

# The Researcher

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## Welcome to the December 2007 issue of *The Researcher*.

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*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.*

## Sudanese Refugee Children in Chad

by Paul Daly, RDC

The latest fighting in eastern Chad between rebel and Government forces is of concern to UNHCR because of its impact on the camps in the region. The ongoing violence in Sudan's western Darfur region has uprooted two million Sudanese inside the country and driven some 230,000 more over the border into 12 refugee camps in eastern Chad, according to the refugee agency.<sup>1</sup>



**Refugee children wash their families' clothes in Djabal camp. Many children are overwhelmed with daily chores and as a result attend school only sporadically.**

[www.ninemillion.org/](http://www.ninemillion.org/) UNHCR / H. Caux

Djabal camp in eastern Chad hosts over 15,000 refugees from Sudan's war-torn Darfur region. Among them are almost 5,000 children aged 6 to 14.<sup>2</sup>

UNHCR say that attendance at school camps is inconsistent due to a shortage of qualified teachers, a lack of school supplies and the fact that many children are overwhelmed by household chores.<sup>3</sup>

Last year Christian Children's Fund (CCF) conducted a survey of 1,580 children, 22 focus groups and 19 structured one-on-one interviews in four of the largest camps in north eastern Chad: Iridimi, Touloum, Mille and Kounoungo. The survey was funded by the U.S. Department of State, Bureau of Population, Refugees and Migration (BPRM). The survey found "that life is tough in these camps for children, even dangerous especially for girls; opportunities for normal childhood activities almost nil; a 7 to 10-hour workday is the norm for 35 percent of the children; more than half of the children find food scarce; educational opportunities are available but grossly overcrowded; and kids are still having nightmares about what happened to them and their families in Darfur."

<sup>4</sup><http://www.christianchildrensfund.org/content.aspx?id=1433>

<sup>1</sup> UNHCR

<sup>2</sup> Ibid

<sup>3</sup> Ibid

<sup>4</sup><http://www.christianchildrensfund.org/content.aspx?id=1433>



**Young girls gather in the yard of the school in Djabal camp to register for the next school year. The camp has three schools but no furniture, school supplies or stationery.**

[www.ninemillion.org](http://www.ninemillion.org) /UNHCR / H. Caux

Despite all the challenges that these children are facing, they are incredibly resilient according to Sweta Shah, Child Protection Program Coordinator for CCF. "They may still have nightmares about what they experienced in Darfur or hide in their tents when planes fly over their camps, but they continue to smile. People think that these children are just victims ... that they can't do anything for themselves. They continue to have hope and take initiatives in their community. Some youth, who felt there were not enough English language classes, organized their own classes with volunteer teachers. CCF and UNICEF are providing these groups space to start these classes. They just inspire me."<sup>5</sup>



**A young girl heaves a large jerry can full of water onto her shoulder. Girls are usually in charge of collecting water for the family. UNHCR / H. Caux**



## UNHCR Observations on Family Reunification in Ireland

### Introduction

Readers of this article will be fully aware of the phenomenon of families being torn apart by war and persecution. It happens every day. There is nothing harder than seeing someone grappling with the difficulties to reunite their family. It reaches all of us on a very personal level.

Each day UNHCR sees missing children, separated and unaccompanied children, wives, husbands, mothers and fathers, all living apart because of circumstances that were unavoidable, or because there are administrative barriers to reunification in their country of asylum; procedures to confirm identities; the need to replace destroyed documents, or find alternative travel documents when families are unable to acquire national passports; and then of course the issue of resources.

It is not easy, particularly for someone waiting to see their family to understand why a process can run into delays and why reunification does not happen immediately when they receive a declaration of refugee status. But the barriers to reuniting families quickly very often reflect legitimate concerns that also need to be addressed, ones that frequently have their basis in protecting those we aim to assist, such as in the case of reuniting children with parents and the need to absolutely confirm the identities of those taking charge of the child.

More can be done to help refugees in these situations. That is why we must work together and combine our experience and understanding of the difficulties that refugees experience, especially if we are to continue to improve the services we provide to solve the problem of separated families.

I have no doubt that Ireland's overall commitment to refugees and their families is a strong one, despite criticism and identified difficulties in the system. The challenge to administrations charged with the task of reunification is not an easy one.

### International framework

Another challenge in dealing with family reunion matters is the task of linking the issue to a body of applicable law, as there is no specific international treaty on family reunion.

Needless to say, the family is a very strong priority for the United Nations. In 1994, a UN General Assembly resolution stated that the family is "the foundation of human society" and the source of human life. This was a simple reformulation of Article 16 of the 1948 Universal Declaration of Human Rights, in addition to the 1966 International Covenants on Civil, Political, Economic, Social and Cultural Rights, according to which "family is the natural and fundamental group unit of society, and is entitled to protection by society and the State".

A number of other universal and regional binding instruments similarly uphold this same principle of protecting family unity, including the 1950 European Convention on Human Rights, the 1961 European Social Charter, the 1989 Convention on the Rights of the Child and others.

Concerning the 1951 Convention, while it does not confer a right to family reunification on refugees, the issue has nevertheless been considered important in view of some of the above mentioned international instruments. In this connection, the Final Conference of Plenipotentiaries which adopted the 1951 Convention relating to the Status of Refugees unanimously considered that the principle of family unity was "an essential right of the refugee". The Conference also urged Governments to extend protection to members of the refugee's family once the head of the family had been granted admission to a particular

<sup>5</sup> Ibid

country. It also emphasized the special protection needs of children, particularly unaccompanied minors who have been separated from their parents. In addition, a number of Conclusions of UNHCR's Executive Committee on this subject generally reaffirm the principle of family unity in international and humanitarian law.

More recently, during the 2000-2002 UNHCR Global Consultations on International Protection, countries agreed in the summary conclusions on family unity that:

"Respect for the right to family unity requires not only that States refrain from action which would result in family separations, but also that they take measures to maintain the unity of the family and reunite family members who have been separated. Refusal to allow family reunification may be considered as an interference with the right to family life or to family unity, especially where the family has no realistic possibilities for enjoying that right elsewhere."

The main limitation of these texts is that they are not binding. The right to family unity, despite being recognized as a core human right, remains largely a State prerogative and thus a matter of national policy.

Indeed, when States are confronted with a binding instrument on this subject, the tendency is to include a number of substantive and procedural limitations. States often prefer to simply "opt out" of instruments that might limit or determine national policy as regards key international public law principles.

The 2003 EU Directive on Family Reunification is a good example of an instrument with these limitations.

After more than three years of negotiations, the then fifteen EU Member States set out conditions under which refugees and migrants may be reunited with their families, which reflected minimum standards in States across the board.

Among other concerns raised by UNHCR and other parties, were:

1. The narrow definition of the family unit, which allows states not to admit adult children, elderly parents or other close relatives who may be entirely dependent on the refugee;
2. The denial of family reunion on the grounds of public policy, public security and public health, which allowed the use of terms such as "public policy" to keep families apart without any real justification;
3. No automatic right to family reunification to both migrant and refugee couples who are under 21 years old, which potentially means splitting marriages that have not only been in place for years, but which may also have produced children;
4. Suspension of the right to work of reunited family members of recognized refugees for up to year for reasons "related to the situation of the labour market";
5. No rights to family reunification to those granted "subsidiary forms of protection", a provision hard to justify as it simply excludes from the scope of the Directive people who have needs that are every bit as compelling as those of refugees.

Despite these shortcomings, the instrument went ahead. Along with Denmark and the UK, Ireland "opted out".

As a result, the Irish legislator is only expected to take into consideration the international human rights instruments mentioned above, in particular the 1950 European Human Rights Convention, the two 1966 International Covenants, the 1989 Convention on the Rights of the Child, International Humanitarian Law and, of course, the 1948 Universal Declaration of Human Rights, which is a non-binding instrument but still one which Ireland has signed.

### Irish legislation, current and future

Existing legislation in Ireland, in particular Section 18 of the Refugee Act (as amended), meets international standards.

The Act makes a distinction between two types of family members, i.e. direct family members (spouse, minor unmarried children, parents where the refugee is a minor unmarried child), and certain extended family members (grandparent, parent, sibling, grandchild, ward or guardian of the refugee who is dependent on the refugee or is suffering from a mental or physical disability to such extent that it is not reasonable for him/her to maintain him/herself).

The latter type of family member is granted permission at the Minister's discretion, whereas the former type "shall" be granted permission, provided that the Minister is satisfied that the person is who he/she purports to be.

Moreover, the current provisions also give consideration to persons granted Subsidiary Protection Status under Statutory Instrument. No 518 (Regulation 16).

While UNHCR would like to see authorities have a more liberal approach to the issue of "family formation", "customary marriage" and de facto couples, and couples engaged to be married, we tend to be not very optimistic as regards the possible broader definition of the family, or even of a broader application of the concept of dependent relatives.

However, in Ireland, we would hope that the new Immigration, Residence and Protection Bill will allow clarification of what can be accepted as a valid marriage in Ireland, as well as the status of a reunited couple who subsequently divorce.

We would further hope that flexible criteria be adopted as regards proof of family relationship for refugees, allowing alternative means of proof where the necessary documentary evidence is simply not available. And we would also hope that the provisions continue to be applicable to beneficiaries of subsidiary protection.

In the current context, our other main hopes are more of a procedural nature, particularly with possibilities created by the introduction of a Single Procedure in determining who is a refugee.

UNHCR has also consistently promoted the adoption of a derivative refugee status for reunited family members, as a number of family reunification cases now pending concern individuals who are already in Ireland and who are related to a refugee recognized here. The adoption of such a system would in practice cut down a proportion of the number of family reunification applications awaiting a final decision.

Another important measure that could shorten significantly the current length of this procedure would be to end the visa application procedure that follows a successful family reunification authorization. We would recommend that a successful application automatically lead to a grant of a visa.

Finally, we would hope that in the next few years the Irish State could take over from UNHCR the responsibility to provide material assistance to those persons who prove that they do not have enough means to pay the costs involved in family reunification, such as flights and other related costs.

UNHCR Representation in Ireland  
November 2007



## Writing about Refugees: A competition for Aspiring Journalists

The Jesuit Refugee Service (JRS) Europe is launching a competition for student journalists, giving them an opportunity to highlight the challenges facing refugees and asylum seekers trying to access asylum in Europe. The competition is open to students, or recent graduates, from any institute of higher education in one of the forty-three member states of the Council of Europe. Articles should not exceed 1200 words on the theme: 'Access to Asylum'.

The authors of the three best articles will be invited to Brussels to attend a prize giving ceremony in the European Parliament and meet members of the jury who are all experienced journalists in this area. The overall winner will be invited to a refugee camp in Malawi as the guest of JRS Southern Africa, where he or she will meet refugees, representatives of NGOs and local media.

The competition is supported by the European Council for Refugees and Exiles (ECRE), the International Federation of Journalists (IFJ) and MediaWise.

Further information and application forms are available on the JRS Europe website, [www.jrseurope.org](http://www.jrseurope.org). Links to other organisations working with refugees and asylum seekers can also be found on the website. The deadline for entries is 22 February 2008.



## Update on the Immigration, Residence and Protection Bill

In answer to a query from The Researcher the Department of Justice, Equality and Law Reform issued the following response:

"The Immigration, Residence and Protection Bill 2007 was published and initiated in the Seanad on 25 April 2007. The current Government, as part of its agreed Programme for Government, committed itself to reviewing the Bill and accordingly the Bill was not restored to the Order Paper of the Seanad. However, The Minister intends to bring forward a proposal to Government seeking approval for the publication of a new Bill, incorporating the substance of the published Bill, during this Dáil Session."

