

# The Researcher

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## Welcome to the sixth issue of *The Researcher*.

Many new readers will be accessing *The Researcher* now that it is available on the European Country of Origin Information Network <http://www.ecoi.net/> and we would like to extend a warm Irish welcome to each of you.

In this issue we continue to reflect on matters of concern to those involved in refugee status determination and international human rights law.

Last November the Irish Women Lawyers Association held a conference in Dublin on human trafficking. One of the presentations was given by Brid Moriarty BL and she has kindly written a paper for us based on that presentation, 'Human Trafficking: An Overview of the Legal Provisions'.

In early May of this year the European Legal Network on Asylum (ELENA) held a course in Rome on Asylum Procedures, the EU and International Human Rights Law. A major focus of this course was the Procedures Directive. Jacki Kelly, a solicitor with Refugee Legal Service in Dublin attended the course and has written a paper on the Procedures Directive. Another participant at the ELENA course was John Stanley BL who summarised some of the presentations as well as updating us on 'Recent Developments in Irish refugee and Immigration Law'.

The Refugee Studies Centre in Oxford hosted a seminar on 'Palestinian Refugees and the Universal Declaration of Human Rights' in April. Iain Robertson, a solicitor with Refugee Legal Service in Galway attended the seminar and reports on proceedings.

There are also a number of articles written independent of conferences. Sheila McGovern, a solicitor with the Refugee Legal Service in Cork explores 'The need for guidelines on credibility in the Irish asylum process'. Patrick Dowling examines the situation of a minority group in Iraq, the Yazedi. David Goggins writes about the Karen people of Myanmar. Our new librarian Zoe Melling describes the electronic resources in the RDC library. I look at the treatment of Falun Gong in China.

There are also some short news items: where the Immigration, Residence and Protection Bill now stands; the newly launched Refworld website; and the Framework Document on Medico-Legal Reports for Survivors of Torture. The contents list is now hyper-linked.

As always, we welcome contributions for future issues.

*Paul Daly, Refugee Documentation Centre*

## Contents

- **Human Trafficking: An Overview of the Legal Provisions** P.2
- **The Need for Guidelines on Credibility in the Irish Asylum Process** P.10
- **The Procedures Directive** P.14
- **Palestinian Refugees and the Universal Declaration of Human Rights Seminar** P.18
- **Sympathy for the Devil: The Yazedi in Iraq** P.20
- **Recent Developments in Refugee and Immigration Law** P.23
- **ELENA Conference on EU Refugee Law** P.24
- **Immigration, Residence and Protection Bill: Where does it stand?** P.25
- **Refworld now available online** P.26
- **Framework Document on Medico-Legal Reports for Survivors of Torture** P.26
- **Electronic Resources in the RDC** P.27
- **The Falun Gong** P.28
- **The Karen People of Myanmar** P.32

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## Human Trafficking: An Overview of the Legal Provisions<sup>1</sup>

By *Brid Moriarty, B.L.*

### 1.1 Introduction

The purpose of this paper is to provide an overview of some of the important legal provisions concerned with human trafficking. The Council of Europe has noted that

“Trafficking in human beings is a major problem in Europe today. Annually thousands of people, largely women and children, fall victim to trafficking for sexual exploitation or other purposes, whether in their own countries or abroad. All indicators point to an increase in victim numbers. Action to combat trafficking in human beings is receiving world-wide attention because the trafficking threatens the human rights and the fundamental values of democratic societies”<sup>2</sup>

The US Department of State Trafficking in Persons Report, June 2006, known as the TIP Report estimates that 600 000 to 800 000 men, women and children are trafficked across international borders each year. Approximately 80% of those are women and girls and up to 50% are minors.<sup>3</sup> Human trafficking often involves organised crime groups. It has been estimated that trafficking is the third largest source of money produced by organised crime, after arms and drugs.<sup>4</sup>

One organisation that works with women in prostitution in Ireland, Ruhama, is aware of 200 foreign women who were trafficked into Ireland in the past seven years.<sup>5</sup> The TIP Report, 2007 states that in the last year “Zambian girls were trafficked to Ireland for commercial sexual exploitation”.<sup>6</sup> There is also evidence of trafficking in this jurisdiction for forced labour.<sup>7</sup>

### 2.1 International, European and National Legal Provisions

Two international treaties concerning human trafficking have been agreed in recent years. The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, 2000 supplementing the United Nations Convention Against Transnational Organised Crime, (the Palermo Protocol) laid the foundations for international action on trafficking. The Palermo Protocol, which has been signed but not ratified by Ireland, entered into force on 29 September 2003.<sup>8</sup> The Council of Europe Convention on Action against Trafficking in Human Beings (The Council of Europe Convention) aims to strengthen the protection afforded by the Palermo Protocol and other international instruments. Ireland signed the Council of Europe Convention on 13 April 2007.<sup>9</sup> It has not yet entered into force.<sup>10</sup> The Council of Europe Convention expressly states it does not affect the rights and obligations derived from the provisions of the Palermo Protocol and “is intended to enhance the protection afforded by it and develop the standards contained therein.” Both the Palermo Protocol and the Council of Europe Convention state that they do not affect rights derived from international law in particular Status of Refugees Convention.<sup>11</sup>

Considerable concern about human trafficking is also evident at European Union level. The Brussels Declaration described trafficking in human beings “an abhorrent and worrying phenomenon involving coercive sexual exploitation, labour exploitation in conditions akin to slavery, exploitation in

begging and juvenile delinquency as well as domestic servitude...”<sup>12</sup> In November 2006, the European Parliament backed a report that calls for a “coherent EU strategy to fight human trafficking”<sup>13</sup>. The Report considered that “...measures taken so far to reduce trafficking have not yet yielded results in the form of a reduction in the number of victims...”<sup>14</sup> There is a considerable body of EC/EU texts addressing the issue of trafficking.<sup>15</sup> Unfortunately it is beyond the scope of this article to examine any except two legislative provisions; Council Framework Decision of 19 July 2002 on combating trafficking in human beings and Council Directive 2004/81/EC, of 29 April 2004, on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.

There are few existing Irish legal provisions concerned with trafficking in persons. Legislation is required for Ireland to comply with its international and European Union obligations. Heads of a criminal law bill were published. Provisions to protect victims of trafficking offences are also required. It is proposed to examine the international treaties, the EU/EC legislation and the Irish provisions and draft legislation in turn.

### 3.1 An Overview of the Provisions of the Palermo Protocol and the Council of Europe Convention

#### 3.2 Definitions of Human Trafficking

The Palermo Protocol contains the first internationally agreed definition of the term “trafficking in persons”.

Article 3(a) of the Palermo Protocol defines “trafficking in persons” and certain behaviours which constitute exploitation for the purposes of the definition. It provides

“‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring, or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or removal of organs.”

The text of Article 3(a) involves three elements; acts, means and purpose. The Explanatory Report to the Council of Europe Convention explains the breakdown of the constituent elements of the offence as follows.

“Trafficking in human beings is a combination of these constituents and not the constituents taken in isolation. For instance, ‘harbouring’ of persons (action) involving the ‘threat or use of force’ (means) for ‘forced labour’ (purpose) is conduct that is to be treated as trafficking in human beings. Similarly recruitment of persons (action) by deceit (means) for exploitation of prostitution (purpose).”<sup>16</sup>

Article 3(b) of the Palermo Protocol goes on to state that the consent of a victim of trafficking to the intended exploitation shall be irrelevant where any of the means set forth at

paragraph (a) have been used. Article 3(d) defines a child as any person under the age of eighteen and Article 3(c) provides that “the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered ‘trafficking in persons’ even if this does not involve any of the means set out in paragraph (a).”

Article 4 of the Council of Europe Convention defines trafficking and the definition mirrors the definition in the UN Protocol. The provisions relating to consent, that a child is any person under eighteen and the special protection for children contained in the UN Protocol are also replicated. There is one additional definition, that of victim which is defined as “any natural person who is subject to trafficking in human beings as defined in this article.” The scope of the Council of Europe Convention is wider than the Palermo Protocol<sup>17</sup>. Article 2 provides:

“The Convention shall apply to all forms of trafficking in human beings, whether national or transnational, whether or not connected with organised crime.”

### 3.3 Distinction between ‘Trafficking’ and ‘Smuggling’

The UN has drawn a clear distinction between the smuggling of migrants and trafficking in human beings. Two separate protocols were to the United Nations Convention Against Transnational Organised Crime were agreed: the Palermo Protocol and the Protocol on smuggling migrants by land, air and sea.

Article 3 of the UN Protocol on smuggling migrants provides

“‘Smuggling of migrants’ shall mean the procurement...of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.”

The European Communities Proposal for a Comprehensive Plan to Combat Trafficking stated that the expressions ‘smuggling’ and ‘trafficking’ are often used synonymously and that it was necessary to draw a clear distinction which would also be useful from a law enforcement perspective. The Proposal then referred to the distinction drawn by the UN Protocols and their relationship to illegal immigration.

“These definitions make it clear that smuggling means helping with an illegal border crossing and illegal entry. Smuggling, therefore, always has a transnational element. This is not necessarily the case with trafficking, where the key element is the exploitative purpose. Trafficking involves the intent to exploit a person, in principle irrespective of how the victim comes to the location where the exploitation takes place. This can involve, in cases where borders are crossed, legal as well as illegal entry into the country of destination. Illegal immigration can also include trafficking aspects, but has indeed a wider scope and relates more to the general illegal entry and residence of persons. Illegal immigrants in a wider sense are, therefore, not necessarily victims of traffickers.”<sup>18</sup>

McCreight argues that ‘only smuggling in persons and trafficking in human beings should be considered crimes. Irregular migration, on the other hand could be classified as

situation not to be punished, because it is caused by poverty.’<sup>19</sup>

According to the UN the following distinctions between smuggling and trafficking can be drawn. Firstly, smuggling of migrants, while often undertaken in dangerous or degrading conditions, involves migrants who have consented to the smuggling. Trafficking victims, on the other hand, have either never consented or, if they have initially consented, that consent has been rendered meaningless by the coercive, deceptive or abusive actions of the traffickers. Secondly, smuggling ends with arrival of migrants at destination whereas trafficking involves the ongoing exploitation of the victims to generate illicit profits for the traffickers. Thirdly, victims of trafficking also tend to be more severely affected and in greater need of protection from re-victimisation. Fourthly smuggling is always transnational, whereas trafficking may not be. Trafficking can occur regardless of whether victims are taken to another country or only moved from one place to another within the same country.<sup>20</sup>

The confusion regarding the smuggling and trafficking can be seen in existing Irish legislation, the Illegal Immigrants (Trafficking) Act, 2000, which purports to deal with trafficking but in fact under the UN definition is an anti-smuggling statute. Section 2 provides

“A person who organises or knowingly facilitates the entry into the State of a person whom he or she knows is or has reasonable cause to believe to be an illegal immigrant or who intends to seek asylum shall be guilty of an offence.....”<sup>21</sup>

The TIP Report, 2006 accepts that Ireland complies with the minimum standards for the elimination of trafficking and that the Irish Government has demonstrated strong leadership through tackling trafficking through law enforcement means in 2005 and that new legislation will be more comprehensive.<sup>22</sup> However the TIP Report states that current law “does not clearly define trafficking but rather merges it with smuggling, complicating efforts to count and verify the extent of trafficking in the country.”<sup>23</sup>

### 3.4 Purpose

The purposes of the Palermo Protocol are stated in Article 2:

- (a) To prevent and combat trafficking in persons and to protect victims, paying particular attention to women and children
- (b) To protect and assist the victims of such trafficking, with full respect for their human rights
- (c) To promote cooperation among State parties in order to meet these objectives”

The purposes of the Council of Europe Convention are set out in Article 1:

- (a) to prevent and combat trafficking in human beings, while guaranteeing gender equality;
- (b) to protect the human rights of victims of trafficking, design a comprehensive framework for the assistance of the victim and witnesses, while guaranteeing gender equality, as well as to ensure effective investigation and prosecution;
- (c) to promote international cooperation on action against trafficking in human beings.”

### 3.5 The Three Ps: Prosecution, Protection and Prevention

According to the Council of Europe “[t]o be effective, a strategy to combat trafficking must adopt a multi-disciplinary approach incorporating prevention, protection of human rights of victims and prosecution of traffickers...”<sup>24</sup>, commonly known as ‘the three Ps’. The 2006 TIP Report suggests that a victim-centred approach requires the “three Rs- rescue, rehabilitation and reintegration” to be equally addressed. It is proposed to examine the prosecution, protection and prevention provisions of the Palermo Protocol and the Council of Europe Convention.

### 3.6 Prosecution

Article 5 of the Palermo Protocol require State parties to legislate and take other necessary measures to establish offences of trafficking (the conduct set forth in Article 3, when committed intentionally), attempted trafficking, participating as an accomplice in trafficking and organising or directing other persons to commit an offence of trafficking.<sup>25</sup>

Chapter IV Council of Europe Convention<sup>26</sup> deals with substantive criminal law and requires the criminalisation of trafficking in human beings (the conduct contained in article 4, when committed intentionally), the use of services of the victim, acts relating to travel and identity documents when committed intentionally and for the purpose of enabling the trafficking in human beings, attempted trafficking and aiding and abetting trafficking. The possibility of corporate liability is required. State parties must ensure that the criminal offences established are punishable by effective, proportionate and dissuasive sanctions. There are provision requiring states to set out aggravating factors, which include if the offence was committed against a child, to be taken into account in the determination of the penalty, to provide for the possibility of taking into account final sentences in other States in the determination of the penalty and to provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities to the extent that they have been compelled to do so.

Chapter V of the Council of Europe Convention is concerned with investigations, prosecutions and procedural law. The purpose of this Chapter is two-fold in that it is concerned with adapting Parties’ criminal procedure to protect victims of trafficking and assist prosecution of traffickers. It could therefore equally be considered to fall under the following heading of Protection. Article 27(1) requires Parties to ensure that investigations into and prosecutions of trafficking offences shall not be dependent upon the report or accusation made by the victim. Parties are required to facilitate victims making complaints in their State of residence and to facilitate the support of victims by non-governmental organisations during criminal proceedings concerning the offence of trafficking. Article 28 provides for protection of victims, witnesses and collaborators with the judicial authorities. Article 29 requires Parties to ensure that persons or entities are specialised in the fight against trafficking and the protection of victims. Co-ordination between agencies is required and relevant officials are to be trained. Article 30 requires the protection of victims’ privacy, safety and protection from intimidation in judicial proceedings.

### 3.7 Protection of victims of Trafficking in Persons

Article 6 of the Palermo Protocol requires State Parties to protect victims of trafficking by protecting the privacy and identity of victims of trafficking in persons, including by making legal proceedings confidential, by ensuring the domestic legal or administrative system contains measures to provide information on court and administrative proceedings to victims and assistance to enable the victim’s views to be heard in criminal proceedings and to ensure domestic measure providing for possibility of obtaining compensation. In applying the provisions of Article 6, State Parties are required to take into account the age, gender and special needs of victims (in particular children). States are required to endeavour to provide for the physical safety of victims.

Article 6 of the Palermo Protocol also requires State Parties to consider implementing measures to provide for physical, psychological and social recovery of victims including the provision of housing, counselling and information (in particular as regards legal rights), medical, psychological and material assistance and employment, education and training opportunities. Article 7 requires States to consider allowing victims to remain temporarily or permanently in its territory.

Article 8 requires State parties to facilitate the return of victims to their territories where the victim is a national or had a permanent right of residence at the time of entering the receiving State.

Stronger protection of victims provisions are found in Chapter III<sup>27</sup> of the Council of Europe Convention. Article 10 requires States to take measures to identify victims of trafficking and special protections are required for unaccompanied children. Article 11 requires the protection of the private life of the victims. Article 12 requires States to take measures to assist victims in their physical, psychological and social recovery and a minimum level of assistance is mandated to include subsistence through such measures as: appropriate accommodation and psychological and material assistance; access to medical treatment, translation and interpretation services, counselling and information (particularly as regards rights and services available to them), assistance to enable rights to be represented in criminal proceedings and access to education for children. Article 12 also requires Parties to take due account of the victim’s safety and protection needs, to provide medical assistance to lawfully resident victims without adequate resources. States are required to adopt rules under which lawfully resident victims can access the labour market and education and to co-operate with non-governmental organisations and civil society. Article 12 (6) mandates measures to assure assistance to a victim is not to be conditional on his or her willingness to act as a witness.

Significant progress from the Palermo Protocol can be seen in Articles 13 and 14 of the Council of Europe Convention. Article 13(1) provides that

“Each Party shall provide in its internal law a recovery and reflection period of at least 30 days, when there are reasonable grounds to accept that the person concerned is a victim....During this period, the Parties shall authorise the person concerned to stay in their territory.”

Article 14(1) provides for a residence permit for victims.

“Each party shall issue a renewable residence permit to victims, in one or other of the two following situations or in both:(a) the competent authority considers that it is necessary owing to their own personal situation

(b) the competent authority considers that their stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings.”

Article 15 requires access to legal redress and compensation.

Article 16 requires States to facilitate the return of victims to their territories. The return is described as “preferably voluntary”.

### 3.8 Prevention

Article 9 of the Palermo Protocol requires State Parties to establish comprehensive policies, programmes and other measures to prevent and combat trafficking in persons and to protect victims, especially women and children from re-victimisation. State Parties shall endeavour to undertake measures such as research information and mass media campaigns and social and economic initiatives to combat trafficking in persons. Policies and programmes are to include co-operation with civil society and States are required to take measures to alleviate factors (such as poverty, underdevelopment and lack of equal opportunity) that make persons vulnerable to trafficking.

Article 10 requires information and exchange and training. Law enforcement, immigration and other relevant authorities of State Parties are required to co-operate. Articles 11-13 require State Parties to strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons, to take measures to ensure the security and control of documents and to verify to another State Party within a reasonable time the validity and legitimacy of travel documents.

Chapter II of the Council of Europe Convention is concerned with prevention and co-operation. To prevent trafficking, Article 5 requires State Parties to take measures to establish or strengthen national co-ordination between bodies responsible for preventing and combating trafficking; to establish or strengthen effective policies and programmes through research, information, awareness raising and education campaigns, social and economic initiatives and training programmes, in particular for persons vulnerable to trafficking and for professionals concerned with trafficking in human beings; to promote a human rights based approach; to enable legal migration; to take measures to reduce children’s vulnerability and to involve non-governmental organisation. Article 6 requires measures to discourage the demand that fosters the exploitation that leads to trafficking. Article 7 requires States *inter alia* to strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons and to strengthen co-operation among border control agencies. Articles 8 and 9 require measures concerning the security and control of documents and verification of the legitimacy and validity of documents issued by that State.

Chapter VI of the Council of Europe Convention provides for international co-operation and co-operation with civil society.

Some of these measures are aimed at prevention and some at protection.

Chapter VII of the Council of Europe provides for a mechanism to monitor the implementation of the Convention. It has two pillars. The first comprises a Group of Experts on action against trafficking in human beings (GRETA), composed of between 10 and 15 independent and highly qualified experts, which is empowered to adopt a report and conclusion on each Party’s implementation of the Convention. The second comprises a Committee of Parties, composed of representatives of the Committee of Ministers of the Parties to the Convention and of representatives of Parties non-members of the Council of Europe, which may adopt recommendations based on a GRETA report, addressed to a Party.

