena Shah Stamets, (14 April 1994), "Were his priorities out of focus?", *St. Petersburg Times (Florida)*  
[http://www.lexisnexis.com/uk/nexis/results/docview/docview.do?risb=21\\_T2774462830&format=GNBFI&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29\\_T2774462833&cisb=22\\_T2774462832&reeMax=true&treeWidth=0&csi=11063&docNo=1](http://www.lexisnexis.com/uk/nexis/results/docview/docview.do?risb=21_T2774462830&format=GNBFI&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29_T2774462833&cisb=22_T2774462832&reeMax=true&treeWidth=0&csi=11063&docNo=1)

<sup>100</sup> Scott MacLeod *op.cit*

<sup>101</sup> *BBC op.cit*

<sup>102</sup> HBO, (2005), *The death of Kevin Carter: Casualty of the Bang Bang club*

<http://www.hbo.com/docs/programs/kevincarter/synopsis.html>

<sup>103</sup> Everything *op.cit*

<sup>104</sup> *BBC, op.cit*

<sup>105</sup> Scott MacLeod *op.cit*

<sup>106</sup> Geoffrey York *op.cit*

<sup>107</sup> *Ibid*

<sup>108</sup> Edith Lederer, (20 August 1994), "Famine Haunts Millions", *The Advertiser*

<http://www.lexisnexis.com/uk/nexis/search/newssubmitForm.do>

<sup>109</sup> *Ibid*

## UK Home Office Operational Guidance Notes – Should they be used as COI in Irish Refugee Status Determination?



By Paul Daly, RDC

### What are OGNs?

OGNs (UK Home Office Operational Guidance Notes) are sometimes requested of the Refugee Documentation Centre for use in Irish refugee status determination (RSD). OGNs are available on the Home Office Border & Immigration Agency website at

<http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/countryspecificasylumpolicyogns/> as well as on ECOI.NET and Refworld. One of the advantages of OGNs is that they are short and readable and to the point. The February 2007 OGN on Iraq, for example, consists of just 39 pages. By contrast the April 2007 UK Home Office Border & Immigration Agency Country of Origin Information Report on Iraq runs to 274 pages with 34 pages of references.

### The OGN has two aims:

Firstly it “evaluates the general, political and human rights situation in [the particular country]”<sup>110</sup>

Secondly, the OGN “provides guidance on the nature and handling of the most common types of claims received from nationals/residents of that country, including whether claims are or are not likely to justify the granting of asylum, Humanitarian Protection or Discretionary Leave.”<sup>111</sup>

OGNs state unequivocally that they are not intended as stand-alone documents:

“Caseworkers must refer to the relevant Asylum Policy Instructions for further details of the policy on these areas...This guidance must also be read in conjunction with any COI Service ... Country of Origin Information at [http://www.homeoffice.gov.uk/rds/country\\_reports.html](http://www.homeoffice.gov.uk/rds/country_reports.html)”<sup>112</sup>

It is clear then that OGNs are just one part of one particular jurisdiction’s toolkit for assessing asylum claims. This toolkit includes the much longer and detailed Country of Origin Information Reports, original sources and the relevant UK Asylum Policy Instructions as well as the reminder that “[c]laims should be considered on an individual basis”.<sup>113</sup>

### Advisory Panel on Country Information on OGNs

The questions then arise: can and should COI be abstracted from OGNs for use in refugee status determination in other countries? These questions, of course, are unlikely to be answered by the UK Home Office. But in another forum the UK Home Office has addressed the issue of what kind of documents OGNs are, which points towards the answer. This forum is the Advisory Panel on Country Information (APCI). In the UK the APCI was established as an independent body under the Nationality Asylum and Immigration Act 2002.

“The function of the Advisory Panel is to review and provide advice about the country of origin information material produced by the Home Office, to help ensure that it is as accurate, balanced, impartial and up to date as possible.”<sup>114</sup> In October 2006 the APCI described as a significant success the fact that “largely as a result of the Panel’s recommendation, COI research has been separated from policy within the Home Office and transferred to Research, Development and Statistics (RDS)”<sup>115</sup>. Given that OGNs contain some COI, the issue was discussed by the APCI and others whether “COI material could be extracted from Operational Guidance Notes (OGNs) to enable the APCI to review this without exceeding its remit”<sup>116</sup>.