<http://www.unhcr.org/protect/PROTECTION/47302b6c2.pdf>



## ELENA<sup>1</sup> COURSE ON THE LAW OF REFUGEE STATUS, SUBSIDIARY PROTECTION AND NON-REFOULEMENT

6-9 September 2007, Budapest, Hungary



Sheila McGovern,  
RLS Solicitor

In opening the conference the representative from ECRE<sup>2</sup> stated that the number of asylum seekers arriving into the EU has halved since 2001 and is at its lowest level since 1998. The restrictive policies adopted by the Member States, in terms of the ability to physically enter the EU and the interpretation of the definition of a refugee in refugee status determination processes, represent key factors underlying this drop in numbers.

**Professor Hathaway's presentation** was on the general Law of Refugee Status. This was his last Elena course on the Refugee Definition. He is to take up the post of Dean of the Law School at Melbourne University in Australia. Among the key issues he raised were the following:

- He emphasised the importance of recognising the Geneva Convention as a living instrument, quoting from Sepet and Bulbul<sup>3</sup> "It is... plain that the Convention must be seen as a living instrument in the sense that while its meaning does not change over time, its application will. I would agree with the observations that unless it is seen as a living thing, adopted by civilised countries for a humanitarian end which is constant in motive but mutable in form, the Convention will eventually become an anachronism."
- In going through the various elements of the definition of a refugee (what are sometimes referred to as the "Hathaway Hurdles"<sup>4</sup>) Hathaway emphasised the danger in adopting an holistic approach to Article 1 of the Convention as opposed to a step by step approach.<sup>5</sup> If you simply adopt a bald approach asking "Is X a refugee or not?" this may result in ignoring all the various

<sup>1</sup> ELENA, the European Legal Network on Asylum, is a forum for legal practitioners who aim to promote the highest human rights standards for the treatment of refugees, asylum seekers and other persons in need of international protection in their daily counselling and advocacy work. The work of ELENA is coordinated by the Legal Officer in the ECRE Secretariat.

<sup>2</sup> The European Council on Refugees and Exiles (ECRE) is an organisation established in 1974 for cooperation between 76 NGOs concerned with refugees. Its principal objective is to promote through joint analysis, research and information exchange a humane and generous asylum policy throughout Europe.

<sup>3</sup> Sepet and Bulbul v SSHD [2003] UKHL 15 (UK House of Lords, March 20, 2003)

<sup>4</sup> Alienage, Genuine Risk, Being Persecuted, Nexus, Cessation and Exclusion

<sup>5</sup> Svazas v SSHD [2002] EWCA Civ 74 (Eng. C.A. Jan 31 2002 per Sedley J) "Experience shows that adjudicators and tribunals give better reasoned and more lucid decisions if they go step by step, rather than follow a recital of the facts and arguments with a single laconic statement which others then have to unpack, deducing or guessing at its elements rather than reading them off the page."

elements of the definition and the integrity of the definition itself.

- Hathaway is of the opinion that the Qualification Directive<sup>6</sup>, in setting minimum standards, has forced Member States to accept a specific interpretation of the treaty, such as the recognition of non-State agents of persecution. Elements of the Directive such as this are to be welcomed. However, he emphasised that the Directive in general represents a “floor” not a “ceiling”. He fears, as many others do, that there will be a gross overuse of Subsidiary Protection for people who should in fact be getting refugee status.
- Hathaway expressed concerns with “country of first arrival rules”<sup>7</sup> citing from a US case; Arout Melkonian v AG: “*This court has previously held that a refugee need not seek asylum in the first place where he arrives...Rather, it is “quite reasonable” for an individual fleeing persecution “to seek a new homeland that is insulated from the instability [of his home country] and that offers more promising economic opportunity...[We have previously held that] we do not find it inconsistent with a claimed fear of persecution that a refugee after he flees his homeland goes to a country where he believes his opportunities will be best.*”<sup>8</sup>
- Art 5(1) of the Qualification Directive provides that “*A well-founded fear of being persecuted...may be based on events which have taken place since the applicant left the country of origin.*” In such cases of refugees “sur place”, Hathaway referred to the jurisprudential split among the courts internationally when assessing whether someone’s actions undertaken in the host country which give rise to the risk of returning them should entitle them to refugee status. Countries such as New Zealand believe that an element of good faith on the part of the individual is needed whereas in the UK the element of good/bad faith is not taken into account – what is considered is whether or not the asylum seekers actions have given rise to a risk of returning them.<sup>9</sup> Hathaway is of the view that there should be no “good faith” requirement and if a government in a country of origin, for example, is paranoid enough to persecute an individual because of his/her actions then surrogate protection should be given to him/her.

<sup>6</sup> Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted L 304/12 Official Journal of the EU 30.09.2004

<sup>7</sup> In the Irish asylum process, when assessing the credibility of an applicant, section 11 B of the Refugee Act 1996 is frequently relied on by decision-makers in practice; ie “*Whether the applicant has provided a reasonable explanation to substantiate his or her claim that the State is the first safe country in which he or she has arrived since departing from his or her country of origin or habitual residence.*”

<sup>8</sup> Arout Melkonian v Attorney General, 2003 US App Lexis 3825 (USCA9, Mar 4, 2003)

<sup>9</sup> Danian v SSHD [1999] INLR 533 (Eng CA, Oct 28 1999) and Mima V Mohammed, [2000] FCA 576 (Aus. Full Fed Ct, May 5 2000)

- In discussing the element of “genuine risk,” Hathaway advocated his well-known view that “well-founded fear” is purely an objective issue and should not involve a state of mind/subjective assessment (see 2005 Michigan Guidelines on Well-founded Fear<sup>10</sup>).
- According to the Qualification Directive (Art 4(5)) aspects of the asylum seeker’s statements which are not supported by documentary or other evidence will not need confirmation when a number of conditions are met. Among these conditions is the requirement that the asylum seeker should apply for international protection “*at the earliest possible time*” (Art 4.5 (d)). Hathaway believes that this provision should be struck down.
- Whilst acknowledging the difficulty faced by decision-makers in assessing credibility, Hathaway states that a myriad of factors may explain why applicants appear to lack credibility, citing *inter alia* Mima v SLGB.<sup>11</sup>
- “Persecution = Serious Harm and the Failure of State Protection.”<sup>12</sup> Authorities in some countries accept that the link/nexus to one of the five grounds<sup>13</sup> may be to the former element of persecution (i.e. serious harm) or the latter (failure of state protection). However the American view, shared by many countries, is that the nexus must be to the former element, ie one must prove that the persecutor possessed the requisite motive on one of the five grounds.<sup>14</sup> In the case of *Chen Shi Hai*<sup>15</sup> the Australian courts held that no element of personal animus is needed. (see Michigan Guidelines on Nexus to a Convention Ground 2001)
- In assessing what are acts of persecution Article 9(1) and 9(2) of the Qualification Directive suggest looking at European Human Rights Law. Hathaway was very critical of this aspect of the Directive believing that International Human Rights Law should not have been displaced by Regional law in the Directive. He suggested that it was both arrogant and parochial on the part of the Member States to limit this reference to European Human Rights Law and not International Human Rights Law. There is an assumption that Regional (European) law is more advanced than International Treaties. In some cases it is better but not in all. He cited as an example, the concept of “economic and social values”

<sup>10</sup> “The Michigan Guidelines on Well-Founded Fear” [2005] 26 (2) Mich J Intl L. 493 at paras 3-4

<sup>11</sup> “*Many factors may explain why applicants present with the appearance of poor credibility. These include mistrust of the authority, defects in perception and memory; cultural differences; the effects of fear; the effects of physical and psychological trauma; communication and translation deficiencies; poor experience elsewhere with government officials; and a belief that the interests of the applicants or their children may be advanced by saying what they believe officials want to hear*” – *MIMA v SLGB*, 2004 HCA 32 (Aus HC June 17, 2004, per Kirby J)

<sup>12</sup> *Islam and Shah v SSHD* [1999] 2 All ER 545, per Lord Hoffman (UK House of Lords, Mar 25 1999)

<sup>13</sup> Race, Religion, Nationality, Membership of a Particular Social Group or Political Opinion

<sup>14</sup> *Elias Zacharias*

<sup>15</sup> *Chen Shi Hai v MIMA* (2000) 170 ALR 553 (Aus High Ct, Apr 13 2000)

which in European Human Rights Law is not as evolved as in International Human Rights law.

- Protection is in place if the risk falls below the well-founded fear standard (i.e. real chance, reasonable likelihood/possibility). Hathaway holds the view that the Horvath<sup>16</sup> decision in the UK represents an extremely low point in the area of refugee law. The Horvath approach has now, regrettably, been adopted in Article 7(2) of the Qualification Directive.<sup>17</sup> The words “effective” and “has access” need to be given a broad interpretation. Hathaway holds the view that the right standard is to be found in “MIMA ex parte Miah”.<sup>18</sup> He believes that if we adopt a formalistic approach as advocated in Horvath as opposed to one based on “effective protection” it will lead to disastrous consequences for refugee law.
- Hathaway decries the acceptance in Article 7 of the Qualifications Directive that a “State” can include parties or organisations, including international organisations, which are not accountable to international law. He advocates the approach adopted in the Gardi<sup>19</sup> decision which states that the protection has to be provided by an entity which is capable of granting nationality.
- In discussing the concept of Internal Protection Alternative (IPA), Hathaway noted that both the EU and UNHCR believe that assessing IPA is part of the well-founded-fear inquiry and not part of the latter wording of Article 1 “unable or unwilling to avail himself of the protection of that country.” The UNHCR approach requires that absence of risk be shown. Hathaway is of

the view that if you root the inquiry, as he believes should be done, in the last clause you have to show, not only the absence of risk but also that affirmative protection is available in the alternative place. He believes that the “reasonableness” test in relation to IPA tends to lead to arbitrariness and ad-hoc decision-making. He deplores the decision in the House of Lords case of Januzi<sup>20</sup> (See Michigan Guidelines on IPA<sup>21</sup>).

- Hathaway indicated that the notion of “Politics” is controversial nowadays and that the authorities are pulling back, more and more, on the definition of what constitutes Political Opinion in Article 1 of the Convention (see *Vnay v Mimia*)<sup>22</sup>.
- Today the dominant approach to the concept of “Membership of a Particular Social Group” is based on *Ejusdem Generis*, qualified by the social perception test. While Art 10 (1) (d) of the Qualification Directive appears to require *both* tests to be satisfied<sup>23</sup> Hathaway referred to the House of Lords decision in the case of *Fornah*<sup>24</sup> where he says it is clear that only one test needs to be satisfied.
- In relation to the Cessation of refugee status Hathaway noted that, as a refugee, there is a right to surrogate protection only for the duration of the risk. However, where it is found that there is a change in the country of origin, that change must be truly fundamental, enduring and must not simply eradicate the well-founded fear of being persecuted if the cessation clause is to be invoked. The change must lead to a restoration of protection. Hathaway remarked that the cessation clause dealing with change of circumstances in the country of origin is being increasingly relied upon. The Qualifications Directive (Article 11.e) requires merely that the circumstances in connection with which an individual has been recognised as a refugee have ceased to exist. The UNHCR Guidelines on International Protection on

<sup>16</sup> *Horvath v SSHD*, 2000 3 All E.R. 577 (UK House of Lords) per Lord Hope (majority opinion) “If there is a sufficiency of protection available to them in [their own] state then there should be no obligation on another state to afford a surrogate protection. The persecution with which the Convention is concerned is a persecution which is not countered by a sufficient protection.... There must be in place a system of domestic protection and machinery for the detection, prosecution and punishment of [human rights abuse]... more importantly there must be an ability and a readiness to operate that machinery. But precisely where the line is drawn beyond that generality is necessarily a matter of the circumstances of each particular case.”