### 4.1 European Community/Union legislation

In European Community/Union Law the legal basis for legislation concerned with human trafficking is split between Title IV of the European Community (EC) Treaty (Visas, Asylum, Immigration and Other Policies Related to the Free Movement of Persons)<sup>28</sup> and Title VI of the Treaty on European Union (TEU) (Provisions on Police and Judicial Co-operation in Criminal Matters)<sup>29</sup>. This adds a complexity from Ireland’s perspective as while Ireland is bound to implement legislation adopted under the Title VI TEU it has an opt out with a possible opt in, in respect of legislation adopted under Title IV EC.<sup>30</sup> Legislation has been adopted pursuant to both titles. First, Council Framework Decision of 19 July 2002 on combating trafficking in human beings, which was adopted pursuant to Title VI of the Treaty on European Union which was required to be implemented by the Member States, including Ireland<sup>31</sup> before 1 August 2004 (the EU Framework Decision).<sup>32</sup> Second, Council Directive 2004/81/EC, of 29 April 2004 (the EC Council Directive), on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, which was adopted under Title IV of the European Community Treaty and in the adoption of which Ireland and the United Kingdom did not participate and are therefore not bound by or subject to its application.

### 4.2 The EU Framework Decision

The EU Framework Decision is concerned with criminal/prosecution elements of trafficking. Article 1 requires Member States to take the measures to ensure that trafficking in persons will be punishable. The offence is defined in a similar manner to the Palermo Protocol.<sup>33</sup> Article 2 requires Member States to criminalise the instigation of, aiding, abetting, or attempt to commit the offence of trafficking. Article 3 requires Member States to ensure that the criminal offences established are punishable by effective, proportionate and dissuasive criminal penalties which may entail extradition. The maximum penalty is required to be not less than eight years where the offence has deliberately or by gross negligence endangered the life of the victim, where the offence has been committed against a victim who was particularly vulnerable, where the offence has been committed by use of serious violence or has caused particularly serious harm to the victim or where the offence has been committed within the framework of a criminal organisation.

Article 4 requires the possibility of liability of legal persons and Article 5 requires that sanctions against legal persons be effective and dissuasive. Article 6 is concerned with jurisdiction and prosecution and requires Member States to establish jurisdiction where the offence is committed in whole or in part within its territory, or the offender is one of its nationals or the offence is committed for the benefit of a legal person established within the Member State. Member States who do not extradite their own nationals are required to establish jurisdiction and prosecute the trafficking offences when committed by its nationals outside its territory.

Article 7 requires Member States to establish that investigations into or prosecution of offences shall not be dependent on report or accusation made by a person subjected to the offence. Children who are victims of trafficking offences should be considered as particularly vulnerable victims pursuant to the relevant provisions of Council Framework Decision 2001/220/JHA of 2001 on the standing of victims in criminal proceedings. Families of child victims are to be afforded appropriate assistance. Member States were required to comply with the Framework Decision by 1 August 2004. The Framework Decision has not yet been implemented in Ireland but Heads of a Bill, discussed below, have been published.

### 4.3 The EC Council Directive

Article 1 of the EC Council Directive states that the purpose of the directive is to define the conditions for granting residence permits of limited duration, linked to the length of the relevant national proceedings, to third-country nationals<sup>34</sup> who co-operate in the fight against trafficking in human beings or against action to facilitate against illegal immigration. Article 3 sets out the scope of the Directive and requires Member States to apply the Directive to third country nationals who are, or have been victims of offences relating to trafficking, even if they have illegally entered the territory of the Member States. In addition Member States may apply the Directive to third country nationals who have been subject of an action to facilitate illegal immigration. The Directive applies to third country nationals who have reached the age of majority and Member States by way of derogation can choose to apply it to minors. The key provisions introduce the possibility of a third country national who has been a victim of trafficking being granted a residence permit and being afforded a reflection period.

Article 5 requires Member States to inform a third country national who the competent authorities believe falls into the scope of the Directive of the possibilities offered under the Directive. Article 6 (1) provides that "Member States shall ensure that third country nationals concerned are granted a reflection period<sup>35</sup> allowing them to recover and escape the influence of the perpetrators of the offences so that they can take an informed decision as to whether to co-operate with the competent authorities. During the reflection period the third country national shall have access to treatment pursuant to Article 7 and it shall not be possible to enforce an expulsion order against them. The reflection period shall not create any entitlement to residency. The Member States may terminate the reflection period if the person concerned voluntarily renewed contact with the perpetrators of the offences or for reasons of public policy and national security. Article 7 details the treatment to be granted before the issue of a residence permit. Those who do not have sufficient resources are to be granted standards of living capable of

ensuring their subsistence and access to emergency medical treatment. There is a possibility of psychological assistance if provided by national law. Due account is to be taken of safety and protection needs. Translation and interpretation services are to be provided. Member States may provide free legal aid.

Article 8 details the procedure for issue and renewal of the residence permit. After the expiry of the reflection period, or earlier if the competent authorities are of the view that the third country national has fulfilled the criterion set out at Article 8(1)(b). Article 8(1) provides the Member States shall consider three criteria; (a) the opportunity presented by prolonging his/her stay on its territory for the investigations or the judicial proceedings, and (b) whether he/she has shown a clear intention to co-operate and (c) whether he/she has severed all relations with suspects. Without prejudice to the reasons relating to public policy and to the protection of national security, these conditions must be fulfilled for the issue of a residence permit. The permit shall be valid for at least six months (subject to the provisions on withdrawal) and shall be renewed if the conditions continue to be satisfied. Article 9-12 deal with the treatment of holders of the residence permit. They are to be afforded at least the treatment set out at Article 7. They are to be provided with medical treatment. There are special protections for minors where the Member States has derogated to include them in the Directive. For the duration of the residence permit the third country national shall have access to the labour market, to vocational training and to education. Residence permit holders are to have access to existing schemes aimed at recovery of a normal social life. Article 13 deals with non-renewal and Article 14 with the withdrawal of the residence permit. The Directive is required to be transposed by 6 August 2006. The Directive is without prejudice to the protection granted to refugees, to beneficiaries of subsidiary protection and persons seeking international protection under international refugee law and without prejudice to other human rights instruments.

While Ireland is not bound by the Directive, there were a number of statements in a Department of Justice, Equality and Law Reform discussion document in 2005 concerning a proposal for an immigration and residence bill<sup>36</sup>, which seemed to indicate that draft legislation would accord with the Directive. The Discussion document listed four directives including the directive on the victims of trafficking and then stated;

"While Ireland is not bound by these directives, its position is to participate as fully as possible consistent with the maintenance of the Common Travel Area with the UK. It is possible that at some point in the future Ireland and the UK will become fully involved in the immigration area of the EU acquis. The preparation of Irish legislation should therefore endeavour to ensure that, as far as possible, such legislation is in accord with EU legislation and that we benefit from the collective European experience in developing and implementing such legislation."<sup>37</sup>

In the summary of the key proposals the discussion document stated that;

"To combat child trafficking, there should be provision for appropriate action to be taken to protect children where there are suspicions about the nature of

the relationship of a non-national child to the adults accompanying him/her in entering the State.”<sup>38</sup>

And

“Existing legislation provisions on the issue of trafficking and smuggling should be examined to see whether they can be strengthened. The position of victims of trafficking should be safeguarded with a view to assisting them and getting their co-operation in the prosecution of perpetrators”<sup>39</sup>

However when the Scheme for the Residence and Immigration Bill was published in September 2006 and the Immigration, Residence and Protection Bill in 2007 they did not contain any provisions concerning trafficking.

### 5.1 Existing Legislation in Ireland

Currently there is very little Irish legislation in this field. Section 3 of the Child Trafficking and Pornography Act criminalises trafficking in children for the purpose of sexual exploitation, with penalties of up to life imprisonment. As noted above there is some confusion in the existing Irish legislation. Section 2(1) of the Illegal Immigrants (Trafficking) Act, 2000 which provides “A person who organises or knowingly facilitates the entry into the State of a person whom he or she knows is or has reasonable cause to believe to be an illegal immigrant or who intends to seek asylum shall be guilty of an offence....”<sup>40</sup> is pursuant to the definitions provided by the Palermo Protocol and the Protocol on smuggling migrants by land, air and sea a smuggling rather than a trafficking offence. Pursuant to the Immigration Act, 2003 it is an offence for a Carrier to transport a non-national passenger who does not have appropriate travel documents.<sup>41</sup>

### 5.2 Draft Irish Legislation

In the Immigration and Residence Bill discussion document there was a reference to the fact that Ireland was preparing criminal legislation. “Ireland is at present preparing legislation to comply with the Framework Decision on combating trafficking in persons for the purpose of sexual and labour exploitation and the Framework Decision combating the sexual exploitation of children and child pornography”<sup>42</sup>. This legislation will take account of the more wide-ranging [Palermo Protocol].”

Heads of a Bill have been published concerning the criminalisation of trafficking offences, the Criminal Law (Trafficking in Persons and Sexual Offences), Bill 2006 for the purpose of implementing the EU Framework Decision and also the Framework Decision combating the sexual exploitation of children and child pornography. Only the provisions concerning trafficking will be considered here. Head 2 is the interpretation provision and defines exploitation as “labour or sexual exploitation or the removal of a person’s organs for the purpose of transplanting into another person.” “Labour exploitation” is defined as “(a) forced labour or services, (b) slavery or practices similar to slavery, (c) servitude.” “Sexual exploitation” is defined as “(a) the production of child pornography or for the participation of a child in child pornography or in the something that is indecent or obscene, (b) the prostitution of another person, or (c) any sexual activity with a person which is an offence under any enactment.” Head 3 provides that trafficking in persons for purposes of exploitation is an offence.

“Any person (the trafficker) who recruits, transports, transfers to another person, harbours or knowingly arranges or facilitates-(a) the entry into, travel within or departure from the States of a person (“the trafficked person”), or (b) the provision of accommodation or employment in the State for that person, for the purpose of the trafficked person’s exploitation, is guilty of an offence provided that where the trafficked person is not a child, it shall be necessary to show that

(i) use has been made by the trafficker of coercion, force, threats or abduction

(ii) use has been made by the trafficker of deception or fraud, or

(iii) abuse is made of a position of authority by the trafficker or of the vulnerability of a trafficked person, including the giving of payments by the trafficker to a person who has the care, charge or control of the trafficked person”

Head 3 also proposes to criminalise attempted trafficking and that a convicted “trafficker” is liable on conviction on indictment where the trafficked person is a child to a fine and/or life imprisonment and in any case to a fine and/or a term of imprisonment not exceeding 14 years. Head 14 provides for corporate liability.

## 6. Conclusions

The Tip Report, 2007 notes with regard to Ireland that “[t]he Government and civil society have identified sex trafficking in Ireland as a potential problem. The presence of foreign women in prostitution and a growing migrant population raise concerns about a potential trafficking problem in Ireland.”<sup>43</sup> The TIP Report, 2007 notes that Ireland has prepared draft criminal legislation and that the Government continued to demonstrate strong efforts to protect and assist victims and to demonstrate efforts to raise awareness and prevent trafficking in 2006 citing *inter alia* the encouraging but not pressurising of victims to participate in investigations, the existence of a witness protection programme, an awareness campaign and funding of non-governmental organisations. Unaccompanied minors from source countries, particularly Africa, are regarded as a vulnerable group susceptible to trafficking and exploitation.<sup>44</sup> The conclusions drawn by the TIP Report, 2007 have been criticised by a number of Irish non-governmental organisations including Amnesty International, the Migrant Rights Centre, Ruhama and the National Women’s Council who claim that the report draws “inaccurate conclusions” and that “[t]his report has not highlighted the current legislative vacuum in Ireland in relation to trafficking.”<sup>45</sup> “It does not reflect the reality of trafficking of persons into Ireland- as experienced by those organisations who work in this and related fields.”<sup>46</sup>

By signing the Palermo Protocol and the Council of Europe Convention Ireland evidences a commitment to combat trafficking in human beings. Both international instruments are founded on the principles of prevention, prosecution and protection. Criminalisation of human trafficking is also required by the EU Framework Decision, which is required to be implemented by Ireland. Protection provisions are contained in the EC Council Directive, which Ireland is not bound by or subject to its application. Heads of a Bill have been published concerning the criminalisation of trafficking

offences but there are currently no legislative proposals regarding the protection of victims of trafficking. Domestic legislation is required to implement the Palermo Protocol, the Council of Europe Convention and the EU Framework decision to ensure that victims of trafficking are protected, that the crime of trafficking is clearly defined and traffickers prosecuted and a preventative strategy put in place.

<sup>1</sup> This paper is based on a presentation given at an Irish Women Lawyers Association Conference on Human Trafficking on 25 November 2006. I am grateful to my colleague John Stanley, B.L. who read a draft of this paper for his helpful comments.

<sup>2</sup> Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report, Warsaw, 16 May 2005, published at [www.coe.int/trafficking](http://www.coe.int/trafficking), page 1 of the Explanatory Report.

<sup>3</sup> Published on [www.state.gov/g/tip](http://www.state.gov/g/tip) at page 6 of the Report. These figures do not include victims trafficked within own borders. The Department of State is required to submit a report on an annual basis on foreign governments' efforts to eliminate severe forms of trafficking in persons. A country that fails to bring itself into compliance with the minimum standards for the elimination in trafficking in persons may trigger withholding of non-humanitarian, non trade related assistance from the United States to that country. The Report therefore contains a country by country analysis. The US legislation that guides anti-trafficking efforts is the Trafficking in Victims Protection Act, 2000 as amended.

<sup>4</sup> Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report, Warsaw, 16 May 2005, published at [www.coe.int/trafficking](http://www.coe.int/trafficking) at page 1 of the Explanatory Report but not citing the source for these estimates.

<sup>5</sup> MacCormaic, R. "Hidden world of the sex traffickers", The Irish Times Wednesday May 16, 2007. See also MacCormaic, R. "I was like a cow they were going to buy", The Irish Times Wednesday May 16, 2007. Goodey, J. "Migration, Crime and Victimhood: Responses to sex trafficking in the EU", Punishment and Society, Vol. 5(4) 415 argues that a more victim centred approach is necessary in the EU. See also the Director of Ruhama, Kathleen Fahy's presentation to the Irish Women Lawyers Association Conference, on 25 November 2006, available on [www.iwla.ie/seminars\\_humantrafficking\\_slavery/](http://www.iwla.ie/seminars_humantrafficking_slavery/).

<sup>6</sup> Published at <http://www.state.gov/g/tip/rls/tiprpt/2007/> at page 7 of the Report.

<sup>7</sup> "No Way Forward, No Going Back: Identifying the Problem of trafficking for forced labour in Ireland", published by the Migrant Rights Centre Ireland and DCU, February 2007.

<sup>8</sup> The Palermo Protocol has also been signed by the European Community; EC Council Decision 2006/618/EC of 24 July 2006 on the conclusion on behalf of the European Community, of the [Palermo] Protocol.

<sup>9</sup> In a press release published at <http://www.michaelmcdowell.ie>, the Minister for Justice stated: "[s]igning this Convention is a further and visible demonstration of Ireland's continuing commitment to the global fight against human trafficking. Trafficking is an insidious criminal practice which preys on vulnerable people and the Government will not tolerate it in this country. While instances of trafficking have been rare to date we cannot assume that this will continue and in this context it is

important to send an appropriate signal of the Government's approach."<sup>10</sup>

<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=197&CM=1&DF=&CL=ENG>; Chart of signatures and ratifications, accessed on 18 June 2007 states that to date there have been 7 ratifications (and 29 signatures not followed by ratifications). For the Treaty to enter into force there must be 10 ratifications, of which eight must be by Member States.

<sup>11</sup> Article 14(1) of the Palermo Protocol provides: "Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of *non-refoulement* as contained therein." Article 40(4) of the Council of Europe Convention is identical, save that "Protocol" is replace with "Convention".

<sup>12</sup> The Council took note of the Brussels Declaration made at the European Conference on preventing and combating trafficking in human beings, global challenge for 21<sup>st</sup> Century, on 18 to 20 September 2002. Council Conclusions of 8 May 2003 (2003/C137/01) of 8 May 2003 (OJ C137/1 12 June 2003).

<sup>13</sup> The Edit Bauer Report (Report with a proposal for a European Parliament recommendation to the Council on fighting trafficking in human beings- an integrated approach and proposals for an action plan (2006/2078/INI)).

<sup>14</sup> Ibid, page 6.

<sup>15</sup> See as examples; Proposal for A Comprehensive Plan to Combat Illegal Immigration and Trafficking of Human Beings in the EU (2002/C 142/02); Council Conclusions of 8 May 2003 on combating trafficking (2003/C137/01) (includes Brussels Declaration) EU Plan on best practices, standards and procedures for combating and preventing trafficking in human beings (2005/C 311/01); Council Recommendation of 28 November 2003, on the improvement of methods of prevention and operational investigation in combating organised crime involving trafficking in human beings and the Report of the Experts Group on Trafficking in Human Beings, Brussels, 22 December 2004. A number of operational programmes such as STOP and DAPHNE should also be noted.

<sup>16</sup> At paragraph 75 of the Explanatory Report to the Council of Europe Convention which continues at paragraph 76; "For there to be trafficking in human beings ingredients from each of these three categories (action, means, purpose) must be present together..." Paragraph 76 also points out the exception in respect of children, where for the offence of trafficking it does not have to involve the means listed in Article 4(a). At paragraph 87 it is explained that actual exploitation is not necessary for there to be trafficking in human beings.

<sup>17</sup> Article 1(2) of the Palermo Protocol states that the provisions of the United Nations Convention Against Transnational Organised Crime apply *mutatis mutandis* to the Protocol unless the protocol otherwise provides. Article 3(1) of the UN Convention states that it applies to certain specified offences where the offence is transnational in nature and involves an organised crime group.



<sup>18</sup> Proposal for a Comprehensive Plan to Combat Illegal Immigration and Trafficking of Human Beings in the EU (2002/C142/02)

<sup>19</sup> McCreight, M. "Smuggling of Migrants, Trafficking in Human Beings and Irregular Migration on a Comparative Perspective" (2006) 12 ELJ 106, 107.

<sup>20</sup> [http://www.unodc.org/unodc/trafficking\\_victim\\_consent.html](http://www.unodc.org/unodc/trafficking_victim_consent.html)

<sup>21</sup> Section 2(2) provides that section 2(1) shall not apply (a) to anything done by a person otherwise than for gain, or (b) to anything done to assist a person seeking asylum by a person in the course of his or her employment by a *bona fide* organisation if the purposes of that organisation include giving assistance to persons seeking asylum. Section 2(3) provides that Section 2 (1) shall apply to acts done or omissions made outside, as well as to acts done or omissions made, in the State.

<sup>22</sup> In 2006, Ireland was classified as a Tier 1 country; i.e. a country that fully complies with the Trafficking Victims Protection Act's minimum standards for the elimination of trafficking (See page 288 of the Report, [www.state.gov/g/tip](http://www.state.gov/g/tip)). In the TIP Report 2007 (Published at <http://www.state.gov/g/tip/rls/tiprpt/2007/>) Ireland has not been given a tier ranking but has been placed in the "Special Cases" section of the report at page 218. It is not entirely clear why Ireland has been placed here. At page 12 the TIP report states "Some countries for which information [as to whether is a country of origin, transit or destination for a significant number of victims of severe forms of trafficking, generally in the order of 100 or more victims] are not given tier ratings but are included in the Special Cases section because they exhibited indications of trafficking." The TIP Report 2007's analysis of Ireland, where it is noted that Ireland has not signed the 2000 UN TIP Protocol, is discussed in the Conclusions of this paper.