Prof Castles, then Chair of the APCI discussed this issue in March 2005 with Des Browne, who was then Immigration Minister: “Prof Castles and the Minister agreed that OGNs were policy documents rather than COI documents and were therefore outside the remit of the Panel”.<sup>117</sup>

The issue was raised again on 30 October 2006 by the current Chair of the APCI, Dr Khalid Koser, and the current immigration Minister, Liam Byrne, on 30 October 2006. Dr Koser “acknowledged that OGNs were policy documents, but said that he believed that they contained COI material and that the APCI should consider this. He suggested that one practical way of doing this might be for the APCI to look at extracts from the OGN which provided just the COI content”.<sup>118</sup>

### Home Office Response to APCI Suggestion

The Home Office’s response to this suggestion is worth quoting at length:

“OGNs are policy documents which provide guidance on the treatment of particular categories of asylum and human rights claims. The country information element of these documents is interwoven with wider policy considerations and case law. For this reason it would be difficult to extract the country information element and retain its sense without the context of the original document.

- The country material cited in OGNs is selected / summarised specifically in order to provide sufficient explanation – alongside wider policy considerations and case law – of the guidance given on particular categories of claims. This country material does not seek to provide detailed information on all aspects of an issue and is not a substitute for the COI provided in COIS products. OGNs explicitly instruct decision makers to refer to the relevant COIS product / original sources for the full picture. The country material in OGNs could not therefore be evaluated in the same way as COIS COI products.

- The amount of country material in some OGNs – particularly those for which there are not COIS COI products - has become more extensive than envisaged. To avoid this, in future, a COI product will be produced for all countries for which there is an OGN.

- Also, the format and content of OGNs are currently being reviewed. That process is not yet complete, but a key aim will

<sup>110</sup> UK Home Office Operational Guidance Note – Iraq (12 February 2007)

<sup>111</sup> Ibid

<sup>112</sup> Ibid

<sup>113</sup> Ibid

<sup>114</sup> <http://www.apci.org.uk/>

<sup>115</sup> [http://www.apci.org.uk/PDF/APCI\\_7\\_2\\_Future\\_directions.pdf](http://www.apci.org.uk/PDF/APCI_7_2_Future_directions.pdf)

<sup>116</sup> <http://www.apci.org.uk/PDF/APCI.8.3%20OGNs.pdf>

<sup>117</sup> Ibid

<sup>118</sup> Ibid

be to reduce the country material in OGNs to the minimum necessary for the understanding of the guidance. This will ensure that users refer to the relevant COI Service product for COI.”

#### Conclusion

The APCI’s remit is to provide advice on the content of Home Office COI material. OGNs are policy guidance documents rather than COI documents; and the country material within them is specifically selected to support that policy function. For the reasons given above, it would not be feasible for the APCI to consider the country material in isolation from its policy context.

OGNs are published policy documents and any individual or organisation (including members and observers of the APCI) can comment on them. The Home Office has also agreed arrangements for UNHCR to routinely provide feedback on the contents of OGNs. However, it remains the Home Office position that it would not be possible for the APCI to do so within the terms of its statutory function.

Home Office

February 2007<sup>119</sup>

#### UNHCR and OGNs

In relation to the UK Home Office statement above that it has agreed arrangements for UNHCR “to routinely provide feedback on the content of OGNs”, it should be noted that in the minutes of the APCI meeting of 6 March 2007 one of the UNHCR members of the Panel, Jerome Sabety of UNHCR, Protection Information Section, Geneva, said:

“UNHCR did not have the resources to review all OGNs systematically. In general, UNHCR reviewed OGNs when it was going to release a position paper on a particular country and would then seek to identify any discrepancies. So far, UNHCR had only reviewed two OGNs.”<sup>120</sup>

#### Research Findings on OGNs

In September 2003 the UK Home Office Research, Development and Statistics Directorate published research into the use of country information within the asylum and appeals system.<sup>121</sup> Among the findings were that 84 per cent of UK Home Office caseworkers rate the usefulness of OGNs as high or very high.<sup>122</sup> The OGNs were “commended for their currency, their concise and straightforward format, and as a further source of information where the knowledge base is insufficient”<sup>123</sup>. However, the research also found negative perceptions:

“There was also some concern among caseworkers about the content of OGNs, in particular that the quality of OGNs varies and sometimes contradicts that provided on the knowledge base. This can lead caseworkers to doubt the accuracy of the OGNs as a source of information to be used for decision-making. Concerns were also raised about the extent to which OGNs contribute to an over-generalisation about certain countries which undermines the degree to which caseworkers consider the facts of the individual case when making an initial decision:

Some caseworkers fall down the trap of treating all claimants as a single nationality rather than an individual. A caseworker might say ‘ah this person comes from X country and people from that country aren’t getting asylum therefore I won’t give them asylum either’... They see the same nationality, the same story and they reach the same decision yet the decision really is based on the nationality rather than the story of the individual (SCW)

Some respondents suggested that the use of OGNs may result in caseworkers stereotyping claims from particular nationalities, and may lead to other sources of more detailed country information, such as country assessments and the source documentation in caseworker libraries, being under utilised. It should be noted, however, that OGNs aim to ensure the consistent application of country of origin information with the view to securing consistent asylum decision making amongst caseworkers (providing the OGNs are used with other sources of COI such as the country assessments and source documents in the caseworker libraries)”<sup>124</sup>

#### Conclusion

It is clear from the above that the OGN is a policy guidance document rather than a COI document. The UK Home Office Country of Origin Information Service (COIS) Report is, by contrast, “compiled wholly from material produced by a wide range of recognised external information sources and **does not contain any Home Office opinion or policy**” [emphasis added].<sup>125</sup> In the case of the COIS Report “no attempt has been made to resolve discrepancies between information provided in different source documents”.<sup>126</sup> Also, although the COIS Report is comparatively lengthy, its intention is not “to be a detailed or comprehensive survey” and readers looking for a more detailed account are advised that “the relevant source documents should be examined directly”.<sup>127</sup>

Given the following:

- the policy nature of OGNs,
- the fact that the country information element of these documents is “interwoven with wider policy considerations and case law”
- the concerns quoted above by some UK Home Office caseworkers that OGNs may overgeneralise and stereotype,
- the fact that UNHCR do not have the resources to systematically review OGNs and
- the fact that it is outside the remit of the APCI to review them

it needs to be emphasised that OGNs should always be supplemented by the larger and more detailed COIS reports, the original sources and of course the particular situation of the individual applicant.



<sup>119</sup> Ibid

<sup>120</sup> <http://www.apci.org.uk/PDF/APCI.8.M%20Minutes.pdf>

<sup>121</sup> <http://www.homeoffice.gov.uk/rds/pdfs2/hors271.pdf>

<sup>122</sup> Ibid

<sup>123</sup> Ibid

<sup>124</sup> Ibid

<sup>125</sup> UK Home Office Border & Immigration Agency Country of Origin Information Report on Iraq (April 2007)

<sup>126</sup> Ibid

<sup>127</sup> Ibid

## Some Human Rights issues in Iran



*David Goggins Investigates*

### Background

The 1979 revolution which resulted in the overthrow of the Shah was widely supported by all sections of the Iranian population. However, the revolutionary regime soon came to be dominated by the country's conservative clergy, who drafted a new constitution reflecting Islamic values. This constitution allowed for an elected president and parliament<sup>128</sup>, but all candidates had to be approved by the unelected Council of Guardians, who sought to ensure that elected officials would make all decisions in accordance with Islamic shari'a law. Ayatollah Ruhollah Khomeini was chosen as Supreme Leader by a body of 86 government approved clerics known as the Assembly of Experts and invested with control over the security services, armed forces and the Judiciary. Ayatollah Khomeini held this position until his death in 1989, whereupon he was succeeded by Ayatollah Ali Khamenei. As a result of a change to the constitution Ayatollah Khamenei assumed final authority on all matters of foreign and domestic policy.

Theocratic rule led to the curtailment of basic freedoms and an increase in corruption, which resulted in the growth of a reform movement. The reformist Mohammed Khatami was elected president in 1997 and reformist candidates won the vast majority of seats in parliamentary elections held in 2006. The success of the reformists provoked a backlash by the conservative clerics, who closed down reformist newspapers and jailed journalists. Attempts by parliament to introduce political and economic reforms were vetoed by the Council of Guardians.