<sup>17</sup> Art 7(2) of the Qualification Directive provides that “Protection is generally provided when the actors mentioned in paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, inter alia by operating an **effective** legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm and the applicant **has access** to such protection.” (emphasis added)

<sup>18</sup> *Re MIMA, ex parte Miah*, [2001] HCA 22 (Aus. High Ct, May 3, 2001) “Whatever the law provides and the officials attempt, if the country is unable, as a matter of fact, to afford protection, the fear of an applicant may be classified as well-founded and the conclusions may be reached that “protection is unavailable” in the person’s country of nationality.”

<sup>19</sup> *Gardi v SSHD*, [2002] 1 WLR 2755 (Eng C.A May 24, 2002) “The reference in Art 1(A) (2) is to an asylum seeker being unable or unwilling to avail himself ‘of the protection of that country’ a reference to the earlier phrase ‘the country of his nationality.’ That does seem to imply that the protection has to be that of an entity which is capable of granting nationality to a person in a form recognised internationally.”

<sup>20</sup> *Januzi and Hamid v SSHD*, [2006] UKHL 5 (UK HL Feb 15, 2006, cited with approval in *AA v SSHD* [2006] EWCA Civ 401 (Eng CA Apr 12 2006) “It would be strange if the accident of persecution were to entitle him to escape, not only from....persecution, but also from the deprivation to which his home country is subject.”

<sup>21</sup> International Refugee Law: The Michigan Guidelines on the Internal Protection Alternative

<sup>22</sup> *Vnay v Mimia*, 2005 FCAFC 96 (Aus. FFC, May 13, 2005) “It is not necessary in this case to attempt a comprehensive definition of what constitutes “political opinion” within the meaning of the Convention. It is clearly not limited to party politics in the sense that expression is understood in a parliamentary democracy. It is probably narrower than the usage of the word in connection with the science of politics where it may extend to almost every aspect of society.”

<sup>23</sup> Article 10 (1) (d) “A group shall be considered to form a particular social group where in particular: members of that group share an innate characteristic or a common background that cannot be changed or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it; and that group has a distinct identity in the relevant country because it is perceived as being different by surrounding society.” (emphasis added)

<sup>24</sup> *SSHD v K; Fornah v SSHD* [2006] UKHL 46, 18 October 2006

Cessation of Refugee Status<sup>25</sup> Feb 10 2003) require restoration of affirmative protection.

- On the subject of “Exclusion” (Art 1(F)) Hathaway cites the case of Cabrera<sup>26</sup> wherein it is clearly stated that a decision-maker is not required to make a determination on both inclusion and exclusion. Hathaway notes that there has been an evolution of the Art 1 F(c) clause to cover terrorist groups, vigilantes, militias etc, citing the case of Pushpanathan.<sup>27</sup>

**Alice Edward’s<sup>28</sup> Presentation** focused primarily on the scope and content of the principle of non-refoulement. One of the Irish delegates attending the conference indicated that we can expect the notion of non-refoulement to be expanded upon in forthcoming legislation here in Ireland.

The key provisions discussed by Edwards were the following:

- *ART 33 OF 1951 Geneva Convention:* Article 33(1) provides that “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” Non-refoulement is a principle of customary international law. In discussing who is bound by this article Edwards stated that an act of refoulement undertaken by a private air carrier or transit official acting pursuant to statutory authority will engage the responsibilities of the State concerned.<sup>29</sup> She emphasised that State responsibility is jurisdiction-based. Consequently, the State is subject to the obligation of non-refoulement in its territories as well as in any other location where it exercises effective control or where its actions otherwise affect the individual concerned. Art 33(1) protects refugees and asylum-seekers pending a determination of their claim. It does not generally apply to rejected or failed asylum seekers. The fundamental nature of the principle requires that both direct<sup>30</sup> and indirect<sup>31</sup> refoulement are

prohibited. In relation to Safe Third Countries a proper assessment that the third country would not expose the individual to risk of subsequent removal to an unsafe country should be carried out in order to fulfil obligations under Art 33(1) (see Razgar v UK<sup>32</sup>). As the threat to life or freedom must be linked to one of the five grounds<sup>33</sup> those fleeing generalised violence are not under the 1951 Convention. Progressively the position at international law is that persons who cannot be removed ought to be granted subsidiary or complementary forms of protection.<sup>34</sup>

- Under Art 33(2) the benefit of the non-refoulement principle cannot be claimed by a refugee of whom there are reasonable grounds for regarding as a danger to the security of the country in which he or she is or who having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country. If the conduct of an individual is insufficiently grave to exclude him/her under Art 1(F) it is unlikely to satisfy the higher threshold in Art 33(2).<sup>35</sup> The scope of Art 33(2) (unlike Art 1(F) C) means that it applies in either the country of refuge or elsewhere, ie there are no time or place limits.
- *ART 3 of UNCAT<sup>36</sup>:* “No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” Protection in the case of this article extends to any person. It includes, therefore, rejected asylum-seekers and irregular migrants not applying for asylum. Torture is defined in Art 1 of UNCAT. It does not include cruel, inhuman or degrading treatment. Art 3 is an absolute obligation. It is wider than Art 33 of the Geneva Convention as there are no exceptions, reservations or derogations in respect of Article 3.<sup>37</sup>
- *ARTICLE 7 OF ICCPR<sup>38</sup>:* “No-one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular no one shall be subjected without his free consent to medical or scientific experimentation.” Like Art 3 of the UNCAT, Article 7 of the ICCPR is an absolute prohibition (no exceptions, derogations, etc.) It is wider in scope than Art 3 of the UNCAT in respect of the harm it protects against –

<sup>25</sup> UNHCR Guidelines on International Protection, No 3:Cessation of Refugee Status, Feb 10 2003

<sup>26</sup> Cabrera v MCI, 1998 Fed Ct Appeal Lexis 350 (Can FCA Dec 23 1998). “Whatever merit there might otherwise be to the claim, if the exclusion (clause) applies, the claimant simply cannot be a Convention Refugee...While in certain circumstances it might be desirable to make a determination on both inclusion and exclusion, in law it is not required to do so”.

<sup>27</sup> “The purpose of Article 1 F (c) can be characterised in the following terms: to exclude those individuals responsible for serious, sustained or systemic violations of fundamental human rights which amount to persecution in a non-war setting.” Pushpanathan v Minister of Citizenship and Immigration, 1998 Can Sup Ct Lexis 29 (Can SC June 4 1998)

<sup>28</sup> Alice Edwards is a lecturer in law from the University of Nottingham, UK

<sup>29</sup> See “The Scope and Content of the Principle of Non-Refoulement”, by E. Lauterpacht and D. Bethlehem in Feller, Turk and Nicholson (eds, Refugee Protection in International law, Cambridge University Press, 2003, p 110)

<sup>30</sup> Direct refoulement= return to territories where individual faces risk of threats to life or freedom; usually country of origin but not necessarily

<sup>31</sup> Indirect refoulement = return to any territory where the individual is at risk of onward refoulement such as secondary transfers, or deprivation of economic or social rights that may lead to return or onward movement

<sup>32</sup> Razgar v SSHD (2004) UKHL 27

<sup>33</sup> “on account of race, religion, nationality, membership of a particular social group or political opinion.”

<sup>34</sup> See EXCOM Conclusion no 103 (XLVI) 2005

<sup>35</sup> See Lauterpacht and Bethlehem, pg 129, supra fn 29

<sup>36</sup> United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

<sup>37</sup> “The nature of the activities in which the person concerned engaged cannot be a material consideration when making a determination under Article 3 of the Convention”- Paez v Sweden, 39/1996, para 14.5

<sup>38</sup> United Nations International Covenant on Civil and Political Rights

including cruel, inhuman and degrading treatment or punishment. The Human Rights Committee has included female genital mutilation,<sup>39</sup> forced marriage, domestic violence, sexual violence and rape, clandestine abortion, forced abortion, forced sterilisation, psychological violence of family members and the death row phenomenon.<sup>40</sup>

- *ART 3 OF ECHR*: “No-one shall be subjected to torture or to inhuman or degrading treatment or punishment.” It is an absolute prohibition with no exceptions for national security or other grounds.<sup>41</sup> It includes indirect or chain refoulement.<sup>42</sup> Various case-law was cited in assessing what constitutes torture or inhuman or degrading treatment or punishment.<sup>43</sup> In certain cases, it provides protection to individuals who may have been excluded from refugee status under Art 1F of the Geneva convention. Current challenges relate to the fact that certain governments hold the view that there ought to be an exception for national security reasons akin to that in Art 33(2) of the 1951 Refugee Convention – see *Ramzy v Netherlands* and *Saadi v Italy*.<sup>44</sup>
- *EU QUALIFICATIONS DIRECTIVE*: ART 21 (2) of the Directive provides that “Where not prohibited by international obligations...Member States may refoule a refugee, whether formally recognised or not, when (a) there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present; or (b) he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State”. The recitals to the Directive<sup>45</sup> state that “The notion of national security and public order also covers cases in which a third country national belongs to an association which supports international terrorism or supports such an association.” UNHCR has argued for a restrictive interpretation of national security – including an assessment of the structure, purpose, activities and methods of association, the role of the individual and nature of the risk posed and individual assessment.<sup>46</sup> Exceptions would not apply to the death penalty or torture in line with international and European Human Rights Law. However, exceptions may apply to Art 15 (c) on return to

indiscriminate violence unless it amounts to torture or obligations under International Human Rights Law (Art 45, 1949 Geneva Convention on Protection of Civilians in Time of War).

Overall the conference was “Nagyon Jo” as they’d say in Hungarian/Magyar (ie very good) - an informative and enjoyable conference - particularly enhanced, I might add, by great company, steaming bowls of paprika-spiced goulash, tokaj wine, ‘gypsy music’, a luxuriating dip in the Szechenyi sulphur baths and much perambulation among the breathtaking architecture that makes up the city of “Buda” and “Pest.”



<sup>39</sup> HRC GC No 28/2000

<sup>40</sup> *Kindler v Canada* 470/1991; *NG v Canada*

<sup>41</sup> see *Soering v UK* (1989) and *Chahal v UK* 1996

<sup>42</sup> See *T.I v UK*, Admiss. Dec 7 Mar 2000 Appl No 43844/98 p15

<sup>43</sup> See *Ireland v UK* 1978, Death Row Phenomenon (*Soering*). HIV/AIDS sufferers in critical stage of illness (see *D v UK* 1997 and House of Lords in *N(FC)* 2005) and denial of basic economic rights (*Limuela, Tesema and Adam v SSHD* 2005 UKHL 66)

<sup>44</sup> See *Ramzy v Netherlands* 2006 (Appl No 25424/05) and *Saadi v Italy* (Appl No 37201/06)

<sup>45</sup> Recital 28

<sup>46</sup> See Annotated Comments on EU Qualifications Directive – OJ L 304/12, 30.09.2004

## Elena Course on the Law of Refugee Status – Budapest



by Ian Whelan, BL

Budapest was the venue for the recent European Legal Network on Asylum (ELENA) course on the Law of Refugee Status, Subsidiary Protection and Non-Refoulement, which ran over three days from the 6<sup>th</sup> to the 9<sup>th</sup> of September, 2007. The course examined refugee law in relation to current jurisprudence and asylum developments in Europe, including the impact of the recently adopted EC Qualification Directive. It was dedicated to the study of the main articles of the 1951 Geneva Convention relating to the status of refugees and relevant human rights treaties. Participants from 29 different countries arrived in the Hungarian capital for what promised to be both an entertaining and an educational weekend and once again there was an interesting blend of participants in attendance. The event once again provided those in attendance with a unique opportunity to discuss, contrast and compare the various asylum systems in operation in a range of jurisdictions worldwide.