<sup>23</sup> Page 143. See also page 218 of the TIP Report, 2007.

<sup>24</sup> Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report, Warsaw, 16 May 2005, published at [www.coe.int/trafficking](http://www.coe.int/trafficking), page 1 of the Explanatory Report.

<sup>25</sup> Article 5 of the Palermo Protocol

<sup>26</sup> Articles 18-26.

<sup>27</sup> Articles 10-17.

<sup>28</sup> Ex Pillar 3. For a discussion of the pillar structure see for example Craig and De Burca "EU Law: Text, Cases and Materials" (3<sup>rd</sup> ed.), OUP, 2003, Chapter 1.

<sup>29</sup> Pillar 3.

<sup>30</sup> Protocol on the Position of the United Kingdom and Ireland, added by the Amsterdam Treaty. Craig and De Burca "EU Law: Text, Cases and Materials" (3<sup>rd</sup> ed.), OUP, 2003, page 30.

<sup>31</sup> Pursuant to Article 10 of the EU Framework Decision the Commission is required to provide a written report on the measures taken by the Member States. In the Report from the Commission to the Council and the European Parliament based on Article 10 of the Council Framework Decision of 19 July 2002 on combating trafficking in human beings, Brussels, 2/5/2006, COM (2006) 187 final, the Commission noted that by the end of 2005 the Commission had received no or only preliminary information from four Member States: Portugal, Luxembourg, Ireland and Lithuania. As a result,

when analysing the implementation measures the Report did not refer to these Member States.

<sup>32</sup> Article 34 TEU defines framework decisions not to directly effective. In *Dundon v. The Governor of Cloverhill Prison* [2005] IESC 83, Fennelly J. with whom Murray, C.J. and Hardiman J. following an ECJ decision in Case C-105/03 *Criminal proceedings against Maria Pupino*, judgment of 16 June 2005 held that the obligation to interpret national law in the light of European law applied in the context of measures adopted under the third pillar.

<sup>33</sup> Except that the removal of organs is not included as a purpose.

<sup>34</sup> Defined as any person who is not a citizen of the Union within the meaning of Article 17(1) of the Treaty.

<sup>35</sup> To be determined in accordance with national law.

<sup>36</sup> "Immigration and Residence in Ireland; Outline policy proposals for an Immigration and Residence Bill; a discussion document", Department of Justice Equality and Law Reform, April 2005.

<sup>37</sup> *Ibid*, at page 10. The discussion document also stated, at page 22 "Ireland's migration system must not provide attractions to those who are involved in criminal activity, including organised criminals, traffickers in human beings and terrorists", and at page 25 "Ireland's participation in EU developments in the area of immigration, visas and asylum is subject to the Fourth Protocol of the Treaty of Amsterdam, under which Ireland is not bound to participate in any measure but may opt to participate. Ireland participates in a number of measures in this area, which it is bound to implement. The Immigration and Residence Bill should provide the means to implement our existing commitments in this area and provide the framework for implementation of future measures. In the measures in which Ireland does not participate, the Immigration and Residence Bill should have regard to EU legislation in these areas. As a general principle it would seem desirable to move in the broad direction of EU developments, unless there are reasons for not doing so in any particular respect." See also pages 23, 24, 46, 48, 50, 56-57, 79, 87, 103-109, 119 and 125.

<sup>38</sup> *Ibid*, at page 17. For discussion see page 87.

<sup>39</sup> *Ibid* at page 19. For discussion see pages 108-109.

<sup>40</sup> See footnote 21 and the accompanying text.

<sup>41</sup> Section 2.

<sup>42</sup> Council Framework Decision 2004/68/JHA of 22 December 2004 combating the sexual exploitation of children and child pornography.

<sup>43</sup> Published at <http://www.state.gov/g/tip/rls/tiprpt/2007/>. Ireland is considered at page 218.

<sup>44</sup> *Ibid* 218.

<sup>45</sup> Downes J. "Report on human trafficking in Ireland flawed, say NGOs", Irish Times 19/06/2007 citing a press statement from the NGOs.

<sup>46</sup> *Ibid*.

## The Need for Guidelines on Credibility in the Irish Asylum Process



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The task of assessing credibility in asylum cases has been described as “*One of the most difficult tasks facing the Commissioner and the Tribunal member. It is an unenviable task and one that is fraught with possible danger.*”<sup>1</sup> Applicants for asylum have a duty to tell the truth and the decision-maker has a duty to get at the truth.<sup>2</sup> In asylum applications the decision-maker has to consider whether the individual asylum seeker has the necessary subjective fear to be regarded as someone who is entitled to asylum and in addition to be satisfied that such fear is “well-founded”. Whether or not that fear is well-founded involves applying an objective standard which will depend on the state of affairs in the applicant’s country of origin<sup>3</sup> as well as the circumstances of the individual asylum seeker.

Paragraph 41 of the UNHCR Handbook<sup>4</sup> provides that “*Due to the importance that the definition attaches to the subjective element, an assessment of credibility is indispensable where the case is not sufficiently clear from the facts on record.*” The decision-maker is often in the position of making decisions in the absence of independent evidence which might confirm or contradict the claimant’s testimony. In these circumstances, the assessment of credibility can be determinative.<sup>5</sup> Paragraph 204 of the Handbook provides that the benefit of the doubt should be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant’s general credibility. Credibility is clearly key to the asylum process.

The refugee determination process is unlike other judicial processes in our legal system. It is designed to be expeditious, informal, non-adversarial and investigative in nature. The normal rules of evidence do not apply. A myriad of factors influence the claimant’s testimony including psychological condition, age, cognitive difficulties, passage of time, gender considerations, educational background, interpretation<sup>6</sup>, social position, legal representation<sup>7</sup> and cultural factors. All these matters impact on the applicant’s testimony and how credible he/she appears to the decision-maker. The asylum procedure itself, the statutory framework, personal and western values and compassion fatigue are among the factors which influence decision-makers.

In terms of legal rules concerning credibility, S11 B of the Refugee Act 1996 (as inserted by S7(f) of the Immigration Act 2003) outlines thirteen factors which both the Commissioner and the Tribunal must take into consideration when assessing the credibility of the applicant.<sup>8</sup> Where these provisions apply this may damage an applicant’s credibility (e.g. possession of forged documents, delay in making the application, travel via a safe country, etc.).<sup>9</sup> The decision-maker is not limited to these matters in assessing credibility however.

Regulation 5(1) of Statutory Instrument No 518 of 2006<sup>10</sup> (which gave effect to the “Qualification Directive”<sup>11</sup>) introduced guidance for decision-makers concerning credibility assessments to ensure that decision-makers take into account all the factual circumstances concerning a claim. Regulation 5(2) provides that where a protection applicant has already been the subject of persecution or serious harm that shall be regarded as a serious indication of the applicant’s well-founded fear of persecution or serious harm.<sup>12</sup> Regulation 5(3) provides that where aspects of the claimant’s account are not supported by documentary or other evidence those aspects shall not need confirmation when certain conditions are met,<sup>13</sup> including establishing the general credibility of the applicant.<sup>14</sup>

In addition to legal rules, the High Court has provided some direction on the subject of the assessment of credibility following the judicial review<sup>15</sup> of decisions of the Refugee Applications Commissioner (RAC) and the Refugee Appeals Tribunal (RAT). For a period the courts were reluctant to interfere with decisions of the RAC or RAT where there was *any* material upon which the decision-maker could have based his decision (ie the “no-evidence” rule established in the *Camara* case<sup>16</sup> in 2000 was strictly applied). In subsequent cases, such as *Traore*,<sup>17</sup> the courts demonstrated a greater readiness to adopt a broader approach – looking at individual grounds or components making up the overall negative credibility finding. Recent case law on the issue of credibility indicates a continued reluctance on the part of the High Court to place itself in the role of the decision-maker and substitute its own view on credibility unless the decision is clearly legally flawed or irrational.<sup>18</sup>

A number of general principles have been established by the Irish courts concerning the assessment of credibility which include the following;

- The assessment by the decision-maker of the credibility of the applicant must be carried out in accordance with the principles of constitutional justice<sup>19</sup>
- Corroboration is not essential to establish an applicant’s credibility<sup>20</sup>.
- There is an obligation to consider material evidence<sup>21</sup>
- A duty of care rests on decision-makers when assessing credibility to take into account personal circumstances (eg psychological condition, young age, education, vulnerable circumstances of abused women)<sup>22</sup>
- There is an obligation on the adjudicator to assess the credibility of the applicant in the context of the available country of origin information. A bald statement that the adjudicator has had regard to country of origin information may not be enough in this regard<sup>23</sup>
- When a decision maker is making a credibility assessment he should not exclude country of origin information in support of the applicant in favour of other information contradicting the applicant’s account. All reports should be kept under consideration and a weighing exercise conducted<sup>24</sup>
- There exists an obligation on decision-makers where credibility is in issue to assess the applicant’s

credibility either in general or in relation to particular factual issues and make a clear finding on that issue<sup>25</sup>

- A specific adverse finding as to the appellant's credibility must be based upon reasons which bear a legitimate nexus to the adverse finding<sup>26</sup>
- The reasons for any adverse finding on credibility must be substantial and not relating only to minor matters<sup>27</sup>
- When a decision as to credibility is based on an incorrect and undisputed fact, which is material, there are substantial grounds for challenge<sup>28</sup>
- A decision-maker is under an obligation as a matter of fair procedures to consider and assess an explanation given for an applicant's change in his asylum claim<sup>29</sup>
- The fact that the authority finds the applicant's story inherently implausible or unbelievable is not sufficient, mere conjecture on the part of the authority is insufficient<sup>30</sup>
- A decision-maker who rejects the entire story of an applicant and makes no reference to the documents may have failed to take them into account<sup>31</sup>
- Even if a decision maker concludes that the applicant is not credible in relation to certain past events this does not necessarily mean that the applicant will not have a future fear of persecution. A lack of credibility on the part of the applicant in relation to some, but not all, past events cannot foreclose or obviate the necessity to consider whether, if returned, it is likely that the applicant would suffer Convention Persecution<sup>32</sup>
- A finding of lack of credibility has to be based on a rational analysis which explains why, in the view of the deciding officer, the truth had not been told. Where the entire credibility determination turns on one matter such as the change of information by the applicant it is arguable that the decision maker must give a more detailed analysis justifying his conclusion<sup>33</sup>

In many of these decisions the court has placed reliance on judgments from other jurisdictions.<sup>34</sup> While these general principles, established by the courts, provide useful guidelines to those dealing with the asylum process, there is a clear need for the publication of guidelines by the RAC and RAT on assessing credibility. Such guidelines should address, *inter alia*, the following issues:<sup>35</sup>

**Interview/Hearings:** Interviews and hearings should be conducted in a courteous and non-threatening manner

**Assessment of evidence:** All evidence, both oral and documentary, should be considered and assessed. The more relevant the evidence, the greater the onus on the decision-maker to specifically refer to it. Evidence should not be referred to selectively to support conclusions without also referring to evidence to the contrary. Decision makers should do more than simply search through the evidence looking for inconsistencies or for evidence that lacks credibility, building a case against the claimant and ignoring other aspects of the claim. Decision-makers should weigh each piece of evidence and make appropriate findings of fact.

**Special circumstances of the Applicant:** Characteristics which are specific to the applicant such as psychological condition, age, cognitive difficulties, passage of time, gender considerations, educational background, social position and cultural factors should be taken into account when assessing his/her credibility.

**Inconsistencies/Discrepancies/Omissions;** Inconsistencies raised must be significant and central to the claim.<sup>36</sup> Inconsistency, contradiction and vagueness paradoxically may be evidence of the credibility of a claim.<sup>37</sup> Decision-makers should not display a zeal "*to find instances of contradiction in the testimony...it should not be over-vigilant in its microscopic examination of the evidence.*"<sup>38</sup> A claim should not be rejected on the grounds of non-credibility of secondary or peripheral issues without evaluating the credibility of the evidence concerning the substance of the claim. Decision-makers should offer the claimant an opportunity to clarify the evidence and to explain apparent contradictions or inconsistencies within their testimony.

**Implausibilities:** Considerable caution is required when assessing the norms and patterns of different cultures and the practices and procedures of different judicial, political and social systems. Actions might appear implausible if judged by Irish standards but might be totally plausible when considered in the context of the claimant's social and cultural background.

**Cross-cultural Communication** Decision-makers should be aware of the specific problems of cross-cultural communication and the cultural background of the asylum-seeker. The asylum-seeker is in a subordinate position to the decision-maker and may well be nervous, confused, embarrassed, suspicious, etc at his/her interview or oral hearing. The asylum-seeker's manner and non-verbal behaviour may influence the decision-maker's assessment of the truthfulness of the applicant's claim. The applicant's ability to express him/herself is affected by a myriad of factors (eg education, memory, personality, emotional state/frame-of-mind, questioning technique of the decision-maker (eg interrogatory, intimidating<sup>39</sup>) standard of interpretation, etc..<sup>40</sup>). Victims of trauma, torture (e.g. rape) and stress-related disorders may be very reluctant to disclose past experiences.

**Lack of Knowledge or Detail:** A claim can be rejected as lacking in credibility if the claimant's testimony is found to be incoherent or vague. Decision-makers may use specific information of the applicant's country of origin to evaluate the applicant's general knowledge of their home country (e.g. questions about geographical features of their country, population-size, locations of important buildings in a town/city, cultural practices, etc.). Decision-makers should be cautious about imposing too high a standard on the claimant's knowledge about matters such as politics, religion, geography, etc. The assessment of the applicant's answers must take into consideration the likelihood of someone with their educational, cultural and religious background knowing the answer.

**Demeanour:** Every decision-maker's assessment of credibility is influenced by a claimant's demeanour (their manner replying to questions, facial expressions, tone of voice, physical movements, etc.) However, relying on

demeanour to find a claimant not credible must be approached with a great deal of caution. Individual personality traits and cultural background should be taken into account as these could cause the witness to leave a misleading impression. The claimant may have had a traumatic past experience which impacts on his/her ability to testify.

**Corroborative evidence:** Decision-makers should not disbelieve a claimant merely because he/she presents no documentary or other evidence to confirm his testimony. Likewise, the authorities should not automatically draw a negative inference as to credibility due to the destruction or disposal of personal ID documents by the claimant. Due consideration must be given to the explanation provided by the claimants behind the destruction of documents or inability to obtain documents. Where documents are provided a greater responsibility should be taken by the authorities to authenticate documents. Sufficient time and resources should be set aside for this. It is not sufficient to say that no probative value was assigned to evidence as the documents could not be authenticated.

**Medical evidence:** Appropriate weight should be attached to medical reports. Such reports should not be rejected because the conclusion in the report is based on what is related to the doctor by the claimant, when it is clear from the report that the doctor's own professional observation of the claimant was material to the conclusion reached. Likewise a report should not be rejected on the basis that it does not indicate that the only possible cause of the injury in question is that related by the claimant. It is sufficient that the report finds that the injury in question is consistent with the cause specified by the claimant. Where a report is relevant to findings on non-credibility the authorities should explain how it dealt with the report in the context of making its non-credibility finding.

**Making clear findings and providing adequate reasons:** Decision-makers owe a duty to the claimant to give reasons for rejecting the claim on the basis of credibility in clear and unmistakable terms. If only some of the claimant's story is believed, the decision-maker should say what parts it rejected and why. Reasons should be given for disregarding uncontradicted statements, expert evidence and documentary evidence either expressly or implicitly.

In conclusion, there is a lack of clarity as to how credibility is being assessed at first and second instance in the Irish asylum process. Inconsistency in this area in decisions is great. Empirical research in this field is needed to provide a greater understanding of the difficulties involved in the assessment of credibility in the Irish asylum process and the issues surrounding this subject. The Supreme Court decided in the *Atansov* judgment<sup>41</sup> that there should be consistency of decisions based on the same objective facts. This includes not only consistency concerning objective country of origin findings but in interpreting the Geneva Convention and the approach to evidential and procedural matters including the assessment of credibility. Undoubtedly the publication of guidelines on the assessment of credibility would promote greater consistency in decision-making and assist all those involved in the asylum process.

<sup>1</sup>Da Silveira v RAT, Unreported, High Court, 9<sup>th</sup> July 2004, Peart J

<sup>2</sup>“The purpose of the process is a quest for truth, which quest must be conducted in a fair and humane manner with due regard to the dignity of the individual and in accordance with the principle of constitutional and natural justice.” Ngeudio v RAT, Unreported, High court, 22<sup>nd</sup> July 2003, White J

<sup>3</sup> Regarding the accuracy of Country of Origin Information see Frances Houle “The Credibility and Authoritativeness of Documentary Information in Determining Refugee Status: The Canadian Experience”, International Journal of Refugee Law Vol 6, No 1 1994. See also Savitri Taylor

“Informational Deficiencies Affecting Refugee Status Determinations: Sources and Solutions” (1994) 13

University of Tasmania Law Review 43

<sup>4</sup>“Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees,” Geneva January 1992

<sup>5</sup> Coffey Guy, “The Credibility of Credibility Evidence at the Refugee Review Tribunal,” International Journal of Refugee Law Vol 15, No 3, Oxford University Press 2003

<sup>6</sup> In the Irish asylum process, there is insufficient regulation of interpreters used in the process. “The attention paid by the International Tribunals to language and communication as a significant evidentiary barrier to accuracy is instructive” Rosemary Byrne, “Credibility in Changing Contexts: International Justice and International Protection”, pg 188.

<sup>7</sup> In Ireland, the applicant at first instance is entitled to be accompanied by a legal representative. In practice however, asylum seekers (other than minors and very vulnerable clients) are not so accompanied. At appeal stage, the applicant is represented by a legal adviser.

<sup>8</sup> These factors include issues such as possession of ID documents, forged documents, delay in making the asylum application, false representations, travel route and travel via a “safe” country.

<sup>9</sup> The factors which may lead a decision-maker to draw adverse inferences as to credibility can often be explained in terms that do not impugn credibility – eg innocent explanations such as mistrust of authority, failures in perception and memory, the effects of post-traumatic stress disorder and communication problems. See Savitri Taylor “Informational Deficiencies Affecting Refugee Status Determinations: Sources and Solutions” (1994) 13 University of Tasmania Law Review 43

<sup>10</sup> Statutory Instrument No 518 of 2006 European Communities (Eligibility for Protection) Regulations 2006

<sup>11</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

<sup>12</sup> In addition it is provided that “compelling reasons arising out of previous persecution or serious harm alone may nevertheless warrant a determination that the applicant is eligible for protection.”

<sup>13</sup> The conditions are that (a) the applicant has made a genuine effort to substantiate his or her application, (b) all relevant elements at the applicant's disposal have been submitted and a satisfactory explanation regarding any lack

of other relevant elements has been given (c) the applicant's statements are found to be coherent and plausible and do not run counter to available specific and general information relevant to the applicant's case (d) the applicant has applied for protection at the earliest possible time (except where an applicant demonstrates good reason for not having done so) and (e) the general credibility of the applicant has been established.