The reform movement collapsed when the parliamentary elections held in February 2004 were won by hard-liners after the Council of Guardians had disqualified almost all of the reformist candidates, including many incumbents. Civil and political liberties were further eroded following the election of Mahmoud Ahmadinejad as president in 2005. Freedom of expression in Iran is now severely restricted, with the government controlling all television and radio broadcasting and frequently banning media coverage of certain events. The attitude of the Iranian government is described in a report from *Freedom House* which says:

"The Ahmadinejad government holds that the duty of the media is to report and support government actions, not comment on them."<sup>129</sup>

The *Freedom House* report also commented on the closing of newspapers, saying:

<sup>128</sup> The Iranian parliament is called the Majles

<sup>129</sup> Freedom House (16 April 2007) *Freedom in the World 2007: Iran*

"In 2006 the Iranian government shut down a number of newspapers that it perceived to be insufficiently supportive of the leadership and Ahmadinejad. Papers such as *Sharq*, *Hafez*, *Namah*, and *Karnameh* have all recently been banned. They have been accused of 'insulting religious, political, and national figures' as well as 'fomenting discord'.<sup>130</sup>

Apart from government imposed restrictions on political freedom there is also censorship of the internet, a limiting of academic freedom, interference with the judiciary, denial of women's rights, restrictions on religious freedom and arbitrary arrest and detention.

### Arbitrary Arrest and detention

On the issue of arbitrary arrest and detention *Freedom House* says:

"Although the constitution prohibits arbitrary arrest and detention, these practices are increasingly routine. Suspected dissidents are often held in unofficial, illegal detention centers run by a security apparatus consisting of the intelligence services, the Revolutionary Guard, judicial officials, and the police. Allegations of torture are common in such centers and in the notorious Evin prison."<sup>131</sup>

The detention of dissidents is also commented on in a report from Human Rights Watch which says:

"Police and judiciary security forces often hold people under investigation for suspected violation of the Security Laws, in pretrial investigative detention, for weeks and months without any criminal charges being brought against them and without the opportunity to appear before a judge to challenge their detention. Detainees who are released without having been charged often fear being re-arrested as a form of harassment."<sup>132</sup>

### Prison Conditions

Iranian prisons have been criticised by human rights organisations, who allege that conditions are very poor and that prisoners are treated harshly. Human Rights Watch says:

"Some prison facilities, including Tehran's Evin Prison, were notorious for cruel and prolonged torture of political opponents of the government. Additionally, in recent years authorities have severely abused and tortured prisoners in a series of "unofficial" secret prisons and detention centers outside the national prison system. Common methods include prolonged solitary confinement with sensory deprivation, beatings, long confinement in contorted positions, kicking detainees with military boots, hanging detainees by the arms and legs, threats of execution if individuals refused to confess, burning with cigarettes, sleep deprivation, and severe and repeated beatings with cables or other instruments on the back and on the soles of the feet."<sup>133</sup>

Prison conditions are said to be particularly severe for political prisoners.

<sup>130</sup> *ibid*

<sup>131</sup> *ibid*

<sup>132</sup> Human Rights Watch (January 2008) "*You Can Detain Anyone for Anything*" – *Iran's Broadening Clampdown on Independent Activism*, p.12

<sup>133</sup> US Department of State (6 March 2007) *Iran: Country Reports on Human Rights Practices - 2006*

### Status of Religious Freedom

The constitution states that the official religion of Iran is Islam, and that all laws and regulations must be consistent with the official interpretation of shari'a law. Of Iran's population of 70 million people 89% are Shi'a Muslim, 9% are Sunni and 2% non-Muslim. The largest non-Muslim minority is the Bahá'í religious group, which has about 300,000 members. The 2007 religious freedom report published by the US Department of State describes the situation for members of minority religions as follows:

“Although the Constitution gives Christians, Jews, and Zoroastrians the status of ‘protected’ religious minorities, in practice non-Shi'a Muslims face substantial societal discrimination, and government actions continued to support elements of society who create a threatening atmosphere for some religious minorities.”<sup>134</sup>

The US Department of State also says:

“Government policy and practice contributed to severe restrictions on religious freedom. All non-Shi'a religious minorities suffer varying degrees of officially sanctioned discrimination, particularly in the areas of employment, education, and housing.”<sup>135</sup>

Iranian Muslims do not have the right to change their religion, and adherents of religious groups not recognised by the constitution do not have the freedom to practice their beliefs. This includes sects such as the Sufis, who despite being Muslims who adhere to sharia law have been subjected to harassment from the authorities on the grounds that they are heretics. Iranian lawyer Gholamreza Harsini says:

“The crackdown on the Sufis must therefore be seen as part of a greater plan to suppress alternative reference groups in the society by the hard line government of Ahmadinejad. The hard line and traditionalist clerical establishment that has brought the man to power is increasingly in danger of loss of influence among the masses because of its intolerance.”<sup>136</sup>

### Baha'is

A principal tenet of Islam is that Mohammed was God's final prophet and that no other prophet can come after him. Because of this belief there can be no tolerance of the Baha'is, who adhere to the teachings of the nineteenth century prophet Baha'u'llah but who are regarded by the government as apostates of Islam. Baha'is are barred from government and military posts and are only permitted to enroll in schools if they do not identify themselves as Baha'is.