Ireland was again well represented with 24 participants in attendance from both the public and private sector. Many of those present were no doubt attracted by the attendance of Professor James Hathaway, who was speaking at his 18<sup>th</sup> ELENA course. Professor Hathaway has lectured on ELENA courses since 1992, and Budapest marked his final ELENA appearance prior to his departure from his post in the University of Michigan's Law School and his taking up the post of Dean of the law faculty at the University of Melbourne, where he intends "to move Melbourne into the ranks of the very finest public law schools in the world."

Professor Hathaway opened the course with an introduction to the 1951 UN Convention Relating to the Status of Refugees, as completed by the 1967 Protocol, and the definition of refugee contained therein. The Professor presented analyses of all of the aspects of the refugee definition and the manner in which they are applied and should be applied. His delivery featured extensive reference to Canadian, English, Australian, New Zealand, and US case law, as well as to the provisions of The European Union's Qualification Directive. Professor Hathaway presented an interesting argument as to why the assessment of a "well-founded fear" of being persecuted should not, in his view comprise any evaluation of an individual applicant's state of mind but should be solely an objective test with no subjective element. His line of argument on this point is documented in "The Michigan Guidelines on Well-Founded Fear", which is freely available on [www.refugeecaselaw.org](http://www.refugeecaselaw.org). Most participants were enthralled by Professor Hathaway's open offer to attend free of charge to argue this point before the Supreme Court of any country in an effort to finally dispel the notion that the assessment of the well-foundedness of an asylum applicant's fear of persecution has any subjective element.

There was analysis of the topic of "persecution" and of what, in the absence of an accepted definition of persecution, in fact

constitutes "being persecuted" for the purposes of the 1951 Convention. The issues of the cessation of refugee status and exclusion from refugee status were discussed at length, and I was most interested in the case law on the issues of the cessation of the refugee status of refugees in circumstances where they voluntarily re-establish themselves in their country of origin, or whose country of origin undergoes some fundamental and enduring change which renders the grant of refugee status unnecessary. The case law discussed in this regard included *Arguello-Garcia v. Canada (Minister of Employment and Immigration)* (1993) 70 F.T.R. 1 (F.C.T.D.) and *Abarajithan v. Canada* (1992) FCJ 54 (Can, FC, Jan. 28, 1992).

The case of *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* [1998] 1 S.C.R. 982 was discussed in relation to the issue of exclusion. In *Pushpanathan*, the appellant challenged the rejection of his application for refugee status due to a finding that he was not a Convention Refugee because he was excluded by Art 1F(c) of the Convention, which provides that the Convention does not apply to a person who "has been guilty of acts contrary to the purposes and principles of the United Nations." The Supreme Court of Canada found that a serious non-political crime such as drug trafficking should not be included in Art 1F(c) as there was no clear indication that the international community recognises drug trafficking as a sufficiently serious and sustained violation of fundamental human rights as to amount to persecution, either through a specific designation as an act contrary to the purposes and principles of the United Nations or through international instruments which otherwise indicate that trafficking is a serious violation of fundamental human rights. I found this case to be particularly interesting and was led to wonder if a court in this, or indeed some other jurisdiction, would make a similar finding were a similar case to arise today.

The remainder of the course was taught by Alice Edwards, lecturer in law at the University of Nottingham, and concentrated on a discussion of the principle of *non-refoulement* and the exceptions thereto, subsidiary forms of protection, and *non-refoulement* in Europe, in particular the EC Qualification Directive. There was also some discussion of *non-refoulement* and other instruments of international human rights law, including the UN Convention against Torture, and the International Covenant on Civil and Political Rights. Participants were provided with a copy of an opinion on "The Scope and Content of the Principle of Non-Refoulement" by Elihu Lauterpacht and Daniel Bethlehem; this opinion is also freely available on [www.refugeelawreader.org](http://www.refugeelawreader.org). There were several case studies and participants were encouraged to interact with one another in discussion of the issues arising therein. Although interesting and informative, the lecture was not as thought provoking as what had preceded it.

The European Council on Refugees and Exiles (ECRE) made available in printed form some of its research into the operation of the Dublin II Regulation. The Regulation, which has as its goal the prevention of "asylum shopping" between Member States by ensuring that an asylum seeker may only claim asylum in one EU State, has been the subject of much criticism from many quarters as its operation results in obvious injustices to the individual asylum applicant.

Although EU States are endeavouring to harmonise their asylum systems, conditions for granting refugee status still vary hugely from one country to another, with some granting protection to almost 50 per cent of applicants and others to less than 1 per cent. Furthermore, several States operate policies of arbitrary detention of asylum seekers, provide little or no access to social assistance and medical treatment and provide for the “fast-tracking” of asylum applications with the applicant being detained in an asylum camp in a remote area of the Member State with little or no access to legal representation. In addition, an asylum seeker’s file can often be closed by a particular Member State in circumstances where the applicant has moved out of the jurisdiction of that Member State, and upon the applicant being transferred back to the Member State where he/she first applied, that Member State often refuses to re-open it. The Regulation also fails to recognise that asylum seekers often travel to a particular Member State in order to be reunited with a family member(s) and that the Regulation in its operation often infringes upon the family rights of these individuals as it only provides for family reunification in certain prescribed circumstances. ECRE, through its member agencies across Europe, has collected over 50 case studies demonstrating the devastating impact of the Dublin system on individual lives. These testimonies will be presented in a dossier to the European Commission in order to help inform its current review of the Dublin regulation. ECRE has also identified ten key recommendations for immediate reform to ensure that all asylum seekers in Europe receive a fair hearing. In the longer term, ECRE believes that the Dublin system needs to be replaced with an alternative system enabling Europe to better share its responsibility to protect refugees.

The course was once again expertly organised by ECRE and closed with a presentation to Professor Hathaway as a mark of appreciation for his extensive contribution to ELENA over the past 15 years. Information regarding ECRE and ELENA can be found on [www.ecre.org](http://www.ecre.org).



## Country of Origin Information and Women

Asylum Aid have published a guide on researching gender and persecution in the context of asylum and human rights claims.

Ecoi.net states that the guide "Country of Origin Information and Women: Researching gender and persecution in the context of asylum and human rights claims" is aimed at a mixed audience of legal representatives, COI researchers, information professionals and volunteers involved with supporting women asylum seekers.

The guide provides structured information and guidance on approaching research, rather than legal matters, in a woman’s case. It covers: what COI is and how it is used within the determination process; the difficulties women experience in substantiating their claim; types of gender related harm and their impact on women and strategies for researching COI specific to a client’s individual circumstances; FGM; honour crimes; domestic violence; trafficking; rape and sexual violence.

The report can be accessed at:

[http://www.asylumaid.org.uk/data/files/publications/68/Country\\_of\\_Origin\\_Information\\_and\\_Women.pdf](http://www.asylumaid.org.uk/data/files/publications/68/Country_of_Origin_Information_and_Women.pdf)

## Recent Developments in Refugee and Immigration Law

### *COI v The Minister for Justice, Equality and Law Reform, Unreported, McGovern J., 2<sup>nd</sup> March 2007*

JUDICIAL REVIEW – CERTIORARI – S.17(7) REFUGEE ACT 1996 – MINISTER’S DISCRETION TO ALLOW A FRESH ASYLUM APPLICATION – ANXIOUS SCRUTINY – CONSISTENCY OF DECISION-MAKING

#### Facts

The Applicant claimed asylum on the basis of a claimed fear of persecution in his (undisclosed) country of origin because of his race and political opinion. The Applicant was refused by the Commissioner and Tribunal. The Tribunal, however, recommended that the Applicant’s sister-in-law be declared a refugee. The Applicant sought the Minister’s consent pursuant to section 17(7) of the Refugee Act, 1996, as amended, to allow him to make a fresh application for asylum. The fresh evidence cited by the Applicant was the fact that the Tribunal made a decision in favour of the applicant’s sister-in-law. The Minister refused this request, stating that “it was decided that the new evidence submitted does not significantly add to the likelihood of the applicant qualifying for asylum on the totality of the evidence already available and considered.” The Applicant challenged this refusal by way of judicial review, claiming (a) that the Minister had erred in law in the test to be applied and (b) that the Minister acted in denial of his constitutional right to the equality of treatment within the asylum process.

**Held** by McGovern J. in granting the relief sought, and holding that the Minister acted unlawfully in refusing his consent to the s. 17(7) application, (a) that in applying the test he did the Minister erred in holding that the comparisons between the applicant’s case and that of his sister were not relevant, and that the Minister’s statement was arbitrary and (b) that the refusal of the Minister to consent under s. 17(7) was a denial of justice and fairness to the applicant who should be entitled to go to the relevant bodies established under the asylum legislation and who should be entitled to make a further application in light of the fact that his sister-in-law had been successful in her application on, essentially, the same facts. That since the right of an applicant to a new hearing is dependent on obtaining the Minister’s consent, the Minister is obliged to act fairly and in accordance with the principles of natural justice.

#### Obiter

That the test of anxious scrutiny is one which the courts should use as well as the *O’Keefe* principles. That cases might legitimately fall to be reviewed where there is a manifest error disclosing a reasonable possibility that on the facts the original decision was wrong.

#### Cases Cited

*Ladd v Marshall* [1954] 1 WLR 1489

*R v Home Secretary Ex Parte Onibiyo* [1996] QB 768

*Kingloo Chia* [2006] 201 JR

*O’Keefe v An Bord Pleanala*

*Fasakin v RAT and Anor*; Unreported, O’Leary J., 21<sup>st</sup> December 2005

*Shirazi v Secretary of State* [2004] INLR 92

*Atanov v RAT and Ors*, Supreme Court, 26<sup>th</sup> July 2006

*Dikilu v Minister and Anor*, 2<sup>nd</sup> July 2003

*State (Keegan) v Stardust Victims Compensation Tribunal* [1986] IR 642



***NN v Refugee Appeals Tribunal and Ors, High Court, McGovern J., 28<sup>th</sup> June 2007***

JUDICIAL REVIEW – CERTIORARI – REFUGEE APPEALS TRIBUNAL – COUNTRY OF ORIGIN – S. 13(6) REFUGEE ACT 1996 – REOPENING OF MATTERS BY TRIBUNAL PREVIOUSLY DETERMINED BY THE COMMISSIONER – S. 16(6) REFUGEE ACT 1996

**Facts**

The Applicant claimed to be from Zimbabwe, and that she would be persecuted if returned there because she is a member of a group opposed to the ruling Mugabe regime. The RAT dealt with the Applicant's case on the basis that she was from Zimbabwe, but rejected her claim on credibility grounds. On appeal (which was on the papers only), the RAT dealt with the Applicant's case on the basis that she was from South Africa, and found against her. The Applicant had been granted leave to seek judicial review, claiming it was in breach of fair procedures for her to be failed on one issue, succeed on a second, and subsequently have the matter she was successful on reopened and held against her without her being put on notice.

**Held** by McGovern J in granting the relief sought and quashing the Tribunal's decision, that basic fairness requires that an appellant be informed that she would have to deal with the issue, that it was unjust to deprive the Applicant of the opportunity to make an argument on an issue that had been deemed to be fundamental by the Tribunal when the issue had already been resolved in the Applicant's favour by the Commissioner, and that it had been open to the RAT under s. 16(6) Refugee Act 1996 to request the Commissioner to make further enquiries, but that there was no evidence that the Tribunal had done so.