<sup>14</sup> For further details as to how limitations in the asylum process outlined in the "Procedures" directive (ie Council Directive 2005/85/EC of 1st December 2005 on Minimum standards on Procedures in Member States for Granting and Withdrawing refugee status") which comes into force on 1st December 07, may significantly impact on how a claimant's credibility is assessed see; Robert Thomas "Assessing the Credibility of Asylum Claims: EU and UK Approaches Examined," University of Manchester; and Rosemary Byrne "Credibility in Changing Contexts: International Justice and International Protection", Chapter 10.

<sup>15</sup> In the case of Bujari v Minister for Justice, Equality and Law Reform, Unreported, High Court, 7th May 2003, Finlay Geoghegan J stated that "The assessment of the credibility of the applicant is a matter for the examiner at first instance or on appeal by the member of the tribunal. It is not a matter for this court on judicial review. However, the process by which such credibility is assessed does appear to be a matter which is within the remit of this court upon a judicial review."

<sup>16</sup> Camara v Minister for Justice, Equality and Law Reform, Unreported 26<sup>th</sup> July 2000, Kelly J

<sup>17</sup> Traore v Minister for Justice & Anor, Unreported, High Court, 14th May 2004, Finlay Geoghegan J. It was held in this case that a single factual error which may materially affect the assessment of the "basket of credibility ingredients" may be sufficient to warrant a conclusion that the decision should be set aside and/or is unsafe.

<sup>18</sup> Imafu v Minister for Justice, Equality and Law Reform, Unreported, Peart J, 9th December 2005 (affirmed in Banzuzi v Minister for Justice, Equality and Law Reform, Feeney J, 18th Jan 2007)

<sup>19</sup> Traore v Minister for Justice & Anor, Unreported, High Court, 14th May 2004, Finlay Geoghegan J

<sup>20</sup> Memishi v RAT and others, Unreported, High Court, June 25<sup>th</sup> 2003, Peart J

<sup>21</sup> Traore v Minister for Justice & Anor, Unreported, High Court, 14<sup>th</sup> May 2004, Finlay Geoghegan J

<sup>22</sup> Edionwe v RAT & Minister for Justice, Equality and Law Reform, High Court, 21 October 2004, Peart J

<sup>23</sup> Roman v RAT & Minister for Justice, Equality and Law Reform, High Court, Gilligan J and Kramarenko v RAT, High Court, 2<sup>nd</sup> April 2004 Finlay Geoghegan J

<sup>24</sup> Da Silveira v RAT, Unreported, High Court, 9<sup>th</sup> July 2004, Peart J

<sup>25</sup> Kramarenko v RAT, Unreported, High Court, 2<sup>nd</sup> April 2004, Finlay Geoghegan J

<sup>26</sup> Kramarenko v RAT, Unreported, High Court, 2<sup>nd</sup> April 2004, Finlay Geoghegan J

<sup>27</sup> Memishi v RAT and others, Unreported, High Court, June 25<sup>th</sup> 2003, Peart J

<sup>28</sup> Carciu v MJELR & RAT, Unreported, High Court, 4th July 2003, Finlay Geoghegan J

<sup>29</sup> Bujari V MJELR, Unreported, High Court, 7th May 2003, Finlay Geoghegan J

<sup>30</sup> Memishi v RAT and others, Unreported, High Court, June 25<sup>th</sup> 2003, Peart J

<sup>31</sup> Averina v MJELR, Unreported, High Court, October 2004, Finlay Geoghegan J

<sup>32</sup> Da Silveira v RAT, Unreported, High Court, 9<sup>th</sup> July 2004, Peart J

<sup>33</sup> Zhuchkova V MJELR & RAT, Unreported, High Court, 26th Nov 2004, Clarke J

<sup>34</sup> Eg: Aguilera-Cota v INS 914 F 2d 1375 (9<sup>th</sup> Cir 1990), Milan Horvath v Secretary of State for the Home Dept 2000 IAS Update Vol 3 No 12, Karanakaran v Secretary of State for the Home Dept 2000 3 All ER 449, Minister for Immigration & Multicultural Affairs v Rajalingam 1999 FCA 719, Cordon Garcia v INS 204F 3d 985, 991 (9<sup>th</sup> Cir 2000), Najeebdeen, Mohamed Saly v M.C.I (FCTD no IMM-5438-98) Lutfy July 30 1999

<sup>35</sup> Many of the issues cited are drawn from guidelines used in Canada and Australia - see "Assessment of Credibility in Claims for Refugee Protection," Legal Services, Canadian Immigration and Refugee board, 31<sup>st</sup> January 2004 and "Guidance on the assessment of credibility" - October 2006, Australian Government, Migration Review Tribunal, Refugee Review Tribunal

<sup>36</sup> "There are strong grounds for arguing that lack of consistency per se can not be used to give any negative weight to the assessment of credibility." - See Dr Juliet Cohen "Errors of Recall and Credibility: Can Omissions and Discrepancies in Successive Statements Reasonably be said to Undermine Credibility or Testimony?", Medico Legal Journal, 69, (1) 25-34, 2001

<sup>37</sup> Rosemary Byrne, "Credibility in Changing Contexts: International Justice and International Protection", pg 187.

<sup>38</sup> Attakora v Canada (Minister of Employment and Immigration (1989) 99 NR 168 (F.C.A)

<sup>39</sup> For example, the asylum-seeker may be told by the decision-maker to answer questions directly. The problem with this is that in certain non-Western societies it is important to let persons involved in legal procedures speak freely about issues which appear to be not directly relevant to the topic of the procedure. See Walter Kalin "Troubled Communication: Cross Cultural Misunderstandings in the Asylum Hearing", International Migration Review Vol XX, No 2, Summer 1986, pg 230.

<sup>40</sup> The cultural relativity of words, notions and concepts can give rise to major sources of misunderstanding. For example, the word "brother or cousin" for an African is often used to speak of members of his/her tribe and not an actual relative. Also the concept of "common-sense" is culturally determined. It is not an effective means of judging the possibility or probability of something happening in a society different from our own. Often a decision-maker will insist on exact dates - imprecision regarding dates can result from a host of reasons (eg, fading memory, different concepts of time culturally, a non-Western calendar, etc.. - ). See Walter Kalin "Troubled Communication: Cross Cultural Misunderstandings in the Asylum Hearing, International Migration Review Vol XX, No 2, Summer 1986, pg 230

<sup>41</sup> Atanasov V Refugee Appeals Tribunal and others, Supreme Court, 26 July 2006, Geoghegan J

## The Procedures Directive

By Jacki Kelly

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The content and import of the Procedures Directive (Council Directive 2005/85/EC)<sup>1</sup> was a primary focus of the recent ECRE conference held in Rome in early May titled “Asylum Procedures, the EU and International Human Rights Law”.

### Background to the Procedures Directive

Following a two-year endeavour to reach political agreement, the European Commission issued its proposal for an asylum procedures directive in 2002.<sup>2</sup> The proposal as issued gave significantly more room for national discretion than had been anticipated when the directive was first conceived in 2000.<sup>3</sup> Negotiations to agree the text of the directive itself were also protracted with drafts revealing diminishing protection standards.<sup>4</sup> Particular points of contention included the establishment of a common minimum list of safe countries of origin, safe third country provisions, detention, access to an appeal and the right to legal aid.<sup>5</sup> UNHCR made two interventions warning that the provisions of the directive would fall short of international legal standards and, with particular reference to “safe third country” provisions, could result in a real danger of indirect refoulement.<sup>6</sup> In March 2004 an alliance of non-governmental organizations including ECRE, Amnesty International, Human Rights Watch, Medecins San Frontieres and Save the Children Europe also called for the withdrawal of the Directive.<sup>7</sup> In September 2005 the European Parliament endorsed an amended proposal for the Directive subject to more than 100 amendments. The Council of the European Union nevertheless officially adopted the Directive on December 1<sup>st</sup> 2005 without further consideration of the proposed amendments. While the European Parliament subsequently launched a challenge to the Directive before the European Court of Justice no decision has been issued as of yet and Member States must ensure compliance by December 1<sup>st</sup> 2007.<sup>8</sup>

### Purpose of the Directive

The purpose of the Directive as set out in the Preamble is to establish minimum standards for procedures within EU Member States for the granting and withdrawing of refugee status. It is also intended to reduce the “secondary movement” of applicants within the EU in search of different legal procedures. The Directive is the fifth piece of legislation arising from the asylum agenda of the Amsterdam Treaty and is a further step towards the development of a Common European Asylum System as laid out in the Amsterdam Treaty.<sup>9</sup>

### Key Provisions

#### (1) Scope & Minimum Standards

Article 4 confirms that the Directive applies to “responsible authorities” in Member States who are first instance authorities only. Annex I of the Directive specifically relates to Ireland and confirms that ORAC and not the Refugee Appeals Tribunal are the responsible authority in this jurisdiction. Importantly, Article 5 emphasizes that the guarantees contained within the directive are minimum guarantees and States are free to introduce more favorable standards.<sup>10</sup> The introduction of more favourable standards,

however, is subject to those standards being compatible with the Procedures Directive. There is no general “standstill clause”, precluding Member States from lowering standards in implementing the Directive.<sup>11</sup>

#### (2) Procedural Guarantees

Chapter II (Articles 6 -22) of the Directive expands on the procedural guarantees to be offered to applicants. Pursuant to Articles 6 and 7 there is a right of access to the procedure and a right to remain in the territory during the examination of a claim, but only until the conclusion of the first instance process.<sup>12</sup> Pursuant to Article 8 Member States must give a factually and legally reasoned decision<sup>13</sup> and information on how to challenge that decision in writing. Decisions must be made on an individual, objective and impartial basis by personnel with precise and up to date country of origin information obtained from various sources. Procedures relating to a personal interview are set down at Articles 12-14. Article 15 provides for a right to consult a lawyer, but the right to free legal aid is for appeals only. Given that suspensive effect is largely confined to the first instance procedure, the value of mandating legal aid for appeals only is problematic. It is also questionable as to whether it is in fact permissible under EC law. The Charter of Fundamental Rights of the European Union incorporates an unequivocal provision to the effect that legal aid will be made available to those who lack sufficient resources and insofar as the aid is necessary to ensure effective access to justice.<sup>14</sup> ECHR caselaw pertaining to Article 6 applies whenever EC Rights are being invoked. Article 6 case law developed in a line of cases since *Airey v. Ireland*, provides that civil legal aid be provided where an applicant has insufficient means and the nature of the case means legal assistance is required to give meaningful access to justice.<sup>15</sup> Cathryn Costello argues that it is clear from the Court’s case law that the requirement to grant legal aid is thus “dependent on an individual’s circumstances, rather than on the sector concerned” and concludes that is arguable that if the Court’s criteria are applied to the asylum determination process, legal aid would be a requirement in many instances.<sup>16</sup>

#### (2) Accelerated Procedures

A core feature of the Directive is that it allows Member States significant latitude to differentiate between the procedural rights given to different applicants for asylum.<sup>17</sup> It is expressly provided that Member States may accelerate procedures for claims likely to be well-founded claims and for those with special needs.<sup>18</sup> Under Article 23(2)(a) the personal interview otherwise required can be set-aside in circumstances where a determining authority can take a *positive* decision without an interview. This would clearly be useful to very vulnerable applicants for whom the process of interview is particularly arduous.

Member States also have a very broad discretion to find applications manifestly unfounded and in those circumstances may also waive the right to a personal interview<sup>19</sup>, grant access to lower procedural standards, allocate the case to be dealt with by a different body, where staff have limited training which extends only to “the appropriate knowledge or receive necessary training to fulfill their obligations when implementing [the] directive”.<sup>20</sup> The combined effect of Articles 23 and 28 is that Member States may prioritise or accelerate any application for asylum.

Commentators have noted that under this Directive “exceptional measures become the norm” and that it is difficult to see which Procedures may not be accelerated.<sup>21</sup>

Under Article 23(4) an applicant may be deemed manifestly unfounded for a total of 15 reasons a number of which are unrelated to the substance of their claim.<sup>22</sup> Judith Farbey has categorized these 15 reasons as falling into five broad categories.<sup>23</sup> Firstly, applications which are “unlikely to succeed on their merits” or who “clearly” do not qualify for status under the Qualification Directive may be deemed manifestly unfounded. Secondly, cases can be deemed unfounded because the applicant is from a safe country of origin or there is a non-EU country which is considered a safe third country.

Thirdly, applications can be accelerated for reasons of an applicant’s conduct within the asylum process. These extensive and detailed provisions facilitate cases being accelerated for a variety of conduct issues while in the process including failing to produce information establishing identity, withholding or disposing of identity or travel documentation. Applications can also be accelerated for reasons of timing or delay, such as failing to make an application earlier, failing to present, and where it is perceived that the application has been made “merely in order to frustrate the enforcement of an earlier or imminent decision which would result in removal”. The final category of cases are those that may also be accelerated on the grounds of public order and national security. Special bodies can be established to deal with national security issues and to deal with preliminary examination of cases for safe third country analysis.

### (3) Inadmissibility to the Procedure

Article 25 sets out eight reasons why applications can be deemed inadmissible to the asylum process. Seven of these reasons, set out at Article 25(2), are additional to the Dublin Regulation and the list was expanded during the process of agreeing the Proposal. The reasons for inadmissibility include situations where an applicant has already been granted refugee status in another Member State; where a non-Member State is the first country of asylum or is considered a safe country of asylum for the applicant; where an identical application has been lodged following a final decision and where a dependent of an applicant lodges an application without new facts where they have already been part of an application made on their behalf.<sup>24</sup> ECRE have strongly disagreed with the inclusion of safe third country cases being subject to inadmissibility procedures without a substantive determination as to whether the country can be considered safe for a particular individual.<sup>25</sup> Although recognizing that this provision is based on the premise that these can or have been fully examined elsewhere, Cathryn Costello is of the view that inadmissibility determinations, even in the context of Dublin II Regulation cases, run counter to the standards of *TI*,<sup>26</sup> which requires the individual examination of the claim in the context of applicable standards in the receiving state prior to transfer.

### (4) First Country of Asylum, Safe Third Country and Safe Country of Origin Procedures

The concept of first country of asylum applies where an asylum seeker already availed of protection and was granted

legal status allowing them to enter and remain as an asylum seeker or refugee. Return to a first country of asylum is anticipated by UNHCR in EXCOM Conclusion 58 so long as there is protection from refoulement there.<sup>27</sup> Article 26 of the Procedures Directive provides that a country can be a first country of asylum for a particular applicant if she will be readmitted to the territory, is recognized in that country as a refugee and can still avail of protection there or “otherwise enjoys sufficient protection in that country”. There is no elaboration, however, on the meaning of “sufficient protection” and no procedure for an applicant to rebut the presumption that in practice she will be safe in that first country. National parliaments have scope to decide on first countries of asylum to which returns can take place. UNHCR have raised concerns that countries where UNHCR itself undertakes determinations on refugee status may be considered as safe first countries of asylum. In such situations UNHCR are often required to carry out determinations as there is a large refugee population and the State does not have capacity either to carry out determinations or offer effective protection.<sup>28</sup>

The concept of safe third country applies when an asylum seeker could have received protection elsewhere but did not do so.<sup>29</sup> Article 27 of the directive allows a Member State to invoke the responsibility of a third State to examine a claim beyond the territory of the European Union so long as those countries meet four procedural safeguards as set out at Article 27(1)(d): the safe third country should be a place where life and liberty are not threatened for any of the five Convention grounds, where there is respect for the principle of non-refoulement, where there is the possibility to request refugee status and to receive protection in accordance with the Geneva Convention. A range of individuals and organizations have strongly criticized these safeguards as being inadequate and undermining the asylum system of the EU. ECRE have noted that while transfers to third countries cannot absolve the Member State from responsibility in accordance with *TI*, the minimum standards set down in the Procedures directive contain no requirement to examine whether the Geneva Convention has been actually ratified or meaningfully incorporated in safe third countries and, again, there is no requirement that Member States conduct an analysis of whether the proposed third country can protect the particular applicant.<sup>30</sup> Individual Member States may draw up rules on methodology to establish whether the safe third country concept is applicable to a particular applicant or country. This must be done in accordance with international law and permit the applicant to challenge on the grounds that he or she would be subjected to torture, inhuman or degrading treatment there.<sup>31</sup> Article 27(3) is useful in requiring that the third state give its explicit consent in writing to admit the asylum seeker to its territory, but does not require the State to confirm that it is giving access to the asylum determination procedure.

Pursuant to Article 29(1) of the Directive, the Council shall adopt a list of third countries which must be jointly accepted by the Member States as being safe countries of origin.<sup>32</sup> The requirement to adopt such a list raises competence concerns in light of the fact that some Member States do not currently operate safe country of origin systems.<sup>33</sup> Arguably, as Title IV permits the EU to establish minimum standards in this field only, Member States are forced to dilute their current

protection systems by adopting such a list. Moreover, while Member States are mandated (“shall”) to adopt a list of third countries, Member States may also treat additional countries as safe in accordance with Article 30(1) and Annex 2. Member States may also decide that just part of a territory can be deemed safe. There has been no agreement to date on the common list, however, and many Member States continue to maintain their own safe country lists that may be retained and extended pursuant to Article 30(1) and Annex 2.

Pursuant to Article 31(2) all applicants from designated safe countries are to be treated as unfounded if that country is safe for that particular applicant. If the applicant is a citizen of that country, or has been habitually resident there, it is to be presumed that the country is safe and the burden is on the applicant to establish “serious grounds” to rebut that presumption.

The concept of “supersafe” European third countries is introduced at Article 36 of the Directive and permits Member States to provide no access or no full access to the procedure for those who enter illegally from designated countries. This provision has been the subject of considerable criticism.<sup>34</sup> Cathryn Costello has written on this as follows:

[T]he variety of procedures permitted [under the Directive] reflects an assumption that it is possible to determine the cogency of claims on the basis of generalisations or cursory examination. This runs counter to any informed context-sensitive understanding of the asylum process. In the worst cases under the Procedures Directive, such as the supersafe third country provisions, the generalised assessment entirely substitutes for any individual process.<sup>35</sup>

There is no express requirement of any individual assessment of such an application which conflicts with the Convention requirement for individual assessment of all claims. In essence, applicants from these countries may be expelled without full consideration of the merits of their case and without an analysis of whether the designated third country is safe for them in practice.

#### (6) Unaccompanied Minors

The inclusion of a distinct article specifically dealing with procedural guarantees to be afforded to unaccompanied minors has been welcomed. Article 17 and the Preamble to the Directive mandate Member States to implement the provision with the best interests of the child as a primary consideration. Member States are obliged to ensure that interviews with children are conducted by interviewers with special knowledge/competence in dealing with children. There is an obligation on Member States to ensure that decision makers and interviewers are provided with such training. While there is provision for “a representative” to be assigned to the minor, however, Article 17 does not set down any minimum qualifications for the representative and the obligation to appoint a representative may be waived in certain circumstances. Of further concern is that a child’s refusal to undergo a medical examination may also comprise grounds for rejecting their application.