The US Department of State says:

“Broad restrictions on Bahá'ís severely undermined their ability to function as a community. The Government repeatedly offers Bahá'ís relief from mistreatment in exchange for recanting their faith.”<sup>137</sup>

<sup>134</sup> US Department of State (14 September 2007) *Iran – International Religious Freedom Report 2007*

<sup>135</sup> *ibid*

<sup>136</sup> Inter Press Service News Agency (23 November 2007) *Religion-Iran: Attack on Sufis Reveals Intolerance of Muslim Sects*

<sup>137</sup> *ibid*

A document published on a web site maintained by the Office of Public Information of the Bahá'í International Community lists the names of 206 Baha'is allegedly killed in Iran during the period 1978 to 1998. Chapter III of this document describes the current situation of Baha'is as follows:

“In contrast to its campaign of outright killing, imprisonment, and torture of Bahá'ís during the 1980s, the Iranian government has in recent years focused largely on economic and social efforts to drive Bahá'ís from Iran and destroy their cultural and community life. Such measures include ongoing efforts to prevent Bahá'ís from receiving higher education, to deny them the means of economic livelihood, and to deprive them of the inspiration provided by their sacred and historic sites. The government has also used arbitrary arrests and detentions, coupled with the confiscation of personal property, to terrorize, oppress and otherwise keep the community off balance — a stratagem that appears to be on the rise. Behind these techniques remains the implicit threat of long term imprisonment and execution.”<sup>138</sup>

On 29 January 2008 Agence France Presse reported that the Iranian authorities had sentenced 54 Baha'is for what a judiciary spokesman described as “for propaganda against the regime”.<sup>139</sup>

### Executions

Iran is second only to the People's Republic of China in the number of executions recorded each year. The Amnesty International report on human rights in Iran during 2006 says:

“At least 177 people were executed, at least four of whom were under 18 at the time of the alleged offence, including one who was under 18 at the time of execution. Two people were reportedly stoned to death. Sentences of flogging, amputation and eye-gouging continued to be passed. The true numbers of those executed or subjected to corporal punishment were probably considerably higher than those reported.”<sup>140</sup>

Amnesty International has recently published a detailed report on the issue of death by stoning in Iran, which says:

“Ja'far Kiani was stoned to death on 5 July 2007 in the village of Aghche-kand, near Takestan in Qazvin province. He had been convicted of committing adultery with Mokarrameh Ebrahimi, with whom he had two children and who was also sentenced to death by stoning. The stoning was carried out despite a stay of execution ordered in his case and in defiance of a moratorium on stonings reportedly issued in 2002 by the Head of the Judiciary. It was the first officially confirmed stoning since the moratorium, although a woman and a man are known to have been stoned to death in Mashhad in May 2006.”<sup>141</sup>

A report from the Inter Press Service news agency suggests that this stoning was the action of an over-zealous local judge rather than deliberate government policy. This report quotes journalist and women's rights activist Asieh Amini as saying

<sup>138</sup> The Bahá'í Question (2004) *Cultural Cleansing in Iran*

<sup>139</sup> Agence France Presse (29 January 2008) *Iran sentences Bahais for 'anti-regime propaganda'*

<sup>140</sup> Amnesty International (23 May 2007) *Report 2007 - Iran*

<sup>141</sup> Amnesty International (15 January 2008) *Iran – End executions by stoning*

“The judge, with help from a few policemen, took the prisoner from detention to a very small village, along with some of his colleagues from the judiciary office in Ghazvin province. Although none of the people in that small village were agreeable to the stoning, the judge and his accomplices stoned him to death.”<sup>142</sup>

### Women

Women in Iran have access to education, are represented in parliament and are allowed to work outside the home. However, Iranian women do not have full equality with men and are suffer many forms of discrimination. Freedom House says:

“Although Iranian women currently hold seats in Parliament, they do not enjoy the same political rights as men. Women are barred from serving as judges and are routinely excluded from running for public office. Women also face systematic discrimination in legal and social matters. A woman cannot obtain a passport without the permission of a male relative or her husband, and women do not enjoy equal rights under Sharia statutes governing divorce, inheritance, and child custody. A woman's testimony in court is given only half the weight of a man's. Women must conform to strict dress codes and are segregated from men in most public places.”<sup>143</sup>

Women's rights activists have been among the most prominent human rights workers in Iran in recent years, organising campaigns such as the One Million Signatures Campaign.<sup>144</sup> These activities have resulted in government measures to intimidate members of the women's movement. An example of such intimidation occurred on June 12 2006 when a peaceful demonstration held in Tehran was disbanded, with many of the participants beaten or arrested.

### Dress Code Violations

Women who infringe the strict dress code imposed by Iran's conservative authorities run the risk of being detained by the police. In December 2007 Radio Free Europe/Radio Liberty reported that:

“This week in Tehran and other cities, officials began a fresh crackdown on women -- and men -- who violate rules for winter garb, such as sporting overcoats that are too short or hats instead of head scarves. Police in Tehran have set up mobile centers and stationed cars in busy areas, such as bustling Valiasr Street, to implement a new phase in the enforcement of the dress code.” Boots that are worn over pants, also hats worn without head scarves, body-hugging clothes, and coats that are shorter than knee-length will be targeted,” General Ahmad Reza Radan, Tehran's police chief, told reporters at the launch of the winter campaign on December 9. ‘And these rules should also be obeyed when [women] are in their cars.’”<sup>145</sup>

### Other Human Rights Issues

Other groups subjected to discriminatory laws and practices in Iran include minority ethnic groups such as Arabs, Azerbaijanis, Kurds and Baluchis, human rights defenders, journalists and bloggers, academics and students, homosexuals and members of trade unions. In regard to the treatment of trade union activists Human Rights Watch says:

“The Iranian government has increasingly harassed and arbitrarily arrested members of the Iranian labor force who have spoken out and organized for improving the situation of workers in Iran. Authorities have detained independent labor leaders and ordinary workers in Evin 209, where they have treated them as security prisoners and denied them access to lawyers or family visits. The continuing persecution of labor union leader Mansour Ossanlu and a March 2007 crackdown on protesting teachers throughout the country stand out as indicators of labor's increased persecution under the Ahmadinejad administration.”<sup>146</sup>

In May 2007 Human Rights Watch reported that the Iranian authorities had arrested thousands of people on the grounds of “countering immoral behaviour”. According to Human Rights Watch:

“Since early April 2007, Iranian police and militia known as basiji have launched a nationwide crackdown against people they accuse of deviating from official standards of dress or behavior. On April 14, Iran's Supreme Court overturned murder sentences against six basiji who had killed five people in 2002 whom they considered “morally corrupt,” contributing to a climate of impunity for the militia forces.”<sup>147</sup>

Perhaps the most unusual example of the Iranian authorities cracking down on what is perceived as un-Islamic behavior is the arrest and detention of pet dogs. In September 2007 Radio Free Europe/Radio Liberty reported that:

“In the past, dog owners have received warnings or were forced to pay fines for having a pet dog. Despite such harassment, dog ownership has increased over the years, especially among young people in Tehran. One of them is 23-year-old Banafshe, whose dog was recently detained in Tehran for 48 hours and then released on bail. Banafshe says she was walking her young puppy, Jessica, when Iranian police snatched the dog and took her to a dog “jail.” The dog's crime was ‘walking in public.’”<sup>148</sup>

All reports and documents referred to in this article are available on request from the Refugee Documentation Centre.



<sup>146</sup> *ibid*, p.29

<sup>147</sup> Human Rights Watch (17 May 2007) *Iran: End Arrests on Immorality Charges*

<sup>148</sup> Radio Free Europe/Radio Liberty (14 September 2007) *Iran: Tehran Officials Begin Crackdown On Pet Dogs*

<sup>142</sup> Inter Press Service News Agency (13 July 2007) *Rights-Iran: “Blood Was Everywhere, the Smell of Death*

<sup>143</sup> Freedom House (16 April 2007) *Freedom in the World 2007: Iran*

<sup>144</sup> A project to raise general awareness about discriminatory laws against women (Human Rights Watch)

<sup>145</sup> Radio Free Europe/Radio Liberty (13 December 2007) *Iran: Wrapping Up For Winter, and The Morality Police*