**Cases**

*Nwole v Minister for Justice [2004] 1 IEHC 408*

*Dada v Minister for Justice, Unreported, High Court, Peart J., 31<sup>st</sup> January 2006*

*Salu v Minister for Justice, Unreported, High Court, Feeney J., 19<sup>th</sup> December 2006*



***AN and Ors v The Minister for Justice and Anor., Supreme Court, 18<sup>th</sup> October 2007***

JUDICIAL REVIEW – APPEAL – POINT OF LAW OF EXCEPTIONAL PUBLIC IMPORTANCE – DEPORTATION – INCLUSION OF CHILDREN IN PARENT'S ASYLUM APPLICATION – S. 3(2)(F) IMMIGRATION ACT 1999 – FAMILY UNITY – UNHCR HANDBOOK

**Facts**

The appellants, the children of the first-named Applicant, had challenged the Minister's decision to deport them on the basis that their designation as failed asylum seekers was wrong in law as they had not in fact applied for asylum or received lawful refusals of refugee status. The parent applicant's asylum application was in her name alone. There was no mention of the children in the Commissioner's refusal determination. Similarly, there was no mention of the children in the decision of the Refugee Appeals Authority. The Minister, however, proposed to, and then in fact issued

deportation orders against the parent applicant and the children.

On 5<sup>th</sup> November 2005, Finlay-Geoghegan J. granted the applicants leave to seek judicial review on the ground that the deportation orders relating to the children applicants were invalid in that the children were not people whose applications for asylum had been refused by the Minister within the meaning of s. 3(2)(f) Immigration Act 1999. The Applicants were subsequently refused the relief of certiorari sought, and appealed that decision to the Supreme Court on a point of law of exceptional public importance.

**Held** by Fennelly J, Denham, Geoghegan and Kearns JJ. concurring, in allowing the appeal, setting aside the judgment of the High Court, and making an order of certiorari quashing the children's deportation orders, that there was no record of any decision refusing any asylum applications on behalf of the children appellants, that such a refusal was a fundamental prerequisite to the Minister's power pursuant to s. 3(2)(f) Immigration Act 1999.

**Obiter**

That the Minister could have written to the first-named Applicant and/or to the children stating that several applications were deemed to exist. The principle of family unity is central to asylum and immigration practice. The most obvious consequence is that where an asylum seeker is accompanied by his children of tender years and is accorded refugee status, it obviously enures to the benefit of the children. Paragraph 185 of the UNHCR Handbook states that "the principle of family unity operates in favour of dependants and not against them."

**Held** by Finnegan J, Denham, Geoghegan and Kearns JJ. concurring, allowing the appeal and making an order of certiorari quashing the children's deportation orders, that on an application by a parent of a minor child the Minister could deal with the application without having regard to the minor, that if the application succeeds the minor should be given refugee status, that if the application is unsuccessful the minor is entitled to apply for recognition of his refugee status based on his own circumstances and reasons. That the UNHCR Handbook does not envisage the parent's application as being also an application on behalf of the minor, nor that on failure of the parent's application the status of the minor should be determined without regard to his individual circumstances or reasons. That the Minister was thus in error in treating the application as one on behalf of the children also. That the mother's application was not an application by the children but, if successful, they would benefit via the principle of family unity. That there was no application by the children, and therefore section 3(2)(f) of the Immigration Act 1999 could not apply to them.

**Case cited**

*VZ v Minister for Justice [2002] 2 IR 135*



### ***OO and Ors v The Minister for Justice and Anor, High Court, Peart J., 3<sup>rd</sup> July 2007***

JUDICIAL REVIEW – LEAVE – CERTIORARI – REFUGEE APPLICATIONS COMMISSIONER - NIGERIA – ERROR OF FACT – ERROR OF LAW - SAFE COUNTRY OF ORIGIN - FAILURE TO SPECIFY GROUND - AFFIDAVITS

#### **Facts**

The Applicants were a Nigerian husband and wife and their four children, two of whom were Irish citizen children. The mother had been granted residency pursuant to the IBC05 scheme. The father had been refused residency under that scheme on the basis that he had not lived continuously in the State since the birth of the children. The father had been issued with a deportation order dated before the births of his Irish children. The father was deported to Nigeria in October 2004, returned to Ireland illegally, and was arrested in June 2007 and detained under s.5 Immigration Act 1999. This arrest led to a letter being written on the father's behalf seeking residency on the basis of his family and domestic circumstances and parentage of Irish children. The Applicants sought leave by way of judicial review and an injunction to restrain the father's deportation pending the judicial review hearing. The Applicants contended that the Minister had failed to consider the family-based Constitutional and ECHR rights of the mother and children, and submitted that the deportation order should not be executed until those rights had been considered, and that the father should be entitled to remain in the State pending the consideration. The father's various applications contained patent untruths.

**Held** by Peart J. in granting leave to apply for judicial review, that there were arguable grounds for the contention that the Minister had not considered the Constitutional and ECHR rights of the Irish children, and that to remove the father in such circumstances may be in breach of the requirements under s. 3(1) of the European Convention on Human Rights Act 2003, given the State's obligations under Article 8 of the European Convention on Human Rights.

**Held** by the Court in declining the application for an interlocutory injunction, that there was no evidence to show that irreparable loss would be suffered by any of the Applicants should the father be deported, that the matters averred in this regard fell short of demonstrating irreparable loss, that damages would accordingly be an adequate remedy, that purely legal matters arose for determination in the context of which the presence of the father was not required or necessary, that the balance of convenience accordingly favoured not granting the injunction, and that as the father's conduct was egregious, it would require very compelling circumstances, which were absent, for the Court to allow equity to intervene in favour of granting interlocutory relief.

#### **Cases**

*Arsenio v Minister for Justice, Unreported, High Court, 22<sup>nd</sup> March 2007, Charleton J.*

*Bode and Ors v Minister for Justice, Unreported, High Court, Finlay-Geoghegan J., 14<sup>th</sup> November 2006*

*Cosma v Minister for Justice, Unreported, Supreme Court, 10<sup>th</sup> July 2006*

*Lelimo v Minister for Justice [2004] 2IR 178*

*Malsheva v Minister for Justice, Unreported, High Court (ex tempore) 25<sup>th</sup> July 2003, Finlay-Geoghegan J.*

*Oguekwe v Ministe for Justice, Unreported, High Court, Finlay-Geoghegan J., 14<sup>th</sup> November 2007*

*Omatseye v Minister for Justice, Unreported, High Court, 1<sup>st</sup> March 2007, Feeney J.*

*Yau v Minister for Justice (ex tempore) High Court, 14<sup>th</sup> October 2005, O'Neill J.*



### ***FO and Ors v The Minister for Justice and Ors, High Court, McGovern J., 16<sup>th</sup> May 2007***

JUDICIAL REVIEW – LEAVE – CERTIORARI – REFUGEE APPLICATIONS COMMISSIONER - NIGERIA – ERROR OF FACT – ERROR OF LAW - SAFE COUNTRY OF ORIGIN - FAILURE TO SPECIFY GROUND - AFFIDAVITS

#### **Facts**

The Applicants were a Nigerian woman and her two children, one of whom was born in Ireland in August 2005. The first-named Applicant and her older child were refused asylum by the Refugee Applications Commissioner and, on appeal, by the Refugee Appeals Tribunal. The Minister made deportation orders against those applicants. Applications for asylum were subsequently submitted on behalf of the two children. The Minister refused to give consent to the older child to make a fresh application. The Commissioner refused the younger child's application. The Applicants sought leave to apply for judicial review for an order of certiorari quashing the decision of the Commissioner recommending that the younger child be refused asylum on various grounds including, *inter alia*, that there was a fundamental error of law and fact in the Commissioner's s. 13 report in that it stated that Nigeria had been designated a safe country of origin, when it had not been so designated.

**Held** by McGovern J. in granting leave to apply for judicial review by way of certiorari, that there were substantial grounds for the Applicants' contention that the Commissioner considered the application on the basis of a fundamental error of fact which gave rise to a presumption under s. 11A of the Refugee Act, 1996, notwithstanding that the matter was raised for the first time in the Applicant's legal submissions. The Court also stated that information averred to by an employee of the Commissioner's office on behalf of the Commissioner should have come from the Authorised Officer of the Commissioner. The Court directed that an affidavit dealing with the issue be furnished to the Court from the Commissioner who determined the application.

#### **Cases**

*McGoldrick v An Bord Pleanala [1997] 1 IR 497*

*Stefan v The Minister for Justice, The Supreme Court*

*The State (Abenglen) v Dublin Corporation [1984] IR 381*

### ***John Stanley BL***



## Reflections from a European Perspective on Intolerance towards Muslims

by *Ambassador Ömür Orhun*,

Personal Representative of the OSCE Chairman-in-Office on Combating Intolerance and Discrimination against Muslims

*In March of this year the National Consultative Committee on Racism and Interculturalism and the British Council co-hosted in the Morrison Hotel a Roundtable Discussion on Issues Facing British and Irish Muslims. The Roundtable Discussion closed with the following Reflections from Ambassador Ömür Orhun.*

We live in a globalized world. Different forms and shapes of globalization have changed our societies and have brought about new challenges. One of these challenges is ignorance; ignorance about the other; ignorance of other peoples, cultures, religions. And ignorance leads to fear, mostly based on false premises. Ignorance of this kind can only be overcome through dialogue, education and understanding. Coming to the topic on hand, I would like to make some closing reflections based on five I's and one F.

### **I- Image of Islam and Muslims in the West:**

Although there are some who argue to the contrary, I reject the notion that Islam is the enemy of the Western civilization. In that respect, it must also be underlined that Islam and Muslims are not a monolithic entity prone to all kinds of extremism. On the other hand, we have to make a distinction between those who claim that Islam is a threat to the West, and those who advocate that Islam is a challenge to the West. As one of the three Abrahamic religions, Islam of course is not a threat; but it may be a challenge, since Islam and Islamic countries have the potential of coming to terms with the modern contemporary world. In that sense, the Islamic world is in a vibrant process of recovering its true identity and intellectual heritage. In short, Islam and Muslims cannot be considered as a distant phenomenon, but their presence in the West is now an undeniable fact.

### **II- Identification of the Problem:**

Despite all efforts for the protection and promotion of human rights, acts related to racism, xenophobia and discrimination, as well as related intolerance persist in all societies. The resurgence of intolerance and discrimination against Muslims, especially after September 11, coupled with related racist tendencies challenge the exercise of fundamental human rights and freedoms of Muslims particularly in the Western countries. In spite of tangible progress in elimination of institutionalized and structured forms of discrimination, many countries still experience new and mounting waves of bias, exclusion and violence against Muslim groups and peoples. Different international organizations have recognized the need to struggle against all forms and manifestations of discrimination and intolerance, and have significantly strengthened their profile in this respect. As I just mentioned, Muslim communities in Western Europe and North America are experiencing an increasingly hostile environment towards them. This environment is characterized by suspicion and prejudice at times going back to history; ignorance; negative or patronizing imaging; discrimination including in housing and employment; stereotyping all Muslims or Islam in general as "terrorist, violent or otherwise

unfit"; lack of provision, recognition and respect for Muslims in public institutions; and attacks, abuse, harassment and violence directed against person perceived to be Muslim and against mosques, Muslim property and cemeteries. Although personally I do not like that term, this phenomena is called Islamophobia, which can also be defined in short as "fear or suspicion of Islam, Muslims and matters pertaining to them". Islamophobia has existed for a very long time, albeit in a rather subdued form, and is deeply rooted in prejudice. However, it became a topical issue since 2001, with devastating effects not only on the lives of the Muslim communities, but also on the societies where they live. Islamophobia, whether in the shape of intolerance and discrimination, or whether in the form of violence, is a violation of human rights and is a threat to social and political cohesion. It is obvious that Islamophobia is seen in countries where Islam is not observed by the majority of the population. All major international human rights organizations have recognized that negative connotations of Islamophobia may lead to exclusion and self-exclusion of especially younger generations, with obvious negative results in terms of self esteem and social integration. It is also acknowledged that, persistent forms of Islamophobia and in particular its repercussions through the mass media represent a threat to peace, stability and democracy.