#### (7) Non Suspensive Effect & Effective Judicial Protection

Pursuant to Article 39 of the Directive, there is no express requirement for states to offer an administrative or in-country appeal, simply to provide access to “effective judicial protection”. Under Article 39(3) there is a purported move towards more non-suspensive appeals and Member States shall adopt rules “where appropriate” on whether or not a remedy should have suspensive effect. These provisions should not be read in isolation. Article 47 of the Charter of Fundamental Rights of the EU enshrines the right to an effective remedy in EU law<sup>36</sup>. The European Court of Justice has held that individuals must be able to invoke the rights conferred on them by Community law.<sup>37</sup> Caselaw of the European Court of Human Rights pursuant to Article 13 in *Conka v. Belgium*, *Jabari v. Turkey* and *Hilal v. the UK* confirms a right to remain in the territory until a final decision is issued once an arguable case is raised on a Convention provision.<sup>38</sup>

#### (8) Conclusions

As is apparent from the text of the Directive, the graduated procedural guarantees it contains do not appear to give clear access to asylum in the EU. There is provision for many applicants to be deemed inadmissible to the process or to be returned to ‘safe’ countries without any examination of their individual circumstances.

The scope of this article was simply to provide an overview of the text of the Directive itself, however it is not a document that a practitioner should view in isolation. As was emphasized throughout the ECRE conference, the Directive must be read in tandem with the general principles of EC law and the provisions of the Qualification Directive on individual assessment of evidence. Practitioners were strongly encouraged to assert ECHR case law and to engage further with the fundamental rights guarantees and general principles of the EC to assert a more robust matrix of protection for applicants.

<sup>1</sup> Council Directive 2005/85/EC on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status [2005] OJ L326/13 [http://eurlex.europa.eu/LexUriServ/site/en/oj/2005/l\\_326/l\\_32620051213en00130034.pdf](http://eurlex.europa.eu/LexUriServ/site/en/oj/2005/l_326/l_32620051213en00130034.pdf)

<sup>2</sup> Amended Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status 18 June 2002 [2002] OJ c291 E/143, the “Revised Proposal”. [http://www.statewatch.org/news/2003/nov/com2002\\_0326en02.pdf](http://www.statewatch.org/news/2003/nov/com2002_0326en02.pdf)

<sup>3</sup> The Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status 24 October 2000 [2001] OJ C62 E/231 the “Original Proposal”.

<sup>4</sup> Costello, Cathryn, *The European Asylum Procedures Directive in Legal Context*, UNHCR Policy and Evaluation Service, New Issues In Refugee Research, Research Paper No. 134, November 2006, p7.

<sup>5</sup> See ECRE, *Information Note on the Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*, IN1/10/2006/EXT/JJ.



<sup>6</sup> UNHCR Press Release, Lubbers Calls for EU Asylum Laws not to Contravene International Law 29 March 2004

[http://www.ecre.org/press/Lubbers\\_concern\\_directive\\_en.pdf](http://www.ecre.org/press/Lubbers_concern_directive_en.pdf)

; UNHCR Press Release UNHCR Regrets Missed Opportunity to Adopt High EU Asylum Standards 30 April 2004 <http://www.unhcr.org/news/NEWS/40921f4e4.html>

<sup>7</sup> Call for Withdrawal of the Asylum Procedures Directive.

[http://www.ecre.org/files/Vitorino\\_call\\_for\\_withdrawalpdf.pdf](http://www.ecre.org/files/Vitorino_call_for_withdrawalpdf.pdf)

<sup>8</sup> The Directive does not apply to Denmark. Article 15 does not have to be implemented until January 1<sup>st</sup> 2008. In relation to Parliament's challenge see *Case C-133/06 European Parliament v Council of the European Union. Application OJ C 108, 6<sup>th</sup> May 2006, p12*. Parliament's challenge to the Directive is on procedural grounds only, not fundamental human rights grounds as human rights organisations had hoped.

<sup>9</sup> Title IV, Article 63, EC Treaty.

<sup>10</sup> Procedures Directive, Article 5. Setting minimum standards is inherent in the competence of Title IV EC, Article 63(1)(d).

<sup>11</sup> Costello, Cathryn, *The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?* *European Journal of Migration and Law*, 7: 35-69, 2005, p53.

<sup>12</sup> The effect of this provision can be seen when looked at in conjunction with Article 39 which provides for a range of appeals, many of which are non-suspensive.

<sup>13</sup> This is subject to a caveat whereby there is no need to state the reasons in circumstances where the applicant is granted status.

<sup>14</sup> Charter of Fundamental Rights of the European Union, Article 47, 2000/C 364/01

[http://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](http://www.europarl.europa.eu/charter/pdf/text_en.pdf)

<sup>15</sup> (1980) 2 EHRR 305.

<sup>16</sup> Costello, Cathryn, *The European Asylum Procedures Directive in Legal Context*, *op. cit.*, at p32.

<sup>17</sup> The Directive applies to all applications for asylum made in the territory of a Member State, including applications made at the border. The Member States can choose whether to apply the directive to applications for subsidiary protection.

<sup>18</sup> Article 23(3), Procedures Directive.

<sup>19</sup> The right to a personal interview is provided by Article 12, Procedures Directive.

<sup>20</sup> Article 4(3), Procedures Directive.

<sup>21</sup> Costello, Cathryn, *The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?* *op. cit.*, p52 and Farbey, Judith, *Border, Admissibility and Accelerated Procedures: International Human Rights Dimensions of the Procedures Directive and the Dublin Regulation*, Paper Delivered at ECRE Conference, Friday 4<sup>th</sup> May, 2007.

<sup>22</sup> Articles 28(2) and Article 23(4)

<sup>23</sup> Farbey, Judith, *op. cit.*

<sup>24</sup> Article 25(2)(a)-(g).

<sup>25</sup> ECRE, *Information Note on the Council Directive 2005.85 EC of 1<sup>st</sup> December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*, IN1/10/2006/EXT/JJ, pp21-22.

<sup>26</sup> *TI v United Kingdom*, 43844/98, Admissibility Ruling, 7 March 2000.

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbk&action=html&highlight=&sessionid=971835&skin=hu doc-fr>

<sup>27</sup> UNHCR EXCOM, 'Problem of Refugees and Asylum Seekers Who Move in an Irregular Manner From a Country in Which They Had Already Found Protection', Conclusion No 58 (XL), 1989

<sup>28</sup> UNHCR, *Provisional Comments on the Proposal for a Council Directive on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*, Council Document 14203/04, Aisle 64, November 2004.

<sup>29</sup> UNHCR EXCOM, *Refugees Without An Asylum Country*, Conclusion No 15 (XXX), 1979.

<sup>30</sup> ECRE Information Note on the Procedures Directive, *op. cit.*, 23-26.

<sup>31</sup> 27(2)(b) and (c), Procedures Directive. There is also a right to an effective remedy in accordance with Article 39.

<sup>32</sup> Costello, Cathryn, *The European Asylum Procedures Directive in Context, New Issues in Refugee Research*, *op. cit.*, p12.

<sup>33</sup> ECRE *Information Note*, p26.

<sup>34</sup> ECRE, *Information Note*, *op. cit.*, p33 and Costello, Cathryn, *The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection*, 7 *European Journal of Migration and Law*, 33 at 62-65.

<sup>35</sup> Costello, Cathryn, *The European Asylum Procedures Directive in Context*, *op. cit.*, at 34.

<sup>36</sup> *Charter of Fundamental Rights of the EU*, *op. cit.*

<sup>37</sup> *C-222/84 Johnston (1986)* ECR 1651, asserting the importance of the availability of judicial review.

<sup>38</sup> *Conka v. Belgium*, Judgment 5 February 2002; *Jabari v. Turkey*, Judgment 11 July 2000 and *Hilal v. UK*, Judgment 6 March 2000.

## Palestinian Refugees and the Universal Declaration of Human Rights Seminar

Refugee Studies Centre, Oxford

*A report by Iain Robertson,  
Solicitor, Refugee Legal Service, Galway*

On 28/29<sup>th</sup> April 2007, James O'Sullivan of the Refugee Documentation Centre and I attended at the Refugee Studies Centre, University of Oxford, to participate in a course on Palestinian refugees and the Universal Declaration of Human Rights. The course consisted of two days of lectures and workshops and was attended by 16 delegates from very different backgrounds and fields.

### DAY 1

Proceedings commenced with each delegate introducing themselves and their particular field of interest. There was plenty of diversity, to say the least, among delegates; ranging from university professors, academics, social anthropologists, students, a political advisor, a policy analyst and a delegate working for an aid agency within Palestinian refugee camps on the West Bank. Had I left anyone out? Oh yes, a mere solicitor and humble researcher from Ireland, who by now were exchanging nervous glances!

The course programme was an interesting mixture of lectures and workshops, commencing with a historical overview and socio-political contextualisation of the events leading to the current situation for Palestinians within refugee camps and the region as a whole.

It is a common misconception and one to which I had subscribed that the creation of the "State of Israel" and subsequent displacement of the Palestinian people in 1948 occurred as a consequence of collective guilt on the part of the Allies, when the full extent of the Holocaust became apparent. In a very comprehensive opening lecture, it was made clear that *al-Nakbah* (literally "the catastrophe"), which is the term used by Palestinians and Arabs to describe the 1947-48 war, which resulted in the displacement of over three quarters of a million Palestinians, the seizure of almost 80% of their land and the establishment of a Jewish state in Palestine, was in fact the culmination of a policy of Western led marginalisation of the Palestinian people and gradual Jewish immigration fuelled by growing anti-Semitism in Europe and Russia.

The Balfour Declaration of 1917 symbolized the commitment of Britain in particular and Western powers in general to the establishment of a "national home for the Jewish people". The 1919 Covenant of the League of Nations, whilst recognising the Palestinian people as an independent nation, placed them under British Mandate and there followed over the next 30 years growing land purchase and acquisition incentives to facilitate Jewish immigration. When in 1939 the Palestinians rebelled against this, their resistance was crushed by 20,000 British troops and 6,000 Israeli auxiliary police.

On 29<sup>th</sup> November 1947, United Nations General Assembly resolution 181, "the Partition Plan" was passed, as a consequence of which a Jewish state, comprising of 56.47% of the territory would be created. At the time of the resolution

being passed only 7% of the total land area was actually owned by Jewish people.

The day after the Partition Plan, armed conflict spread throughout Palestine.

The existing Jewish paramilitary organisations were well prepared, better trained and equipped.

15<sup>th</sup> May 1948 serves both as a celebration and commemoration. It represents the fulfilment of the long denied aspiration of Jewish people to establish a homeland, while for Palestinians it represents simply *al-Nakbah*.

As a result of the 1948 war, over 750,000 Palestinian civilians were uprooted and approximately 530 villages destroyed.

As a consequence of the 1967 Six Day War, a further 350,000 – 400,000 Palestinians were displaced from the West Bank and Gaza.

Today there are over 5 million Palestinian refugees who have been forcibly displaced during, or as a consequence of the 1948 and 1967 wars.

Approximately three-quarters of the Palestinian people have been uprooted from their traditional homeland, rendering them the largest refugee population in the world and the resolution of their predicament no less intractable than it was in 1948.

It was to this sombre backcloth that we broke into study groups, each required to assess the issues and challenges facing Palestinians in:

Lebanon  
Syria  
Jordan  
Gaza/West Bank

The group in which I was involved was looking at the issues and challenges facing those in Gaza and the West Bank. Each group consisted of no more than four delegates, so there was no question of taking a back seat. My own group consisted of two social anthropologists and a student. I learned to my cost that these academics, while keen to read and analyse the material, were noticeably more reticent about presenting it and promptly voted that I deliver our findings when we reconvened!

The Gaza Strip is a narrow strip of land of only 360 square kilometres. It is home to some 1.4 million people, three quarters of whom are refugees. The refugee camps in Gaza have one of the highest population densities in the world. For example, over 78,700 refugees live in Beach camp, whose area is less than one square kilometre. Such a concentration of people would create tensions in its own right, but when one factors in ongoing human rights abuses, inadequate infrastructure, restriction of movement and the well documented lack of security, the daily lives of its inhabitants seems almost unimaginable.

The lack of security is compounded by the fact that military activity by Hamas or Fatah militias invariably provokes an excessive and discriminate response, targeting not the perpetrators of the attacks, but the already beleaguered population. At first glance it is hard to fathom how the

destruction of homes, schools and UNRWA facilities such as medical centres can be justified as a response to terrorism, but from its inception Israel has justified such tactics as necessary for its survival. Its founding leader Ben Gurion noted in mid-December 1947:

“We adopt the system of aggressive defence; with every Arab attack we must respond with a decisive blow: the destruction of the place or the expulsion of the residents along with the seizure of the place”

All of the presentations at the seminar were well received and informative. The morning session was concluded with a discussion of the issues which had arisen from the group presentations.

The afternoon session focused on the rights of Palestinian refugees under International law.

The UNHCR Statute and the 1951 Convention both explicitly excluded Palestinians from protection. Article 1D of the 1951 Convention states that the Convention

*shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection and assistance.*

*When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the general assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of the Convention.*

This exclusion clause was incorporated at the request of Arab States, who wished to single out Palestinian refugees and politicise the issue. They considered the international community responsible for creating the Palestinian refugee problem and wished to ensure that both politically and financially the international community remained responsible for them. They also wished to avoid Palestinians becoming submerged or grouped with other refugees and saw this clause as a way to retain their separate and special status.

Egypt introduced an amendment to the initial draft of Article 1D, which at that point contained only the first italicised paragraph above. To ensure that the exclusion of Palestinian refugees from the benefits of the 1951 Convention was only temporary they proposed and had included the second italicised paragraph, which was effectively a contingent inclusion clause.

However, this attempt to accord Palestinians a unique and constant protection has not been achieved. Subsequent displacement of Palestinians and inconsistency in the interpretation of Article 1D by Convention signatory States has created a protection gap. Our own legislation for instance (The Refugee Act 1996), an Act introduced to give effect to the terms of the 1951 Convention incorporates only the first paragraph of Article 1D, but the contingent inclusion of paragraph 2 is conspicuous by its absence.

Following this consideration of the applicable international law, we broke in to further workgroups, to consider case scenarios and make further presentations. These case studies served to illustrate how intractable the problem is and how

passage of time makes a mutually acceptable solution very difficult to achieve.

The day ended with a short film illustrating the real problems faced by Palestinians living in the occupied territories. *Without Rights* was an admittedly subjective and sympathetic documentary highlighting the social and economic limitations experienced by Palestinians in Gaza and the West Bank. It effectively captured the frustrations and claustrophobia of a grossly overpopulated strip of land, where its inhabitants consider themselves besieged.

At the end of what had been a very full day's business, we were invited to informally discuss the day's events over a glass of wine.

The cerebral exertions of the day were nothing compared to the subsequent physical trekking involved in trying to find a suitable eatery for my Vegan accomplice.

## DAY 2

The focus on Day Two was on the legal status of Palestinian refugees in International law and their civil rights in Arab states.

The CASABLANCA PROTOCOL OF 1965, attempted to regularise the position of Palestinian refugees in Arab States. It required that Palestinians enjoy the same treatment as nationals in host states as regards employment, freedom of movement between Arab states and access to travel documents. However, not all members of the Arab League signed up to the Protocol and it contained no enforcement mechanism. By 1991 the League of Arab states had adopted a resolution which authorized that Palestinians be treated in accordance with local norms rather than the provisions of the Protocol. Consequently, there is no consistency or uniformity of treatment of Palestinians in host Arab states. There is no continuity of protection and their treatment is often politically motivated, but ultimately justified by the argument that to grant Palestinians citizenship in host Arab states would abrogate the international community from its responsibility towards them and would be detrimental to their national identity and fundamental right of return.

Those may well have been laudable sentiments in 1948, when the right of return of the displaced Palestinians still seemed achievable. Almost 60 years on, one has to question whether such aspirational dicta owe more in truth to political expediency.

Having spent the best part of the morning considering the rights of Palestinians within various host Arab states, we again broke in to workgroups to consider case studies designed to illustrate how complex the situation facing Palestinians, who, while ostensibly welcome, are still practically very insecure in terms of the lack of citizenship rights available to them and in many instances to their children born within, but denied full participation in host states.

In the afternoon session, the course presenters uttered the two words which I fear most on any training course: Role Play! We were asked to assume the role of a UN Committee, with small groups of 2-3 delegates representing each of the interested parties, i.e. Palestinian delegation, Arab nations delegation, Israeli delegation etc.

Each group had to prepare and argue its position, with a view to negotiating a universally acceptable and durable solution to the conflict. Generously, we were given an hour in which to achieve this before coming to the negotiating table.

Considering almost 60 years have elapsed in which the combined endeavours of Presidents, Prime Ministers and Camp David talks involving all parties have failed to deliver the Palestinian and Jewish people from the current impasse, it was perhaps bordering on the optimistic that we could ever have hoped to sort it out in 60 minutes.

Recent developments in Gaza/West Bank have left the fundamentalist Hamas (the democratically elected party from Parliamentary elections in 2006) in control of Gaza, but internationally isolated. Fatah, who have hitherto monopolised power and who many believe suffered electorally due to allegations of corruption and indiscipline, may have lost the electoral process, but their more moderate stance and willingness to negotiate with Israel means that they represent the more palatable face of Palestinian national aspirations.

With Israel poised to invade Gaza with an estimated 20,000 ground troops, with a view to striking a decisive blow against Hamas, the only certainty is that the beleaguered and besieged occupants of Gaza face more misery and their dream of a unified Palestinian state further out of reach than ever before.



## Sympathy for the Devil: The Yazedi in Iraq



Patrick Dowling  
RDC Researcher

### Introduction

In 2007 *IRIN* noted:

“Yazidis, Bahais, Jews, Sabeans and Kaka'I communities are believed to have nearly totally fled [Iraq]...most of these minorities have been seeking protection by fleeing to Kurdistan...where they are relatively safer than in other parts of the country”<sup>1</sup>

Also in 2007 *BBC* note:

“Unidentified gunmen have killed 23 people in the northern Iraqi city of Mosul, police said. All the victims were said to be members of the Yazidi religious minority...Police said the victims had been dragged from a bus and shot dead. Followers of other faiths were reportedly left unharmed by the gunmen...[The Yazidi] worship an angel figure that some Muslims and Christians consider the devil.”<sup>2</sup>

This article on the Yazidi minority in Iraq focuses on their current and historical treatment and will conclude noting how they fit into today's Iraq; additionally their history in Iraq alongside their ethnicity and beliefs are addressed. The religious tenets of the Yazidi have never been far from the reasoning behind those who would persecute them.

### Worship of the Devil

The *US Department of State* note:

“Members of the Yazidi community reported that they continued to be targeted by Islamists throughout [2006]...They complained that the misperception that they were devil-worshippers was behind some attacks that the community suffered...”<sup>3</sup>

The *IWRP* add:

“For many Muslim Arabs...the Yazidis are devil-worshippers due to their veneration of Taous Malek, the Peacock Angel...Whereas Muslim theology says the angel was punished by God for refusing to bow to man...the Yazidis hold that he was rewarded for recalling God's earlier commandment to worship no other deity. Yazidis say Taous Malek is a benevolent figure, charged with protecting the world...”<sup>4</sup>

*Ewan Anderson* notes “The Yazidi...[in] Iraq are sometimes spoken of as worshippers of satan. However, far from being devil worshippers, their prime tenet is antidualist, denying the existence of evil, sin and the devil...”<sup>5</sup>

An article in *Information Access Company* states:

“...Evil is a concept unknown to the Yezidis...the[y]...deny the principle of...[satan's] existence as the force of Evil...they do acknowledge the primal sin of the Peacock-Angel, who tried to become the equal of the Supreme Being. In this regard they tell various stories, which are ...similar to the stor[ies]...in the Bible and the Koran.”<sup>6</sup>

A book by *John Bowker* adds:

“The distinctive feature of the religion - a monotheistic faith incorporating many Jewish, Christian, and Muslim traditions - is the belief that the fallen angel Lucifer had been pardoned by God for his disobedience...This concept...may be traceable to pre-Islamic religions. Some scholars suggest Manichean or Zoroastrian origins...”<sup>7</sup>

*IRIN* notes an adherent's plea:

“... “Whatever we worship doesn't affect the normal lives of Iraqis and as we respect their beliefs, we have to have ours respected too,” “<sup>8</sup>

### Beliefs

Origins of the Yazidi belief in the devil are outlined by an *AFP* article from 2006. The article quotes Baba Sheikh Khurto Hajji Ismail, religious leader of the community in the village of Lalesh in northern Iraq and then goes on to comment on the situation in general:

“[T]here are seven angels in heaven and they are respected by God...Malak Taus is one of them. He is an angel, The other angels asked him, “why don't you bow before Adam and Eve,” and he said, “Adam is made of mud and we are angels formed of the spiritual light.”<sup>9</sup>

“...Unfortunately for Yazidis, in the other revealed religions, the chief of the angels was cast out of heaven and was known as Lucifer -- which gave rise to the claim the Yazidis worship the devil, something they hotly dispute. The finer points of religious differences are lost on the Sunni extremists that have come to many of the Yazidi areas...”<sup>9</sup>

Those who persecute the Yazidi focus on one part of their religious mores and belief in the devil forms one aspect of a greater religious descent where oral and written traditions pervade. The *Bowker* book states:

"Illiterate until recently, the Yezidis derive their religious heritage from oral traditions. They have two 'sacred books'...The *Jelwa* ( Book of Revelation ) is a short homily attributed to Sheikh Adi. The *Meshaf Resh* ( Black Book ), attributed to his great-grandnephew Sheikh Hassan ( d.1246 ), contains the Yezidi version of Genesis."<sup>10</sup>

But the Yazidi have not been considered part of the Judeo-Christian-Islamist heritage. *Information Access Company* states:

"...[T]he Yezidis, they were never considered chosen ahl al-kitab ('People of the Book'). Their response to this is very clear: 'Our books are our hearts!', they have always cried."<sup>11</sup>

### Origins

A *New York Times* article outlines the history of the Yazidi:

"The veneration of their saints' tombs means few Yazidis have ever wandered far from their Iraqi roots, although there are branches in Turkey, Syria, Iran, [and] the Caucasus... Estimates..put around 300,000 [remaining] in Iraq. Yazidis venerate Sheik Adi bin Musafir, a 12th-century Lebanese-born Arab mystic whose tomb, in Lalish in northern Iraq, is their main place of pilgrimage. They say Sheik Adi revived a faith dating back to Adam."<sup>12</sup>

The *UNHCR* add to this history and note the unique Yazidi lineage "Yazidism is a monotheistic religion whose history reaches back approximately 4,000 years...Only a person born to Yazidi parents is a member of the Yazidi community and there is no way to convert to the Yazidi religion."<sup>13</sup>

This ancestry also includes Kurdish crossfertilization.

A report by *Minority Rights Group International* says "The Yazidi are ethnically and linguistically Kurdish..."<sup>14</sup>

### Ethnicity

An article by *Information Access Company* states:

"...because of their religious and geographical isolation, the Yezidis are today an ethnic group in their own right, completely separate from the Kurds, with whom nevertheless they share the same language."<sup>15</sup>

The *Encyclopaedia of the Worlds Minorities* notes:

"They are farmers and herdsmen who live in small and isolated groups, are of Kurdish stock and are distinguished by a syncretism of religious elements of paganism, Zoroastrianism, Christianity, and Islam."<sup>16</sup>

The religious mosaic of the Yazidi includes Muslim elements which do not automatically result in tolerance by some Muslims.

### Encounter with Muslims

The *AFP* notes:

"The Yazidis trace their religion back 4,000 years when all Kurds belonged to the same faith but that changed about 1,000 years ago when Arab invasions led to the majority of

Kurds converting to Islam. About five percent held out and refused the Islamic advances"<sup>17</sup>

The *IWRP* states:

"Not only are they a minority, but their faith is not accorded the same respect by Muslims as Christians or Jews, both of which are mentioned in the Quran as protected "Peoples of the Book."<sup>18</sup>

The article also states:

"Most of Iraq's myriad ethnic and religious communities have wrestled with questions of identity in the tumultuous year that has followed the fall of Saddam. But for members of the Yazidis – a pre-Islamic faith professed by a minority of Kurds - the stakes may be higher than for most. For the Yazidis, the choice between identifying themselves with the Kurds or seeking special status, is a particularly urgent one. Widely believed by other Iraqis to be devil-worshippers, they claim a long history of persecution by Muslim rulers, including Saddam. Now, many Yazidis fear, the advent of a new Iraq in which religious parties will likely have strong influence has put them again at risk."<sup>19</sup>

The general Muslim position on the Yazidi is stated by the *Information Access Company* as follows:

"...All Muslims agree that they are shaytan parast or 'abedet iblis ('Worshippers of the Devil')"<sup>20</sup>

### Persecution

*Minority Rights Group International* states that the Yazidi face persecution:

"They face persecution by religious extremists as 'devil worshippers'..."<sup>21</sup>

An article by *VOA* notes:

"The Yazidi religion is one of the oldest in the world. Scholars date it to well before Islam and Christianity. And, while the three religions have co-existed relatively peacefully in this part of Iraq in recent years, that has not always been the case...Yazidis were massacred by Muslims about 100 years ago, partly because of the perception that the Yazidi religious practices were heretical... After more than 100 years, the same attitudes are appearing on the surface."<sup>22</sup>

*Minority Rights Group International* notes the historical standing of the Yazidi:

"The Yazidis have always remained on the fringes of Iraqi society, but because of the strategic position of Jabal Sinjar they have been exposed to the unwonted attentions of state security. Since the Ba'ath came to power, repeated efforts have been made to Arabize the area and also efforts to persuade Yazidis they are really Arab."<sup>23</sup>

The *UNHCR* comment on 'Arabization' of the Yazidi:

"As part of the 'Arabization' campaign, many Yazidis were forced to identify themselves as Arabs, while they were not entitled to any minority rights...religious education was prohibited and the Yazidis...could no longer practice their religion without restrictions. During the 1970s and 1980s, many Yazidis were forcibly relocated from their traditional areas of settlement into so-called 'model villages' in order to ensure better control by the former regime..."<sup>24</sup>

*IRIN* comments on the Saddam Hussein era and its aftermath "...Iraq's Yazidis had a hard time under the Baath party...But liberation did not end their problems."<sup>25</sup>

*The Independent* notes what has transpired since the fall of Saddam "Without a stake in power, the Yazidi remain at risk as conflicting parties struggle for control...Worse, they are in serious danger from the Wahabi Muslim extremist factions that have been growing in power since the fall of the Saddam regime."<sup>26</sup>

The effect of all the years of neglect is reported by *USAID* "The Yazidis live in extreme poverty, and Yazidi homes are often deficient in running water and electricity delivery systems. Many Yazidis lack formal education, hindering the process of social integration and civic participation."<sup>27</sup>

### The Situation in 2007

And into 2007, *IRIN* note:

"Yazidis have long claimed discrimination in Iraq for matters such as employment and education. But now, with sectarian violence escalating over the past year, the threat of death hangs over them."<sup>28</sup>

*UNHCR* state:

"So far, the situation of the Yazidis has not improved substantially...the embracing of stricter Islamic values, the generally dire security situation, the presence of radical Islamic groups and militias as well as the ongoing political power-wrangling of the various sectarian groups about Iraq's future, leaves Yazidis exposed to violent assaults and threats and curtails their traditional ways of living as observed for Christians, Jewish and Mandaean minorities."<sup>29</sup>

The *AFP* note further:

"Iraq's Yazidi minority -- long unfairly stigmatised as "devil worshippers" by their Muslim and Christian neighbors -- have suffered much from Iraq's current turmoil. The half-million-strong community is caught between the intolerance of Sunni extremists, who want to drive them out of their lands, and the ambition of the Kurdish regional government, which wants to co-opt their votes."<sup>30</sup>

*Minority Rights Group International*, continuing on the theme of the Yazidis seen as devil worshippers, state:

"Yazidis are...known by other faiths as devil worshippers, a charge that has exacerbated their persecution in post-Saddam Iraq..the security situation in Iraq degenerates along ethnic and religious lines, this community is particularly at risk because of such prejudice."<sup>31</sup>

The *BBC*, noting a specific incident in 2007 where Yazidi were singled out and murdered, report:

"...the gunmen shouted at the Yazidis, "God curse your devil". Some Muslims regard Yazidis as devil-worshippers ...The incident has worrying implications. It is one more sign that Iraq is not just in the grip of a cycle of violence involving Sunni and Shia Muslims. It faces a broader sectarian problem now affecting some of the country's oldest minorities...Once a mosaic of religious and ethnic groups who enjoyed a largely peaceful coexistence, Iraq is increasingly falling prey to sectarian suspicion and intolerance."<sup>32</sup>

*IRIN*, commenting after this attack, quote Hebert Yegorova, a spokesman for Yazidi Peace Association:

" '...Yazidis, in addition to being a minority in Iraq, have been discriminated against for their beliefs and are forced to isolate themselves to stay alive' "<sup>33</sup>

The *Los Angeles Times* notes how the Yazidi may survive:

"Although the Yazidis are relatively small in number, there are enough adherents that the religion is self-sustaining...Despite the temptations of the modern world and the sea of Islam around them, the Yazidis still practice their rites and customs with great solemnity. They pass on their traditions to the younger generation through regular religious studies held at their temples"<sup>34</sup>

### Conclusion

The Yazidi have survived throughout the tumult of Iraqi history and yet that same challenge remains: to maintain their multifarious religion with its constituent so-called "devil worship" within the symbiosis of Iraq's multicultural civilization:

" "Some experts call us the museum of eastern religions...This is because you can see Islam in there, Christianity in there, Judaism, Zoroastrianism, Buddhism, Mithraism -- you can see everything in the Yazidi religion...."<sup>35</sup>

"...Yazidis are...known by other faiths as devil worshippers, a charge that has exacerbated their persecution in post-Saddam Iraq."<sup>36</sup>

"[I]ts agglomeration of peoples and faiths is one reason Iraq is considered a fractious place, difficult to govern."<sup>37</sup>

<sup>1</sup> (IRIN,( 4 January 2007),*Iraq: Minorities living tormented days under sectarian violence*).

<sup>2</sup> (BBC News,( 22 April 2007),*Iraq gunmen target minority group*).

<sup>3</sup> (US Department of State,( 6 March 2007),*Iraq, Country Reports on Human Rights Practices 2006*).

<sup>4</sup> (IWRP,(15 April 2004), "Devil-worshippers" Fear Renewed Persecution).

<sup>5</sup> (Ewan Anderson,(2000),*The Middle East – Geography and Geopolitics*,London:Routledge).

<sup>6</sup> (Zaim Khenchelaoui,( 22 September 1999),*The Yazidis,People of the Spoken Word in the midst of People of the Book; inhabitants of Iraq and surrounding areas*, Information Access Company, Lexis Nexis).

<sup>7</sup> (John Bowker Editor,(1999),*The Oxford Dictionary of World Religions*,(1999),Oxford:Oxford University Press).

<sup>8</sup> (IRIN,(23 April 2007),*IRAQ:Yazidi minority demands protection after killings*).

<sup>9</sup> (Paul Schemm,( 13 October 2006), "Beleaguered Yazidi find peace high in Iraq's northern mountains",*AFP* ,Lexis Nexis).

<sup>10</sup> (John Bowker,op.cit.).

<sup>11</sup> (Zaim Khenchelaoui,op.cit.).

<sup>12</sup> (Neil MacFarquher,(3 January 2003), "Bashiq Journal; A Sect Shuns Lettuce and Gives the Devil His Due",*New York Times*, Lexis Nexis).

<sup>13</sup> (UNHCR,(1 October 2005),*Background Information on the Situation of Non-Muslim Religious Minorities in Iraq*)

- <sup>14</sup> (Minority Rights Group International, (2007), *State of the World's Minorities 2007, Events of 2006*).
- <sup>15</sup> (Zaim Khenchelaoui, op.cit.).
- <sup>16</sup> (Carl Skutsch Editor, (2005), *Encyclopaedia of the Worlds Minorities, Volume 2 G – O*, Routledge: London).
- <sup>17</sup> (Luke Hunt, (7 October 2003), 'US finds Saddam's 'devil-worshippers' more numerous than thought', *AFP*, Lexis Nexis).
- <sup>18</sup> (IWRP, op.cit.).
- <sup>19</sup> (ibid).
- <sup>20</sup> (Zaim Khenchelaoui, op.cit.).
- <sup>21</sup> (Minority Rights Group International, op.cit.).
- <sup>22</sup> (VOA, (19 February 2007), 'Iraqi Kurd Clan Leaders Work To Ease Tensions', Lexis Nexis).
- <sup>23</sup> (Project Director Miles Litvinoff, (1997), *World Directory of Minorities*, London: Minority Rights Group International).
- <sup>24</sup> (UNHCR, op.cit.).
- <sup>25</sup> (IRIN, (4 November 2004), *IRAQ: Isolated Sinjaris call for more development assistance*).
- <sup>26</sup> (*The Independent*, (29 November 2003), 'Hell's Angels; Scorned As Devil Worshipers', Iraq's Yezidi Tribe Have Survived').



## Recent Developments in Refugee and Immigration Law

*Nafisa Abdi Adan v The Refugee Applications Commissioner and Ors*, High Court, Finlay-Geoghegan J., 23<sup>rd</sup> February 2007

JUDICIAL REVIEW – LEAVE – MINOR – MERGER – DELAY – SUBSISTING DECISION

### Facts

The Applicant applied for asylum in the State 2004, citing her birth date as October 1987, with the result that she was prima facie treated as a minor for the purposes of her claim. The Applicant had previously applied for asylum in the UK, providing a different name and date of birth. Her advisers were unaware of this information. The date of birth she gave in the UK implied she was an adult. The applicant was provided with a HSE project worker and interviewed by an authorised officer of the Commissioner's office. The authorised officer did not disclose the information regarding the previous claim in the UK until a break during the interview during which he took the HSE project worker aside to discuss the matter. The project worker requested an adjournment. This was refused. The project worker averred that the interviewer's questioning became aggressive and that he stated that the Applicant's evidence was irrelevant because she had already lied. The Commissioner found that the Applicant had failed to establish a well-founded fear of persecution, and applied section 13(6) (a) and (b) of the 1996 act, with the result that the Applicant was required to appeal within ten days of the negative decision, and would not have an oral hearing on appeal. The Applicant's legal representatives requested that the Commissioner quash the recommendation, and also lodged an appeal to the Refugee Appeals Tribunal without prejudice to judicial review of the

- <sup>27</sup> (USAID, (14 August 2003), *USAID Iraq Humanitarian and Reconstruction Assistance Fact Sheet No. 60(FY) 2003*, Reliefweb).
- <sup>28</sup> (IRIN, (23 April 2007), *IRAQ: Yazidi minority demands protection after killings*).
- <sup>29</sup> (UNHCR, op.cit.).
- <sup>30</sup> (Paul Schemm, (13 October 2006), 'Beleaguered Yazidi find peace high in Iraq's northern mountains', *AFP*, Lexis Nexis).
- <sup>31</sup> (Preiti Taneja, (February 2007), *Assimilation, Exodus, Eradication: Iraq's minority communities since 2003*, Minority Rights Group International).
- <sup>32</sup> (BBC News, (24 April 2007), *Massacre fuels northern Iraq tensions*).
- <sup>33</sup> (IRIN, op.cit.).
- <sup>34</sup> (John Daniszewski, (10 March 2003), 'Showdown with Iraq; Ancient Faith Is a Reminder of Iraq's Diversity; In the mountainous north, the Yazidi religion retains its hold. Removed from conflict, adherents believe they never had it so good', *Los Angeles Times*, Lexis Nexis).
- <sup>35</sup> (*AFP*, op.cit.).
- <sup>36</sup> (Minority Rights Group International, op.cit.).
- <sup>37</sup> (*New York Times*, op.cit.).

Commissioner's decision. The Applicant's solicitor requested that the Tribunal withhold its decision. The Commissioner refused to quash its own decision by letter dated 5<sup>th</sup> April 2005. The Applicant's legal representatives then took steps to seek judicial review, and judicial review proceedings were instituted in May 2005. In the meantime, the Tribunal had issued its affirmation of the Commissioner's decision on 22<sup>nd</sup> April 2005.

The Applicant alleged that the Commissioner had acted in breach of fair procedures in the manner in which the investigation and interview were carried out. The only ground against the Tribunal was that its decision ought to be quashed on the basis that it had regard to and affirmed the Commissioner's allegedly defective recommendation. The Respondent argued, *inter alia*, that the Commissioner's decision was not susceptible to judicial review because that decision had merged in that of the Tribunal.

**Held** by Finlay-Geoghegan J. in refusing the reliefs sought, that while the Applicant had established substantial grounds for contending that the Commissioner had acted in breach of fair procedures, and that while on the facts of the application, notwithstanding the decision of the Tribunal, there remained an extant decision of the Commissioner that as a matter of law could be the subject of an order of certiorari (*GK; Savin; Okungbowa; Croitoriu; Rusu considered*), the normal position must be that where an appeal is determined an application has gone too far the High Court will not interfere with the first instance decision save where there exist special circumstances, and that the Applicant's case did disclose special circumstances.

That it was not appropriate to set out exhaustively what might constitute special circumstances, and that relevant considerations may include the nature of the grounds asserted; whether they could be considered on appeal; when the Applicant became aware of such grounds; whether the Applicant was prevented from bringing the application for

leave prior to the determination of the appeal; whether the Applicant acquiesced; any relevant statutory scheme; the time that elapsed prior to the determination of appeal and the fairness of the appeal procedure.

That it was the clear intention of the Oireachtas that subsequent to a decision of the Tribunal, that the Report of the Commissioner under section 13(1) Refugee Act 1996 continue to subsist independently. That it appeared from the opening words of section 17(1) Refugee Act 1996 that where the decision of the Tribunal is to affirm the recommendation of the Commissioner, then it is the furnishing of the Commissioner's report under section 13 to the Minister that triggers the decisions that may be made under subsections 17(1)(a) or (b).

That the Tribunal had acceded to the Applicant request to withhold its decision, and had allowed a reasonable time to elapse before issuing its affirmation of the Commissioner's recommendation.