### **III- Identification of the root-causes:**

- a) *Structural root-causes:-* Formal relations or lack of such relations between the State and the Muslim communities - A vicious circle – or catch 22: "lack of proper knowledge of the language of the country of residence, improper housing, improper or insufficient education, leading to unequal access to the labor market" - Net result: sense of being rejected, stigmatization, marginalization, leading to lack of confidence in the State. (Such people are more prone to crime and illegal activities, as well as more susceptible to radical propaganda.)
- b) *Perceptual and behavioral root-causes:*
  - prejudice - also against persons perceived to be Muslim
  - negative sentiments and display of such sentiments
  - media coverage - misrepresentation
  - political discourse - especially by the far right, but recently by moderates also. (In order to illustrate this phenomenon, let me quote from an editorial published in the International Herald Tribune late last year: "Europe appears to be crossing an invisible line regarding its Muslim minorities: More people in the political mainstream are arguing that Islam can not be reconciled with European values...For years, those who raised their voices were mostly on the far right. Now those normally seen as moderates – ordinary people as well as politicians – are asking whether once unquestioned values of tolerance and multiculturalism should have limits. 'It has become politically correct to attack Islam, and this is making it hard for moderates on both sides to remain reasonable.'")

- c) Discriminatory practices:
- first point: no reliable monitoring (and in some countries only discrimination related to race is monitored)
  - a striking example of discrimination is the loyalty (or conscience) tests applied only to Muslims who want to acquire citizenship
  - as mentioned before, housing and employment are two major areas where discrimination occurs (not even considering Muslim sounding names for job interviews)
  - lack of proper places of worship and burial facilities
  - headscarf ban in restaurants and other such public places
  - police practices –search and arrest; customs entry procedures, etc.
  - harassment, vandalism and attacks only because he/she is a Muslim or perceived as such.

#### IV- Identification of the Remedies:

- a) The historical, cultural and psychological depth of the issue of discrimination and intolerance needs always to be taken into full consideration.
- b) A sound normative framework to combat intolerance and discrimination both in the international and national fora does exist; what is needed is to put this normative framework into full use and implementation.
- c) There is also a need for an intellectual and ethical strategy to avoid political exploitation of the issues related to discrimination and intolerance.
- d) Discrimination and intolerance against Muslims is not only a matter of discrimination against a specific religious group, but it also deeply affects international relations as well as the internal stability of Western societies. As such, it is a multifaceted question and must be addressed through a holistic approach.
- e) Various forms of intolerance and discrimination need not be subject to an artificial hierarchy. Discrimination is discrimination and must be condemned and dealt with whatever the underlying motive might be. Within this framework, there should be complementarity between efforts dealing with different forms of discrimination.
- f) The quality of life of Muslims living in Western societies must be improved. This will lead to better understanding and better integration, thus to lessening of mutual mistrust.
- g) Muslims should not be seen as second class citizens, must not be demonized, marginalized, feared or despised.
- h) The war on terror must not become a war on Muslims.
- i) It should be recognized that Muslims have the same basic needs and desires as others, which are material well-being, cultural acceptance and religious freedom, without political or social intimidation. In that vein, Muslims should not be marginalized or attempted to be assimilated, but should be accommodated. Accommodation is the best strategy for integration.

#### V- Implementation:

Having the best doctor to diagnose a sickness, undertaking a thorough medical check-up to understand the pathological history of the patient and agreeing on the best treatment is of course not enough. One must administer these drugs efficiently and timely to cure the sickness. Therefore, first of all governments, societies and peoples must recognize the problem and be ready and willing to adopt a multifaceted approach. Secondly, they must take account of the importance of the intellectual front in the fight against intolerance and discrimination against Muslims and devise a sound strategy in the fields of value systems and perceptions. Thirdly, they must define hate crimes broadly and address the information deficit. (That is to say, collect, analyze and disseminate information related to hate crimes) Fourth, they must enact adequate legislation and implement this legislation effectively. In conjunction with national legislation, they should also implement international commitments and agreed norms. Fifth, clear criteria for reporting and registering of hate crimes must be established and reporting of hate crimes must be encouraged. Sixth, they should build the capacity of Muslim communities and civil society organizations and try to enable them to work with local and national authorities. In this respect, community outreach programs will be of great use in confidence building and in creating community cohesion. (Sense of living together.)

Another point that deserves utmost importance is education. Especially younger generation should be provided with educational programs that would foster tolerance, understanding and respect to “the other.” Related to education is of course training of law enforcement officials. Furthermore, in the field of public discourse related to Muslims and Islam, two points need to be underlined:

a) Political rhetoric: Responsible politicians, both of the government and of the opposition, must underline the importance of correct and unbiased discourse and should also refrain from hate speech and other manifestations of extremism and discrimination. A message of encouraging tolerance, non-discrimination, understanding and respect to all must be voiced.

b) The media: The media can play a positive role in promoting inter-cultural and inter-religious dialogue and harmony. This is what is expected from responsible journalism. On the other hand, the media may also play a very negative and divisive role in projecting wrong and inaccurate messages. Therefore, with due respect to the freedom of expression, governments can assist or encourage creation of self-regulatory media bodies to deal with manifestations of discrimination and racism.

Finally, integration policies. The more Muslim communities will feel at home and will be truly integrated to the Western societies where they live, the easier it will be to marginalize extremism, to defuse radicalism and to overcome the perceptions of being left-out, being stigmatized and being rejected. It is argued, and rightly so, that Europe has not been successful in its bid for integration. While the objective was to create multi-cultural societies, instead parallel, but mutually exclusive societies were born. How to remedy this situation, which can also be characterized as cultural ghettos for Muslims? I believe civic and structural integration is the

answer. Muslim migrants must have a sense of being part of the larger community in which they live, take part in all parts of life and participate in the decision making process. In other words, creating cohesive societies, where mutual understanding between diverse groups will facilitate not only the promotion of tolerance, but more importantly mutual respect for differing view points and backgrounds. The key word here is “mutual”. The Muslim communities, on the other hand, must shoulder their share of the burden, adopt the civic values of their new societies and distance themselves from radicalism and terrorism. The real threat to tolerance and to multi-cultural societies emanates from the extremes of both groups. And here the governments and the public must remain vigilant. For peaceful co-existence to become a reality we must reach those groups who do not wish to engage in dialogue and we must educate those who do not wish to learn or understand or accept the diversity that characterizes the Western societies.

#### VI- Finally, follow-up:

The current political agenda is very much dominated by the necessity to ensure peaceful coexistence between different ethnic, racial and religious groups. As such, our operational instruments must be geared towards reducing and eventually eliminating discrimination as a source of tension, while promoting tolerance. In that respect, a sound follow-up of the measures enumerated above is a must. The first thing we must do should be reaching out across the barricades that exist or that some want to place between the Muslim communities and the rest.

We should avoid being at the wrong end of racism and Islamophobia. We should recognize that even cruel words and dismissive gestures are instrumental in creating barricades of prejudice. As the former Secretary General of the United Nations Mr. Kofi Annan stated, we must “unlearn intolerance.” No one can or should be neutral in the fight against intolerance and discrimination.



### UNHCR releases study on Qualification Directive

UNHCR has released a study on the implementation of the European Union's 'Qualification Directive'. The study looks at how key provisions of this directive are implemented in five EU member states (France, Germany, Greece, Slovak Republic and Sweden) which together received nearly 50 percent of all asylum applications in the EU last year.

It concludes that, while the consistency of decision-making among member states has improved on some issues, there are still great differences on others. The report concludes that much more needs to be done if the EU is to achieve a common approach to asylum claims.

Between March and July this year, UNHCR-appointed researchers examined more than 1,400 individual asylum decisions and interviewed officials, lawyers and representatives of non-governmental organizations. The asylum decisions concerned applicants from countries such as Afghanistan, Colombia, Iraq and the Russian Federation.

The report, ‘Asylum in the European Union – A Study of the Implementation of the Qualification Directive’, can be accessed at

<http://www.unhcr.org/protect/PROTECTION/47302b6c2.pdf>

## The rise of Anti-Semitism in Europe



by Patrick Dowling, RDC

### Introduction

This paper focuses on the rise of anti-Semitism in Western Europe, particularly among Islamist extremists and the impact of events in the Middle East. Other perpetrators of anti-Semitism exist and will be mentioned in this paper but remain outside the principal focus. It must be noted too that, while anti-Semitism has increased among Muslims, it is among extremists of that population where such acts derive.

### Muslim Population

Islam is the fastest growing religion in Europe “...and nearly 20 million people in EU countries identify themselves as Muslims”.<sup>52</sup> Muslims have become “...the largest religious minority in Europe, and... substantial...populations exist in Western European countries, including France, Germany, the United Kingdom, Spain, Italy, the Netherlands, and Belgium”.<sup>53</sup> Mosques are found in many cities and towns in

“...western Europe. In Copenhagen, for example, Muslims today account for 10% of the population; in Sweden they account for close to 4% of the population...If present demographic trends continue, Marseilles will very soon become the first western European city with an Islamic majority. By comparison, there is no country in Western Europe in which the Jewish population, with its far higher profile, accounts for any more than a small fraction of the local Muslim population. The fact is that most Europeans are today far more likely to encounter Muslims than Jews”.<sup>54</sup>

### Middle East conflict

The collision of Muslims and Jews in Europe echoes their origin in the Middle East; and has brought that conflict into Europe which has had serious implications for the Jewish population. “...[I]n recent years the Middle East conflict has been played out on the streets of Europe - mainly in acts of violence directed against Jews and Jewish institutions”.<sup>55</sup> The ceaseless violence in the Middle East has been embraced by the extremists among Europe’s Muslim communities as a reason to deride the Jews. “The...Middle East conflict has had an impact on the growth of anti-Semitism in Europe. Although it is not the sole cause, the Israeli-Palestinian conflict continues to fuel anti-Semitic violence in Europe.

<sup>52</sup> World Jewish Congress, ( May 2001 ), *The Ascendance of Islam in Europe: The "Al-Aqsa Intifada" reveals the new, high profile of European Islam and its potential for anti-Semitic violence*  
[http://www.worldjewishcongress.org/instwjc\\_dispatch.html#](http://www.worldjewishcongress.org/instwjc_dispatch.html#)

<sup>53</sup> CRS, ( 29 July 2005 ), *Islamist Extremism in Europe*  
<http://www.fas.org/sgp/crs/terror/RS22211.pdf>

<sup>54</sup> World Jewish Congress *op.cit*

<sup>55</sup> *ibid*

This is especially the case among immigrants in European cities”.<sup>56</sup>

There has been “...a rise in anti-Semitic activities ...in most of the EU Member States since the beginning of the so-called al-Aqsa Intifada, which...points to a connection between events in the Middle East with criticism of Israel’s politics on the one hand and mobilisation of anti-Semitism on the other “.<sup>57</sup> And while this anti-Semitism among “...European Muslim communities is directly linked with the Israeli-Palestinian conflict and especially the current crisis that began in 2000...there is also some research evidence that European anti-Semitic stereotypes have in recent decades gradually been adopted by sections of Muslim communities...”.<sup>58</sup> Therefore Islamist extremists not only seek to carry on the ancient Middle East tribal hatreds but have additionally borrowed the garb of the worst of European Christian treatment of Jews. And these acts of anti-Semitism among Islamist extremists are more prevalent among the younger, immigrant population newly arrived to Europe. This “...increase in anti-Semitic violence directly linked to the conflict in the Middle East...[can] stem...from young Muslims born of the first and second generations of immigrants and perfectly well integrated. Lacking direct contact with events that are often foreign to them, they are influenced by forceful anti-Semitic propaganda encountered on the Internet and certain Arab television channels”.<sup>59</sup>

#### Rise of anti-Semitism

In Europe there has been a displacement of the former principal aggressor towards Jews. “It is not anymore mainly the extreme right that are seen to be responsible for hostility towards Jewish individuals or property (or public property with a symbolic relation to the Holocaust or to Jews) – especially during the periods when registered incidents peak. Instead, victims identify “young Muslims”, “people of North African origin”, or “immigrants” “.<sup>60</sup> Examples from France and Denmark which have seen a significant rise in their respective Muslim populations attest to this change.