### Cases

*Buckley v Kirby* [2000] 3 IR 431

*Croitoriu v Refugee Appeals Tribunal and Ors* (Unreported, High Court, MacMenamin J., 21<sup>st</sup> June, 2005)

*GK v Minister for Justice and Ors* [2002] 2 IR 418

*McGoldrick v An Bord Pleanála* [1997] 1 IR

*Okungbowa v Minister for Justice and Ors* (Unreported, High Court, MacMenamin J., 8<sup>th</sup> June, 2005)

*Rusu v Refugee Applications Commissioner and Ors* (Unreported, High Court, Hanna J., 26<sup>th</sup> May 2006)

*Savin v The Minister for Justice* (Unreported, High Court, Smyth J. 7<sup>th</sup> May 2002)

*Stefan v The Minister for Justice* [2001] 4 IR 203

*The State (Roche) v Delap* [1980] IR 170

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*Kumar and Anor v The Minister for Justice, Equality and Law Reform*, High Court, Hanna J., 28<sup>th</sup> May 2007

JUDICIAL REVIEW – EU RESIDENCY RIGHTS – MARRIAGE TO AN EU NATIONAL – DIRECTIVE 2005/38/EC – EC (FREEDOM OF MOVEMENT OF PERSONS REGULATIONS 2006, S.I. No. 226/2006 – WHETHER TRANSPOSITION INCORRECT – ULTRA VIRES – ARTICLE 8 ECHR – ARTICLE 41 CONSTITUTION – DISHONESTY

### Facts

The first named Applicant, a national of India, had been in a relationship with the second-named Applicant, a national of Estonia since 2003. They arrived in Ireland in 2006. The first-named Applicant applied for asylum in February 2006. The Applicants were married in March 2006. The Commissioner learned that the first-named Applicant had a prior application for asylum in Belgium, and a transfer order was duly made pursuant to the Dublin Regulation. The first-named Applicant withdrew his asylum application in June 2006, and applied for residency on the basis of his marriage to an EU national. The first-named Applicant did not challenge the Transfer order but claimed that its effect was spent in light of his withdrawal from the asylum process. In July 2006 the first-named Applicant was notified that his

application for residency had been unsuccessful because he had not submitted evidence that he had been lawfully resident in another EU Member State before coming to Ireland. The Applicants sought to quash this decision by way of judicial review on the basis, *inter alia*, that the S.I. No. 226/2006, under which the application was refused, was ultra vires Directive 2004/38/EC. The Applicants argued that the 2004 Directive contained no provision that would require that the first-named Applicant should lawfully be resident in another Member State prior to seeking to enter the State.

**Held** by Hanna J., in refusing the reliefs sought, that the intention of the first-named Applicant in filing his asylum application was to buy time, and that his aim was to circumvent the immigration laws of the State. That it was probable that the second-named Applicant was fully aware of this state of affairs. That the Directive was intended to apply to families which were established in a Member State prior to their move to the host member State. That the first-named Applicant's dishonesty should weigh in the balance in considering the Applicant's Constitutional and ECHR rights. That there was no apparent infirmity in the Minister's decision to refuse residency.

### Cases

*MRAX* [2002] Case C-459/99

*Secretary of State for the Home Department v Hacene Akrich* C/109/01

*Yunying Jia v Migration Sverket (Migrations)* (Case C-1/05)



## ELENA Conference on EU Refugee Law

By John Stanley, BL

The European Legal Network on Asylum (ELENA) hosted an invaluable conference in Rome from 4<sup>th</sup> to 6<sup>th</sup> May 2007 on asylum procedures, the EU and international human rights law. The conference dealt with various matters of pressing importance to the legal practitioner in the field of asylum law. The information and insights shared by the impressive panel of speakers will undoubtedly provide useful guidance to Irish lawyers.

Elsbeth Guild, professor of European Migration Law at the Radboud University of Nijmegen and partner at Kingsley Napley in London, discussed the development of the Common European Asylum System, and outlined the practicalities of seeking remedies at the European Court of Justice. For Ms Guild, there has been a marked reluctance on the part of Member States to rethink the principles that have led to the current problematic situation. She questioned the received wisdom of the proposition that growing numbers of asylum seekers are clogging the system, and enquired into the economic efficiency of the Dublin Regulation scheme, which has resulted in approximately the same number of asylum seekers being transferred from Germany to other Member States, as from other Member States to Germany, each year.

Cathryn Costello, Fellow in Public and EC Law at Worcester College, Oxford, whose work is particularly well known to many working in refugee law in this jurisdiction, presented a comprehensive critique of the EC Asylum Procedures Directive, lamenting a legislative process that has failed to establish clear minimal guarantees, and emphasising that



when it comes to implementing and applying the Directive, refugee lawyers will have to reassert domestic and ECHR principles of fair procedures, and that it will be for national judges to keep the principles alive. Ms Costello identified and contextualised four key areas of controversy: (i) the right to a fair hearing; (ii) the right to a reasoned decision; (iii) the right to effective judicial protection; and (iv), the right to legal aid.

The experience of practitioners in the UK was well expressed by Judith Farbey, Barrister at Toops Chambers in London, and Matthew Davies, partner at Wilson & Co., Solicitors. Ms Farbey's paper approached the derogations and modifications to accelerated and inadmissible cases, and border issues, in the Procedures Directive from an international human rights perspective. Mr Davies led a workshop on representation in fast track procedures with Flip Schuller, partner at Bohler Franken Koppe Wijnngaarden Advocaten in Amsterdam, who contrasted the UK experience with that in the Netherlands. Mr Davies and Mr Schuller helped the participants to identify various challenges endemic to accelerated procedures, and to find legal strategies adequate for meeting such difficulties.

Nicholas Blake QC, the eminent human rights barrister, spoke on detention in asylum procedures. Mr Blake regretted that states have made links between the measures they want to take against suspected terrorism and asylum applicants, but emphasised the background of human rights obligations in the European experience. Mr Blake offered a review of EU legislation and ECHR case law, with a focus on *Saadi v UK* [2006] INLR 628, which is being reconsidered by the Grand Chamber. Mr Blake argued for legal authority that would confirm (i) that it is not enough that a person is an asylum seeker who has not been admitted for lawful residence to justify deprivation of liberty under Article 5(1) of the ECHR; (ii) that interference with a refugee's right to liberty should be proportionate; (iii) that whilst reasonable suspicion of avoidable breach of frontier laws or danger to the security of a host state might justify detention pending determination, in ordinary cases it should not; (iv) that a regime of regulating admission should provide for the needs of children and other vulnerable people; and (v) that national laws should be amended to take these obligations into account.

Rosemary Byrne, Senior Lecturer in international and human rights law at Trinity College, Dublin, presented a paper on evidentiary assessment and the EC Qualification Directive, and argued for progressive steps towards a more coherent and comprehensive understanding of evidence in asylum applications, particularly with regard to matters of credibility. It should be noted that Ms Byrne is the editor-in-chief of the Refugee Law Reader ([www.refugeelawreader.org](http://www.refugeelawreader.org)), a comprehensive on-line resource that should be of profound use to all students and practitioners of refugee law.

Gabor Gyulai of the Hungarian Helsinki Committee, discussed the role of country information in asylum procedures, offered criteria for COI quality standards, and provided an interesting comparative outline of legal provisions in Member States relevant to the use of country of origin information. Judge Katelijne Decleek of the Belgian Permanent Appeals Commission for Refugees, offered judicial criteria for assessing country of origin information: (i) How relevant is the COI to the case in hand?; (ii) Does the COI source adequately cover the relevant issues?; (iii) How

current or temporarily relevant is the COI?; (iv) Is the COI satisfactorily sourced?; (v) Is the COI based on publicly available and accessible sources?; Has the COI been prepared on an empirical basis using sound methodology?; (vii) Does the COI exhibit impartiality and independence?; (viii) Is the COI balanced and not overly selective?; and (ix) Has there been judicial scrutiny by other national courts of the COI in question?

Marian Tankink, a medical anthropologist at Leiden University Medical Centre, spoke authoritatively on the challenges of gender-sensitive issues in the asylum process. Ms Tankink focused particularly on how the complex experiences of female victims of sexual violence result in silence and reticence in the asylum process, and offered suggestions on how to improve the process in light of this difficulty, including the recommendation that accelerated procedures should on no account be applied in such cases.

Guy Goodwin-Gill, Senior Research Fellow of All Souls College, Oxford, Professor of International Refugee Law at Oxford, and author of *The Refugee in International Law*, the second edition of which was published recently, spoke eloquently about the role of expert medical evidence in asylum law. Mr Goodwin-Gill investigated the responsibilities of medical experts, and highlighted the difficulties of preparing challenges to asylum decisions that ignore or fail to properly consider material medical evidence.

The conference concluded with a panel discussion on the impact of state interception practices on access to protection in the Common European Asylum System. Mark Nash, Stephanie Huber and all present from ECRE organised the conference with a level of composure entirely out of place at a conference of almost two hundred participants, among whom they deftly facilitated a thoroughly helpful sharing of ideas. Copies of all papers provided at the conference are available from the Refugee Documentation Centre.



## **Immigration, Residence and Protection Bill: Where does it stand?**

The previous issue of *The Researcher* featured a number of articles on the Immigration, Residence and Protection Bill. I asked Brian Ingoldsby, Principal Officer in the Civil Law Reform Division of the Department of Justice, Equality and Law Reform where the Bill now stands.

The Immigration, Residence and Protection Bill is one of a number of Bills at present at different stages before the Seanad.

The present Seanad continues in existence until the day before 23 July 2007, Seanad election day (Constitution, Article 18.9). On the extinguishment of the present Seanad, all Bills before it lapse; but Rule 122 of the Seanad Standing Orders provides that any Bill which lapses by reason of a general election for the Seanad may be proceeded with after the general election at the stage it had reached prior to the general election upon a Resolution restoring it to the Order Paper. The default in such cases is that a Bill is restored at the beginning of the Stage that it had reached (in the case of the Immigration, Residence and Protection Bill, at Second

Stage), but the terms of a restoring resolution could, in the case of a Bill at a more advanced stage (e.g. the Coroners Bill, which is part-way through Committee Stage) recommence it at the point it had reached or set it back to an earlier Stage.

*Brian Ingoldsby, PO, DJELR*



### Refworld now available online

Refworld's collection of protection information has now been made available online at [www.refworld.org](http://www.refworld.org). Until mid June it was only available in CD-Rom and DVD formats.

Refworld contains a vast collection of reports relating to situations in countries of origin, policy documents and positions, and documents relating to international and national legal frameworks. The data have been carefully selected and compiled from – and with – UNHCR's global network of field offices, governments, international, regional and non-governmental organizations, academic institutions and judicial bodies.

The new website includes multiple and advanced possibilities for browsing the collection of more than 76,000 documents by region and/or country, by publisher, by topic or keyword and by document type. In addition, it has a powerful full text search engine and advanced searching facilities.

Refworld is updated daily and includes special features on topics of importance such as refugee status determination, statelessness, migration and related issues, gender equality and women, internally displaced persons, resettlement, voluntary repatriation and children.

The Irish government made a generous contribution towards development costs.

"This new Refworld has restored UNHCR's credibility in information and knowledge dissemination," Guy Goodwin-Gill, Professor of International Refugee Law at Oxford University, said after the launch on 14 June. He added that the new version was clearly much more user-friendly.



### Framework Document on Medico-Legal Reports for Survivors of Torture

According to the Director of SPIRASI, Fr. Michael Begley, the first quality international standard for the assessment and formal documentation of alleged torture for determination bodies is that found in the Istanbul Protocol (Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or degrading Treatment or Punishment). He explains that it is "developed by an international panel of 75 medical, legal, human rights and forensic science experts".

The Protocol outlines the procedures and details the steps to be taken by States, investigators, legal and medical experts to ensure the impartial medical and psychological investigation and documentation of alleged torture.

An important development in the Irish context is that the Istanbul Protocol formed the basis for the drafting of a 'Framework Document for the Production, Interpretation and Use of Medico-legal Reports in Determining Refugee Status' which includes a format for Medico-legal reports and has now been adopted by examining physicians at the Centre for the Care of Survivors of Torture at SPIRASI.

This process was guided by the independent chair of the Dublin office of the United Nations High Commissioner for Refugees and at a multi-agency meeting held on 12th December 2006, a final draft of the Framework was completed by the principal parties: the Office of the Refugee Applications Commissioner, the Refugee Appeals Tribunal, the Refugee Legal Services, and the Centre for the Care of Survivors of Torture at SPIRASI. Over the three year life cycle of negotiations, the Centre for the Care of Survivors of Torture at SPIRASI was represented by Fr. Michael Begley (Director), Dr. Patrick O'Sullivan (Senior CCST Physician), Edward Horgan (CCST Manager) and Greg Straton (SDU Manager).

It is anticipated that the 'Framework Document for the Production, Interpretation and Use of Medico-legal Reports in Determining Refugee Status' together with a more comprehensive compilation of relevant material in the form of annexes, such as the Istanbul Protocol, will be published during 2007. An international conference scheduled for 2008 is also planned in Dublin to explore related medico-legal issues.

The Director of SPIRASI, Michael Begley, firmly believes that "the importance of this agreement is that it will not only contribute to better quality medico-legal reports against an agreed international standard but also enhance a better understanding and use of them by representing solicitors and adjudicating authorities at both initial and appeals stages in the determination process".

This article first appeared in Issue 1 of the Spirasi Newsletter, which can be accessed at:

<http://www.spirasi.ie/newsletter/issue-1.pdf>



## Electronic Resources in the RDC



*Zoe Melling,  
RDC Librarian*

Hello. I'm the new librarian for the Refugee Documentation Centre and Legal Aid Board. Before joining the RDC team at the end of May I spent five years working in the Law Library, providing a legal information service for barristers. I'm looking forward to developing and promoting the library service at the RDC, and ensuring that users get the most out of what we have to offer. In this edition of The Researcher, I'd like to highlight some of the key electronic resources available in the RDC, which are invaluable tools in accessing reliable up-to-date information. Many of these sources are freely available on the Internet; others are subscription databases used by researchers in the RDC. Some resources are available to Legal Aid Board staff outside the RDC. Internet access is provided for members of the public visiting the RDC to conduct their own research.

### Subscription databases:

All Africa – Media coverage from newspapers, magazines, and news agencies

BBC Monitoring Online - media coverage from radio, television, newspapers and news agencies in over 150 countries.

Business Monitor International – regional reports on political risk assessment, economic forecasts and business analysis.

Documentchecker.com – image database to assist verification of identity documents

The Economist – full text archive dating from 1997.

Electronic Immigration Network – UK immigration, refugee & nationality law, including the full text of Immigration Appeal Tribunal determinations Incorporates the Immigration Consortium Country Information database (ICCI), which covers human rights & news materials from over 50 countries.

FirstLaw - Irish reported & unreported judgments, acts and statutory instruments dating from 1919.

Ingenta: database of over 10,000 academic journals, including European Journal of Migration and Law, International Journal of Children's Rights, International Journal of Minority and Group Rights.

The Irish Times – full text archive dating from 1996.

JUSTIS – our subscription includes European Court of Human Rights judgments and Irish Reports & digests dating from 1919.

Lexis Nexis – worldwide legal & news database including case law from a variety of jurisdictions.

The New York Times – full text archive dating from 1851.

Westlaw – contains the full text of Round Hall journals, Irish annotated and consolidated legislation, and reported and unreported judgments.

### Free web-based resources

BAILII ([www.bailii.org](http://www.bailii.org)) – British, Irish and European case law, legislation and other materials, including Law Reform Commission reports.

Courts Service ([www.courts.ie](http://www.courts.ie)) – full text of selected Supreme Court, High Court and Court of Criminal Appeal judgments since 2001.

European Country of Origin Information Network ([www.ecoi.net](http://www.ecoi.net)) – comprehensive web portal providing links to publicly available COI information from a variety of reputable sources.

European Court of Human Rights ([www.echr.coe.int](http://www.echr.coe.int)) - judgments, decisions, resolutions and reports of the European Court of Human Rights since 1959.

European Court of Justice ([www.curia.europa.eu](http://www.curia.europa.eu)) – full text of decisions of the European Court of Justice dating from 1997.

International Crisis Group ([www.crisisgroup.org](http://www.crisisgroup.org)) - research reports and briefing papers aiming to resolve and prevent conflicts.

Irish Statute Book ([www.irishstatutebook.ie](http://www.irishstatutebook.ie)) – Acts of the Oireachtas & Statutory Instruments dating from 1922. Includes Chronological Tables covering statutes dating back to 1226.

IRLII ([www.irlii.org](http://www.irlii.org)) – University College Cork site containing indexes to Irish journals, judgments and statutory instruments, with some full text links.

Refugee Legal Centre London ([www.refugee-legal-centre.org.uk](http://www.refugee-legal-centre.org.uk)) - includes COI & legal information.

Refworld ([www.refworld.org](http://www.refworld.org)) – newly relaunched UNHCR site containing COI and legal information (see article in this issue).

University of Michigan Refugee Caselaw ([www.refugeecaselaw.org](http://www.refugeecaselaw.org)) – decisions from a variety of jurisdictions including the United States, compiled by Professor James Hathaway.

WORLDLII ([www.worldlii.org](http://www.worldlii.org)) – legislation and case law from a variety of countries.

### Decisions Search Unit

Access to Refugee Appeals Tribunal decisions is available through our Decisions Search Unit. Query forms can be emailed, faxed or posted to: Decision Search Unit, Refugee Documentation Centre, Montague Court, 7-11 Montague St, Dublin 2 DX 149 Dublin. fax: (01) 6613113. email: [dsu@legalaidboard.ie](mailto:dsu@legalaidboard.ie).

### Library Catalogue

The RDC Library Catalogue is available to Irish agencies involved in the asylum process. It can be accessed through Lotus Notes or at <http://lib.lab.ie>. We're currently testing a new Library Management System which will be available in the near future.

### Requesting information from the RDC

Requests can be emailed to us at

[Refugee\\_Documentation\\_Centre@legalaidboard.ie](mailto:Refugee_Documentation_Centre@legalaidboard.ie),

or submitted through the query form, which is available on the Legal Aid Board website at [www.legalaidboard.ie](http://www.legalaidboard.ie).

Feel free to contact me personally at

[zxmelling@legalaidboard.ie](mailto:zxmelling@legalaidboard.ie) if you have any queries or comments about the resources available in the RDC.