“In some countries – e.g. France and Denmark – the NFPs [National Focal Points] conclude that there is indeed evidence of a shift away from extreme right perpetrators towards young Muslim males. In France the Human Rights Commission (CNCDH) notes that the percentage of anti-Semitic violence attributable to the extreme right was only 9% in 2002 (against 14% in 2001 and 68% in 1994). The CNCDH concludes that the revival of anti-Semitism can be

<sup>56</sup> Council of Europe Parliamentary Assembly, ( 27 June 2007 ), *Resolution 1563 ( 2007 )Combating anti-Semitism in Europe*  
<http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/ERES1563.htm>

<sup>57</sup> EUMC, ( 20 February 2003 ), *Manifestation of anti-Semitism in the European Union*  
<http://www.infopartisan.net/document/antisemitismusstudie.pdf>

<sup>58</sup> EUMC, ( 2006 ), *Anti-Semitism, Summary overview of the situation in the European Union 2001-2005*  
[http://fra.europa.eu/fra/material/pub/AS/Antisemitism\\_Overview\\_December\\_2006\\_en.pdf](http://fra.europa.eu/fra/material/pub/AS/Antisemitism_Overview_December_2006_en.pdf)

<sup>59</sup> Mikhail Margelov, ( 4 June 2007 ), *Combating anti-Semitism in Europe*, Council of Europe Parliamentary Assembly,  
<http://www.assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc07/EDOC11292.htm>

<sup>60</sup> EUMC, ( 2003 ), *Manifestation of Anti-Semitism in the EU 2002-2003, Executive Summary*  
[http://www.europarl.europa.eu/studies/eumc\\_report/eumc\\_summary\\_en.pdf](http://www.europarl.europa.eu/studies/eumc_report/eumc_summary_en.pdf)

attributed to the worsening of the Israeli Palestinian conflict, notably in the spring of 2002, corresponding with the Israeli army offensive in the West Bank and the return of suicide bombings to Israel. Anti-Semitic acts are ascribed by the CNCDH to youth from neighbourhoods sensitive to the conflict, principally youth of North African heritage. In Denmark, according to the NFP, the perpetrators of anti-Semitic acts were traditionally to be found amongst the groups of the so-called “Racial revolutionaries”. However, for the years 2001/2002, from the reports of the Jewish Community in Denmark, victims and witnesses of anti-Semitic acts now typically describe “young males with Arabic/Palestinian/Muslim background” as being the main perpetrators”.<sup>61</sup>

And the conclusion drawn is that the increase in anti-Semitism in Europe has much to do with Islamist extremists:

“The reports of the NFPs have not only shown that some countries have perceived an increase in anti-Semitic incidents during the last years, but that this increase was also to some extent accompanied by a change in the profiles of perpetrators reported to the data collecting bodies. Particularly in Belgium, Denmark, France, Germany, the Netherlands, Sweden, and the UK, it is no longer solely or predominantly the extreme right that is named as alleged perpetrators of anti-Semitic incidents; a varying proportion of victims of hostility in these countries classified perpetrators to be “young Muslims”, “people of North African origin”, or “immigrants” “.<sup>62</sup>

The UK, France, Belgium and The Netherlands have “...witnessed numerous physical attacks and insults directed against Jews and vandalism of Jewish institutions (synagogues, shops, cemeteries). In these countries the violent attacks on Jews and/or synagogues were reported to be committed often by members of the Muslim-Arab minority, frequently youths...”.<sup>63</sup>

#### Islamist Anti-Semitism

In Western Europe it has been reported that “[p]hysical attacks on Jews and the desecration and destruction of synagogues were acts often committed by young Muslim perpetrators...”<sup>64</sup> And perpetrators of an Islamic background “...are more highly represented than in the European population as a whole [in carrying out Anti-Semitic acts]”.<sup>65</sup> This is an anti-Jewish “...sentiment expressed by some in Europe’s growing Muslim population, based on longstanding antipathy toward both Israel and Jews, as well as Muslim opposition to developments in Israel and the occupied territories, and more recently in Iraq”.<sup>66</sup>

<sup>61</sup> *ibid*

<sup>62</sup> *ibid*

<sup>63</sup> EUMC, ( 20 February 2003 ), *Manifestation of anti-Semitism in the European Union*

<http://www.infopartisan.net/document/antisemitismusstudie.pdf>

<sup>64</sup> *ibid*

<sup>65</sup> The Stephen Roth Institute for the Study of Contemporary Anti-Semitism and Racism *op.cit*

<sup>66</sup> US Department of State, ( 5 January 2005 ), *Report on Global Anti-Semitism*

This development of anti-Semitism had been called a new anti-Semitism because of the change in aggressor towards Europe's Jews. International analysts are quoted by the European Jewish Congress in a recent report:

"...a 'new anti-Semitism', that has been primarily responsible for attacks on European Jews, at times replacing extreme-right violence. This 'new form' is "characterized primarily by the vilification of Israel and perpetrated primarily by members of Europe's Muslim population."...Europeans of North African and Arab origin did carry out a large number of these acts in countries where there is such a population".<sup>67</sup>

Recent violence in the Middle East "...was marked by a parallel outbreak of violence against Jews and other Jewish targets unprecedented since the end of the Second World War. Jews were attacked; Jewish institutions desecrated and even destroyed...these attacks were not directed against well-guarded Israeli institutions, but against Jews. In most instances this violence has been traced to Islamic radicals who have openly proclaimed that all Jewish targets, wherever they may be, are fair game".<sup>68</sup> These radicalised young Muslims "...are the major perpetrators of anti-Semitic acts. This is the case not only in France but also in Belgium, The Netherlands, Sweden, and increasingly in Great Britain".<sup>69</sup>

### Conclusion

Anti-Semitism is not new to Europe and indeed existed well before the present demographic change involving Muslims but its present form is new. "That anti-Semitic offenders in some cases are drawn from Muslim minorities in Europe – whether they be radical Islamist groups or young males of North African descent – is certainly a new development for most Member States..."<sup>70</sup> Some extremists have used European freedom to advance causes that incite hatred: "In the democratic systems of western Europe, Muslims have been free to establish the entire gamut of social and communal institutions that exist in their countries of origin - and in some instances even some that have been banned there because of their opposition to the regime in power. Unfortunately, it also means that the extremists within their camp, under the guise of freedom of speech and assembly,

<http://www.state.gov/g/drl/rls/40258.htm>

<sup>67</sup> Memorandum submitted by the European Monitoring Centre on Racism and Xenophobia, the All-Party Parliamentary Inquiry into Antisemitism, All-Party Group Against Antisemitism, September 2006 quoted in European Jewish Congress, ( 15 November 2006 ), *Anti-Semitic Incidents and Discourse in Europe During the Israel-Hezbollah War*

[http://www.eurojewcong.org/ejc/DOC/601\\_AS\\_report.pdf](http://www.eurojewcong.org/ejc/DOC/601_AS_report.pdf)

<sup>68</sup> World Jewish Congress *op.cit*

<sup>69</sup> Robert Wistrich, ( 1 October 2004 ), "Something is Rotten in the State of Europe" *Anti-Semitism as a Civilizational Pathology, An Interview with Robert Wistrich*, Post-Holocaust and Anti-Semitism, Jerusalem Center for Public Affairs

<http://www.jcpa.org/JCPA/Templates/ShowPage.asp?DRIT=3&DBID=1&LNGID=1&TMID=111&FID=253&PID=0&ID=636&TTL=>

<sup>70</sup> EUMC *op.cit*

have been able to create organizations that foment violence and hatred...[within] the...countries in which they have found sanctuary".<sup>71</sup> And these anti-Semitic acts committed by this younger generation of Muslims have differentiated themselves from their forebears who lived in Europe. Since the most recent Palestinian uprising began in 2000 "the number of incidents of anti-Semitic violence in Europe has trebled. The bulk of these have been attributed to Muslims who wish to demonstrate their solidarity with their Palestinian Arab brethren. This development underscores the Islamic presence in Europe. Over the last decades the Muslim population in Europe has expanded dramatically. Until recently, that population kept a low profile, but the younger generation, much of it European-born, has been flexing its muscles and asserting itself in ways that would have been unimaginable to its parents".<sup>72</sup>

The impact of two groups of Europe's minorities, Muslims and Jews, upon each other derives from "...the precarious situation of a conflict that is primarily motivated by foreign affairs but played out on the domestic front, a conflict in which the members of one minority discriminate against another minority group".<sup>73</sup> And it has led to the return of an ancient hatred in Europe where far "...from having been eliminated, anti-Semitism is today on the rise in Europe".<sup>74</sup>

For individual Jews a spokesperson posits the following test which can be representative for Europe as a whole, given the rise of anti-Semitism. "In view of the escalation of assaults on identifiable Jews in the streets of Europe, Gideon Joffe, head of the community in Berlin – where in 2006 anti-Semitic incidents occurred on a daily basis – proposed 'a kippa-test'. He suggested that those who wanted to experience what it felt like to be recognized as a Jew in the streets of Berlin should wear a kippa and/or a Star of David. According to Joffe, Jewish pupils were harassed and assaulted by Muslims as well as by non-Muslims".<sup>75</sup>

<sup>71</sup> World Jewish Congress *op.cit*

<sup>72</sup> *ibid*

<sup>73</sup> EUMC *op.cit*

<sup>74</sup> Mikhail Margelov *op.cit*,

<sup>75</sup> The Stephen Roth Institute for the Study of Contemporary Anti-Semitism and Racism *op.cit*



## African Migrants Seeking Entry to Europe



The Spanish coastguard intercepts a traditional fishing boat laden with migrants off the island of Tenerife in the Canaries. (Photo: UNHCR/A. Rodriguez/July – October 2007) Despite considerable dangers, migrants seeking a better future and refugees fleeing war and persecution continue to board flimsy boats and set off against the high seas. One of the main routes into Europe runs from West Africa to Spain's Canary Islands. Although only a small proportion of the almost 32,000 people who arrived in the Canary Islands in 2006 applied for asylum, the number has gone up. More than 500 people applied for asylum in 2007, compared with 359 the year before, according to UNHCR.



Weary immigrants on a fishing boat intercepted by the Spanish coastguard off the island of Tenerife. (Photo: UNHCR/A. Rodriguez/July – October 2007)



Every year hundreds of men, women and children drown in a desperate bid to reach European Union countries. The Italian island of Lampedusa is just 290km off the coast of Libya. In 2006, UNHCR say that some 18,000 people crossed this perilous stretch of sea – mostly on overcrowded inflatable dinghies fitted with an outboard engine. (Photo: A Di Loreto/July 2007)

## The Mungiki of Kenya – Religious Sect or Criminal Gang?



*David Goggins Investigates*

### Introduction

The Mungiki of Kenya is a secretive group which has variously been described as a religious sect, a cultural movement, a political organisation and a criminal gang. The Mungiki draws its membership entirely from the Kikuyu, which is the largest ethnic group in Kenya. It is not known exactly how many Mungiki there are, but there have been claims made by the group that it has up to two million members. The Nairobi-based newspaper The East African Standard explains the origin of the name “Mungiki” as follows:

“The name Mungiki is a corruption of the Kikuyu word for muing-ki, or multitude. It could also mean everybody. The word signifies support for the group as a mass movement.”<sup>76</sup>

### Principal Beliefs of the Mungiki

When the Mungiki first came into prominence it presented itself as a religious movement dedicated to the restoration of traditional African beliefs and tribal values. It was strongly opposed to western values, to modernisation, and in particular to Christianity, which was seen as a cultural manifestation of Western civilisation that perpetuated neo-colonialism. Instead, Mungiki prayed towards Mount Kenya, which was supposedly the home of a god named Ngai. Mungiki members were noted for taking snuff and for wearing dreadlocks, and were said to be initiated into the sect in secret ceremonies which involved the taking of oaths. As their symbol the Mungiki choose a red, green, black and white flag. However, despite their posturing as a traditional religious sect the leadership of the Mungiki has at times embraced both Islam and born-again Christianity, giving rise to the suspicion that their religious convictions are less than genuine. In an interview with the Sunday Nation Ndura Waruinge, the sect's former national co-ordinator, admitted:

“We joined Islam because we wanted to look for a place to hide. We were only searching for cover. We also wanted to remove the tribal tag that it (Mungiki) was a Kikuyu organisation.”<sup>77</sup>

### Early History

The origin of the Mungiki is shrouded in secrecy, although it was thought to have been founded around 1987. The sect supposedly began as a local militia protecting Kikuyu farmers involved in land disputes with other ethnic groups, and was said to have been inspired by the Mau Mau fighters who opposed British colonial rule. During the 1990s the Mungiki extended their influence into those areas of Nairobi

<sup>76</sup> East African Standard (6 March 2002) *Who are the Mungiki?* Miring'uh Eliud

<sup>77</sup> Nation, The (24 June 2007) *How Mungiki Leaders And Mau Mau Veterans Met Top Political Leaders*

which had a largely Kikuyu population, especially the informal settlement of Mathare, where it recruited its membership from those youths who were disillusioned with the failure of post-colonial governments to provide them with an acceptable standard of living. It was during this decade that the Mungiki evolved from a purely cultural movement into what is allegedly an organised criminal gang involved in murder, kidnapping, extortion and intimidation. In particular, the Mungiki were accused of using violent tactics to gain control of Nairobi's public transport system, which led to clashes with the operators of the local Matatu minibuses in which many people were killed. A BBC News report on the Mungiki states:

"Mungiki followers have been demanding protection fees from public transport operators, slum dwellers and other businessmen in Nairobi. Those who refuse are often brutally murdered."<sup>78</sup>

In October 2001 the BBC reported that four "minibus touts" had been hacked to death by the Mungiki.<sup>79</sup>

They also became involved in increasingly violent clashes with the police. The Mungiki were banned in March 2002 after its members beheaded 21 people following clashes with a rival gang called the Taliban.<sup>80</sup> There have been suggestions that the real reason for the ban was Mungiki support for certain politicians in the 2002 presidential and parliamentary elections.

#### **Involvement in 2002 Elections**

It has been alleged that, despite their acts of extreme violence, the Mungiki enjoyed impunity for their actions because they could be relied on at election time to support the ruling KANU party.<sup>81</sup>

The African Church Information Service describes a demonstration in Nairobi during the 2002 election campaign as follows:

"The police stood by as the club, machete, and sword-wielding Mungiki members took charge of the city centre. People were baffled at how such a volatile and outlawed group could easily chant around the streets carrying crude weapons without police interference. But there was an answer. The Mungiki were simply responding to a challenge by two former members of Parliament and ardent KANU supporters, Mr. Kihika Kimani and Steven Ndichu, that they 'parade up and defend KANU'. Silence from the then government gave the impression that it tacitly supported the idea."<sup>82</sup>

<sup>78</sup> BBC News (22 June 2007) *Kenya murders after sect jailing*

<sup>79</sup> BBC News (9 October 2001) *Four die in Nairobi minibus wars.*

<sup>80</sup> The Taliban has no connection to the Afghan group of that name, but is instead a criminal gang which draws its members from the Luo ethnic group.

<sup>81</sup> KANU (Kenya African National Union) was the party which ruled Kenya from independence in 1963 until the 2002 elections when it was defeated by a coalition of all the opposition parties.

<sup>82</sup> African Church Information Service (3 February 2003) *Mungiki: A Mysterious Sect, a Thorn in the Flesh*

However, despite fears that the Mungiki might try to intimidate voters the elections held on 27 December 2002 were free of violence.

Amnesty International has stated:

"Leaders of the group have at various times publicly alleged that the group has had tacit support from individual prominent government officials in the previous and current governments. Although alleged leaders of the group have in the recent past threatened to publicly name some of these government officials they are yet to do so."<sup>83</sup>

#### **Mathare**

Although originally a rural organisation, the Mungiki is now believed to have its strongest support among the Kikuyu population of the Nairobi district of Mathare. IRIN News describes conditions in Mathare as follows:

"According to the United Nations Centre for Human Settlement (Habitat), Mathare is one of Africa's largest, most overcrowded slums, with more than half a million people living there. Most of Mathare's residents live in one room dwellings, accommodating four to six people. The dwellings are very close to each other. Urban services are basic, while morbidity and mortality rates are high."<sup>84</sup>

The Mungiki are believed to have broad support in Mathare despite numerous reports of the group extorting money from the inhabitants. This is largely due to the sect illegally supplying electricity and water to people who otherwise could not afford either. The Mungiki are also said to provide protection from other gangs.

In November 2006 BBC News reported that a dusk-to-dawn curfew had been imposed on Mathare after several days of gang warfare between the Mungiki and their Taliban rivals resulted in four people being hacked to death and hundreds more fleeing from their homes.<sup>85</sup>

An indication that there are elements in Mathare who are opposed to the Mungiki came in August 2007 when it was reported that Mungiki members had been injured by unidentified attackers who also set fire to the houses of alleged sect members.<sup>86</sup>

#### **Female Genital Mutilation (FGM)**

Perhaps the most controversial traditional Kikuyu practice advocated by the Mungiki is that of female genital mutilation (FGM), especially as the sect has called for this to be carried out by force. In April 2002 The East African Standard reported:

"Members of the Mungiki sect in some parts of Kiambu district have issued a three-month ultimatum to all women

<sup>83</sup> Amnesty International (11 June 2007) *Kenya: Police operations against Mungiki must comply with Kenya's obligations under international human rights law*, AI Index: AFR 32/008/2007

<sup>84</sup> IRIN News (10 November 2006) *Kenya: Thousands flee clashes in Nairobi slum*

<sup>85</sup> BBC News (8 November 2006) *Kenyan flee deadly gang battle*

<sup>86</sup> BBC News (30 August 2007) *Kenyan gang attacks slum dwellers*

between 13 and 65 years who have not undergone circumcision to do so. The sect members have given women in parts of Kikuyu and Kiambaa divisions until July 7, commonly known as Sabasaba, to undergo the Kikuyu customary exercise failure to which they will perform it by force.”<sup>87</sup>

The Mungiki have also been held responsible for attacks in which women who wear trousers have been stripped naked in public.

#### **Police Response to the Mungiki – Use of Excessive Force?**

In early 2007 the Mungiki reportedly increased the sum demanded from the operators of the Matatu minibuses, which are Nairobi’s main form of public transport. These operators grouped together and refused to pay, and as a result scores of them were murdered in especially gruesome circumstances.<sup>88</sup>

The police responded to this upsurge in violence by arresting or killing large numbers of suspected Mungiki. This violence was not all one-sided, with the Mungiki been accused of killing 15 police officers during the period April to June 2007.

In June 2007 the police launched “Operation Kosovo”, in which the Mungiki stronghold of Mathare was cordoned off before a force of 500 heavily armed officers, drawn mainly from the paramilitary General Service Unit, was sent in to hunt down suspected sect members. A number of gun battles ensued, with reports that 37 people were killed.<sup>89</sup> During this operation a police spokesman said:

"Anybody who attempts to obstruct police from enforcing law and order is in for a big surprise. Mungiki is a dangerous group and we shall deal with them ruthlessly."<sup>90</sup>

The Kenyan National Commission on Human Rights issued a report in November 2007 which alleged that the police were responsible for the deaths of more than 450 suspected Mungiki members over the previous five months. More controversial is a report released on 24 November 2007 by the Oscar Foundation Free Legal Clinic - Kenya which claims that as many as 8,040 young Kenyans have been executed or tortured to death by the police since the banning of the Mungiki in March 2002.<sup>91</sup>

The attitude of the authorities towards the killing of Mungiki members was shown by the Minister of Internal security on 4 June 2007 when he was reported to have said:

“We will straighten them and wipe them out. I cannot tell you today where those who have been arrested in connection with the recent killings are. What you will be hearing is that there

<sup>87</sup> East African Standard (22 April 2002) *Get Circumcised, Mungiki Sect Tells Women* Kanja, David

<sup>88</sup> BBC News (9 October 2007) *The rise of Kenya’s vigilantes* Warigi, Gitau (Gitau Warigi is a columnist for the Sunday Nation newspaper in Nairobi)

<sup>89</sup> Nation, The (8 June 2007) *37 Killed in Police Operations* Mukinda, Fred

<sup>90</sup> *ibid*

<sup>91</sup> Associated Press (25 November 2007) *8,040 young Kenyans executed during police crackdown on outlawed sect: report* Odula, Tom

will be burial tomorrow. If you use a gun to kill you are also required to be executed”<sup>92</sup>

#### **Outlook for the Future**

The authorities have repeatedly claimed that they are winning the war against the Mungiki, with Police spokesman Eric Kiraithe saying:

“We can boast the war has been won. A lot of progress has been achieved. The beheadings have disappeared because Mungiki network is virtually dismantled and their (Mungiki members) sources of finance is almost crippled”<sup>93</sup>

The real test of whether or not the Mungiki problem has been brought under control will come when elections are held on 29 December 2007, as there are real fears that certain politicians will incite the group to use violence against their opponents.



#### **ELENA Course on Cessation and Exclusion Clauses, National Security and Non-Refoulement**

ECRE has announced that the next ELENA course will take as its theme, Cessation and Exclusion Clauses, National Security and Non-Refoulement. It will take place in the Royal Olympic Hotel in Athens from 22nd to 24th of February, 2008. The course will examine the exclusion and cessation clauses in the EC Qualification Directive in light of international Refugee and Human Rights law as well as recent developments in relation to the principle of non-refoulement. It will also address the impact of security measures on asylum policy and challenges to the protection of the rights of refugees and asylum seekers. Presentations will be given by Elspeth Guild, Ioannis Papageorgiou, Geoff Gilbert, Maria-Teresa Gil-Bazo, Nuala Mole, Anneliese Baldacini and Raza Husain. For more details see

<http://www.ecre.org/files/ELENA%20Flyer%20Athens%20008.pdf>



<sup>92</sup> Amnesty International (*ibid*)

<sup>93</sup> Nation, The (23 October 2007) *Killings Linked to the War Against Mungiki Sect* Mukinda, Fred

## Recent acquisitions in the RDC library

*Zoe Melling, RDC Librarian*

The RDC library contains a growing collection of books on a range of subjects relevant to COI research. A catalogue of books and other library holdings is available on the Electronic Library (<http://newcoi.lab.ie>), which is accessible to staff of the Refugee Legal Service, Legal Aid Board and asylum organisations that use our query and research service. Members of the public may visit the library for reference purposes. Below is a list of recent additions to the RDC's book collection.

A Long Way Gone: Memoirs of a Boy Soldier, Beah, Ishmael, HarperCollins, 2007  
 Africa, Pitcher, Gemma, Lonely Planet Publications, 2007  
 Africa Road Atlas, Map Studio, 2007  
 African Guerillas: Raging Against the Machine, Boas, Morten and Dunn, Kevin C (eds), Lynne Reinner, 2007  
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 The Caged Virgin: A Muslim Woman's Cry for Reason, Ali, Ayaan Hirsi, Pocket Books, 2007  
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 Unscathed: Escape from Sierra Leone, Ashby, Phil Major, Macmillan, 2002



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