## The Falun Gong



By Paul Daly  
Refugee Documentation Centre

### Nature of Falun Gong

Falun Gong, also known as Falun Dafa, is a form of *qigong*, an ancient Chinese deep breathing and exercise regime, which is sometimes combined with meditation and which is said to enhance the flow of energy through the body.<sup>1</sup> Falun Gong means “Law Wheel Cultivation” but it is also known as “Great Law of the Wheel”.<sup>2</sup> It blends aspects of Taoism and Buddhism.<sup>3</sup> Falun Gong offers practitioners physical well being, tranquillity and a higher understanding of life’s purpose and one’s place in society.<sup>4</sup> It upholds three main virtues – compassion, forbearance and truthfulness and warns of contemporary “moral degradation”.<sup>5</sup> Its system of belief which emphasises truthfulness, compassion and forbearance, is said to encourage the highest standards of moral behaviour and to increase the goodness already present within individuals and within society.<sup>6</sup> Falun Gong contains salvationist and apocalyptic ideas: “Falun can save oneself by turning inward and save others by turning outward”; human civilizations are seen to be cyclically destroyed and the present is referred to in the writings of the movement’s founder as the “Last Havoc”.<sup>7</sup> Despite the spiritual content of some of its founder’s teachings, Falun Gong does not consider itself a religion and it has no clergy or places of worship.<sup>8</sup> In its own publications it maintains that none of its exercises can be considered religious rituals.<sup>9</sup>

### Li Hongzhi

Falun Gong was developed in the late 1980s by Li Hongzhi (Master Li) when *qigong* began to gain popularity in China.<sup>10</sup> In 1992 Li published his book *Zhuan Falun*. In 1993 Falun Gong was incorporated into the official Chinese Qiqong Association in 1993 but expelled in 1996 because of unorthodox practices; Li reportedly left China soon after.<sup>11</sup>

### Numbers of Practitioners

Sources cite various figures for the total number of Falun Gong practitioners in China. The Chinese Government claimed that prior to its crackdown there were 2.1 million adherents in the country.<sup>12</sup> This figure was reportedly downgraded from an original Chinese government estimate of 70 million to 100 million practitioners in 1989.<sup>13</sup> The number has declined as a result of the crackdown but there are still hundreds of thousands of practitioners in the country.<sup>14</sup>

### Pivotal Moment

The pivotal moment for Falun Gong occurred on 25 April 1999. An estimated 10,000 to 30,000 followers assembled in front of the Chinese Communist Party compound in Beijing and took part in a silent protest against state repression of their activities.<sup>15</sup> The demonstrators sat silently or meditated and some of them presented an open letter to the Party leadership demanding official recognition and their constitutional rights to free speech, press and assembly.<sup>16</sup>

This was the largest public demonstration in China since the democracy movement of 1989. Between May and June 1999 Chinese Communist Party (CCP) leaders were reportedly split on whether to ban Falun Gong and conveyed contradictory messages.<sup>17</sup>

### Crackdown

On 21 July 1999 President Jiang Zemin finally ordered a crackdown which outlawed Falun Gong.<sup>18</sup> The Chinese Government said that the ban was because Falun Gong were “engaged in illegal activities, advocating superstition and spreading fallacies, hoodwinking people, inciting and creating disturbances, and jeopardizing social stability”<sup>19</sup> 67 teaching stations and 1,627 practice sites were closed in Beijing; 1,200 Party and Government officials were ordered to sever their links with the movement; 30,000 participants nationwide were detained and questioned; and Falun Gong internet sites and email accounts of many practitioners were blocked.<sup>20</sup> On 23 July 1999 the Chinese Communist Party declared the “falungong incident” [on April 25] the most serious political incident” since the 1989 pro-democracy protests in Tiananmen Square.<sup>21</sup>

### Defiance

Human Rights Watch state in their 2002 report, *Dangerous Meditation*:

“Throughout 2000, every action taken by Chinese authorities to stop Falungong activities and punish its leaders met carefully orchestrated defiance...It was able to do so in part through continuous protests in Tiananmen Square, in part through a sophisticated media strategy and in part through vigorous lobbying of Western governments...On holidays such as October 1, 2000 (National Day), New Year’s Eve, Chinese New Year, or days that carried particular significance for Falungong, participants could number 1,000 or more. Falungong members, many of them middle-aged women, courted detention by unfurling banners or meditating. Within minutes, police hustled them off to waiting vans; kicking, punching, dragging them by their clothes or by their hair; and knocking them over if they did not move quickly or if they tried to get away. Falungong organisers saw to it that the international media was on hand to witness the juxtaposition of peaceful protest and violent response, and they drew attention to details of formal arrests, detentions, and suspicious deaths in custody...By January 2001 the government had to admit that, contrary to earlier statements, the war had not yet been won and the ‘broad masses’ had to be made understand the ‘duration, complexity and ferocity of our battle with Falun Gong.’”<sup>22</sup>

### Self-Immolation

On 23 January 2001 a group of alleged Falun Gong practitioners set themselves on fire in Tiananmen Square; Falun Gong spokespersons denied that the people involved in the immolations were practitioners<sup>23</sup> and argued that the government had staged the incident<sup>24</sup> One woman died on the spot; her twelve year old daughter died weeks later and three people were hospitalised.<sup>25</sup> The Chinese government responded to the event quickly, completely shutting down Tiananmen Square, whipping up public revulsion and attempting to claim the moral high ground by presenting their response to Falun Gong as a protection of human rights and an effort to prevent cults.<sup>26</sup> According to Human Rights

Watch's 2002 report questions about whether practitioners were involved and the role of security officers remain unresolved.<sup>27</sup> Two subsequent self-immolations were reported.<sup>28</sup> The deaths in Tiananmen Square led to a change in Falun Gong tactics: the small demonstrations in Beijing stopped and the focus switched to publicising through handouts, the internet and the interruption of state television programmes the treatment of practitioners in custody.<sup>29</sup> As a result of the risks for those involved public demonstrations had become rare by 2005.<sup>30</sup> In November 2004 the Epoch Times (a publication sympathetic to Falun Gong) published a series of essays entitled "Nine Commentaries on the Chinese Communist Party", that are highly critical of the party and which the Epoch Times and Falun Gong allege has prompted over a million members of the Chinese Communist Party (CCP) to withdraw from the party but this has not been corroborated.<sup>31</sup> Dr. Thomas Weyrauch stated at the 10<sup>th</sup> European Country of Origin Information Seminar that "the possession of the (banned) book "Nine Commentaries" will, in the eyes of the authorities, definitely be viewed as possession of Falun Gong literature."<sup>32</sup>

### Penalties

In 2001 the Chinese government widened the legal parameters for crimes associated with the practice: those who disseminated information about the treatment of fellow practitioners to those outside the country or distributed Falun Gong materials or used the internet to communicate with members could be prosecuted.<sup>33</sup> Human Rights Watch state that the Chinese government divide followers of Falun Gong into three categories with the severity of the punishment increasing with the offender's importance to the organisation: (i) ordinary practitioners, (ii) so-called leading members and (ii) "backbone elements".<sup>34</sup> The same report states that the number of practitioners sentenced judicially is small and appears to be limited to Falun Gong's core leaders and large-scale publishers and distributors while the overwhelming majority have been sentenced to "re-education through labour" (RTL), a form of administrative punishment.<sup>35</sup> There are an estimated 300 RTL camps in China where conditions vary from mild to harsh.<sup>36</sup> Human Rights Watch says that there is evidence of "a range of serious abuses against Falungong members in custody, including beatings, electric shock and other forms of torture, forced feeding and administration of psychotropic drugs and extreme psychological pressure to recant".<sup>37</sup> This report discusses in detail the discrepancy between official and Falun Gong explanations for deaths of practitioners in custody and concludes that "in many cases their refusals to capitulate during interrogation appears to have led directly to their deaths".<sup>38</sup> Falun Gong practitioners have reportedly been incarcerated in psychiatric institutions: In a study published in November 2004 Alan Stone stated that many appeared to have been sent to psychiatric hospitals from labour camps, not at the initiation of psychiatrists but by local authorities, including security officials.<sup>39</sup> Human Rights Watch's 2002 report on political psychiatry in China states:

"The accounts of the treatment meted out to detained practitioners in mental asylums around the country make frequent and consistent reference to the following kinds of practices: people are drugged with various unknown kinds of medication, tied with ropes to hospital beds or put under other forms of physical restraint, kept in dark hospital rooms

for long periods, subjected to electro-convulsive therapy or painful forms of electrical acupuncture treatment, denied adequate food and water and allowed only restricted access to toilet facilities, forced to write confessional statements renouncing their beliefs in Falun Gong as a condition of their release..."<sup>40</sup>

Forum 18, an independent Oslo organisation that promotes the right to freedom of thought, conscience and religion, states:

"the [Chinese] state is clearly hostile to Chinese religious groups maintaining or establishing their own non-state controlled ties with foreign groups. One of the most prominent examples is the Chinese government's continued belief that the Falun Gong movement is funded and promoted by the US government. Although generally uncorroborated by non-Falun Gong groups, many overseas Chinese Falun Gong practitioners speak of being interrogated by Chinese state security officials about their alleged ties with the US Central Intelligence Agency, when Falun Gong practitioners return to China."<sup>41</sup>

### Recent US Department of State Reports

The 2006 US Department of State International Religious Freedom Report states:

"Under Article 300 of the criminal law, "cult" members who "disrupt public order" or distribute publications may be sentenced to three to seven years in prison, while "cult" leaders and recruiters may be sentenced to seven years or more in prison. Under the new Public Security Administrative Punishment Law, which took effect March 1, 2006, Falun Gong adherents could face five to fifteen days of administrative detention and fines of up to \$125 (1,000 RMB) for using superstitious cults or qigong activities to disrupt public order or harm public health. Public security officials said the law would be used against Falun Gong."<sup>42</sup>

This report also states:

"Falun Gong practitioners continued to face arrest, detention, and imprisonment, and there have been credible reports of deaths due to torture and abuse. Practitioners who refuse to recant their beliefs are sometimes subjected to harsh treatment in prisons, reeducation through labor camps, and extra-judicial "legal education" centers, while some who recanted returned from detention. ... There were continuing revelations about the extra-legal activities of the Government's "610 office" including torture and forced confessions, a state security agency implicated in most alleged abuses of Falun Gong practitioners.... According to Falun Gong practitioners in the United States, since 1999 more than 100,000 practitioners have been detained for engaging in Falun Gong practices, admitting that they adhere to the teachings of Falun Gong, or refusing to criticize the organization or its founder. The organization reported that its members have been subject to excessive force, abuse, rape, detention, and torture, and that some of its member's, including children, have died in custody. NGOs not affiliated with the Falun Gong documented nearly 500 cases of Falun Gong members detained, prosecuted, or sentenced to reeducation during the period covered by this report. Credible estimates suggested the actual number was much higher. In November 2005 police at the Dongchengfang Police Station

in Tunzhou City, Hebei Province, reportedly raped two Falun Gong practitioners. Reliable sources indicated that Zheng Ruihuan and Liu Yinglan were detained in Shandong Province in July 2005 for practicing Falun Gong. In May 2006, Yuan Yuju and Liang Jinhui, relatives of a Hong Kong journalist who works for a television station supportive of Falun Gong, were sentenced to reeducation for using an illegal cult to organize and obstruct justice, relating to their distribution of Falun Gong materials. Some foreign observers estimated that at least half of the 250,000 officially recorded inmates in the country's reeducation-through-labor camps were Falun Gong adherents. Falun Gong sources overseas placed the number even higher. Hundreds of Falun Gong adherents were also incarcerated in legal education centers, a form of administrative detention, upon completion of their reeducation-through-labor sentences. Government officials denied the existence of such "legal education" centers. According to the Falun Gong, hundreds of its practitioners have been confined to psychiatric institutions and forced to take medications or undergo electric shock treatment against their will.<sup>43</sup>

The 2006 US Department of State Country Report on Human Rights Practices states:

"Since the crackdown on Falun Gong began in 1999, estimates of the numbers of Falun Gong adherents who died in custody due to torture, abuse, and neglect ranged from several hundred to a few thousand... UN Special Rapporteur Nowak reported in March that Falun Gong practitioners accounted for 66 percent of victims of alleged torture while in government custody... Since the government banned the Falun Gong in 1999, the mere belief in the discipline (even without any public manifestation of its tenets) has been sufficient grounds for practitioners to receive punishments ranging from loss of employment to imprisonment."<sup>44</sup>

#### Conclusions of UK Home Office Operational Guidance Note

The conclusions of the 2006 UK Home Office Operational Guidance Note on China in relation to Falun Gong are as follows:

"There is widespread repression of Falun Gong by the Chinese authorities and Falun Gong practitioners/activists may face ill-treatment in China if they come to the attention of the Chinese authorities. Falun Gong practitioners and in particular Falun Gong activists who have come to the attention of the authorities are likely to face ill-treatment that may amount to persecution in China and therefore are likely to qualify for a grant of asylum under the 1951 Convention by reason of imputed political opinion.

However, the Court of Appeal found in [2004] EWCA (Civ) 1441 that anyone can become a member or cease to be a member of Falun Gong at any time and can practise Falun Gong exercises on their own in the privacy of their home without significant risk of being ill-treated. The IAT found in [2005] UKIAT 00122 that there will not normally be any real risk from the Chinese authorities for a person who practices Falun Gong in private and with discretion. Therefore, ordinary Falun Gong practitioners who have not come to the attention of the Chinese authorities are unlikely to qualify for a grant of asylum or Humanitarian Protection."<sup>45</sup>

<sup>1</sup> Human Rights Watch (Jan 2002) *Dangerous Meditation* (pg 8)

<sup>2</sup> Maria Hsia Chang (2004) *Falun Gong: The End of Days* quoted in Extended Response, Research Directorate, Immigration and Refugee Board, Ottawa, *China: Situation of Falun Gong practitioners and treatment by state authorities (2001-2005)*

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## The Karen People of Myanmar



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### Introduction

Myanmar, also known as Burma, is the scene of the world's longest-running civil war. The principal participants in this war are the ruling military regime, known as the State Peace and Development Council (SPDC), and the Karen people, who have been fighting for an independent homeland since Myanmar became independent in 1948. This conflict has resulted in the displacement of up to one million people, with at least 140,000 Karen refugees now living in refugee camps in Thailand.

### Who are the Karen?

The Karen people comprise the second largest ethnic group in Myanmar. They have an estimated population of seven million and live mainly in the hilly region in the east of the country, along the border with Thailand. About 40% of the Karen are Christian, 40% are Buddhist and 20% are animists. They have two closely-related written languages, Po and S'gaw. Karen children also learn English and Thai in school. The Karen are said to live largely traditional lives, although they have had changes forced upon them by the pressures of the modern world. A good introduction to the culture of the Karen is an article by David Tharckabaw and Roland Watson which says:

“Traditional Karen village society revolves around a number of core values. These include both spiritual values and related social values such as the importance of the family and the community, respect for the elderly, care for the poor and disadvantaged, and a high level of equality between the sexes. For community organization, the Karen have an established democratic tradition.”

The principal political organisation which claims to represent the Karen people is the Karen National Union (KNU), which has an armed wing called the Karen National Liberation Army (KNLA).

### Background to the conflict

Since Myanmar gained its independence in 1948 there has been a constant state of civil war between the central government, which since 1962 has consisted of an unelected military regime whose leaders are mainly from the dominant Burman ethnic group, and the ethnic minority groups which make up at least 35% of the population. Since 1989 the government has agreed cease-fires with 17 armed opposition groups, but has failed to reach an agreement with the KNU, which has stated that it will only enter negotiations for a full-scale political settlement rather than a limited military ceasefire.

In the 1980s the KNU had a force of 20,000 fighters and largely controlled Karen State. However, the government built up an army 400,000 soldiers, known as the Tatmadaw, which was much better equipped than the Karen forces. In

1994 the KNU was seriously weakened when a group of disaffected Buddhist soldiers broke away and formed the Democratic Kayin Buddhist Army (DBKA), which then entered into an informal alliance with the government. During the period 1995-1997 government and DBKA forces inflicted a series of heavy defeats on the KNU, as a result of which the KNU lost control of nearly all its territory. At present the KNU has at most 5,000 fighters, which some sources suggest is actually no more than 1,800, and is reduced to conducting small-scale guerrilla operations. In November 2006 the government began its most serious offensive for ten years, destroying hundreds of villages and driving out the inhabitants. Refugees International estimates that 27,000 people have been driven from their homes in Karen State, while a report from *The Guardian* refers to the destruction of 232 villages, with the displacement of 82,000 Karen. An article published in *The Independent* in January 2007 says:

“The current offensive in Karen State follows a clear pattern. Burmese troops force Karen civilians to relocate to villages already under their control. Old villages are burnt down and land-mined to stop villagers returning. Forced labour is demanded for months at a time. Anyone caught trying to leave is shot.”

### Human Rights Abuses

Many allegations of human rights abuses committed by government forces against the civilian population in the conflict area have been recorded by international organisations. Amnesty International has documented instances of forced relocation and village burning, which the Myanmar army allegedly uses as a means of separating Karen fighters from the support of the civilian population. Amnesty International has also reported the widespread use of forced labour, particularly forced portering, many instances of rape, and numerous extrajudicial executions.

Amnesty International's allegations have been corroborated by other sources, including Human Rights Watch (HRW) which estimates that over 3,000 villages have been destroyed since 1996. A report from HRW says that:

“Decades of armed conflict have devastated ethnic minority communities, which make up approximately 35 percent of Burma's population. The Burmese army, or Tatmadaw, has for many years carried out numerous and widespread summary executions, looting, torture, rape and other sexual violence, arbitrary arrests and torture, forced labor, recruitment of child soldiers, and the displacement and demolition of entire villages as part of military operations against ethnic minority armed groups. Civilians bear the brunt of a state of almost perpetual conflict and militarization.”

Karen refugees first began arriving in Thailand in 1984 following an increase in counter-insurgency operations by the Myanmar army. These refugees were accommodated in nine refugee camps located in the remote border region, which had been set up by the government of Thailand. Many Karen refugees have lived in these camps for up to 20 years, and have little chance of returning home.

Conditions in these camps are regarded as being a lot better than in similar camps in Darfur, but there are problems



arising from overcrowding and a lack of electricity and plumbing. Other problems include drug use, a lack of employment and inadequate education facilities. Contact with the outside world is forbidden. The Thai authorities have faced criticism for forcing refugees to relocate from urban areas to remote camps along the border with Myanmar, allegedly to curtail the activities of pro-democracy exiles.

The largest refugee camp is Mae La, which has 50,000 inhabitants. One visitor to Mae La says that "It is a crowded, trash-filled maze, where shoeless dirty children run unattended and adults wander aimlessly with nothing to do." Mae La (also called Mae La Oon) is the most remote of the refugee camps and the hardest for aid workers to reach. Conditions in the camp are said to be worsening due to a lack of sanitation and water facilities.

Between 2003 and 2006 the UNHCR reported a wide range of protection incidents taking place in and around the refugee camps, with rape and domestic violence being the most common forms of violent crime, while there were also many reports of murders and extrajudicial killings. UNHCR has reported that "There is a high level of involvement of Thai camp security guards in perpetrating physical assaults on refugees."

In April 2007 HRW reported that the Myanmar army and the DBKA had positioned artillery and heavy machine guns overlooking Mae La, leading to fears that an attack on the camp was imminent.

#### **Attitude of the Thai government**

Prime Minister, Thaksin Shinawatra, who pursued a harsh policy towards refugees from Myanmar, was forced out of power following a military coup in September 2006. General Surayud Chulanont, who was appointed as an interim Prime Minister, is said to be more sympathetic to the plight of the refugees and has stated that finding a solution to the refugee problem is one of his three main priorities. The new government has allowed UNHCR to issue identity cards to all Myanmar refugees more than 12 years old. These cards are due to be issued during 2007. The Thai authorities have also relaxed their opposition to the resettlement of refugees to those countries willing to accept them.

#### **Resettlement of Refugees**

As there is little likelihood of Karen refugees being able to return home while present conditions in Myanmar persist, and as integration into the local population is not possible, the only solution available to these refugees is that of resettlement to a third country. Until 2006 the Thai authorities did not allow large-scale resettlement due to a fear that this would bring even more refugees across the border. Group resettlement is defined as differing from the usual case-by-case processing in that it allows the UNHCR to submit large groups with a uniform refugee claim, a clearly defined membership and particular vulnerabilities or protection needs. The US, Canada, Australia and seven other countries have accepted UNHCR programme refugees, mainly ethnic Karen, with the US accepting a further 2,700 refugees from the overcrowded Tham Hin camp. Due to higher intake quotas from the resettlement countries and the cooperation of the Thai government, the UNHCR was able to resettle 4,700 refugees during 2006, and intends to submit the names of an additional 15,000 Karen refugees for

resettlement during 2007. Following a verification exercise in December 2006, 43% of the population of Mae La camp has been submitted for resettlement by UNHCR, with 18,000 people in the camp applying for resettlement.



#### **The Opening hours of the RDC library**

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

#### **Contacting the Refugee Documentation Centre**

You may contact the RDC in the following ways: tel: 01 477 6250 fax: 01 661 3113 email:

[Refugee\\_Documentation\\_Centre@legaidboard.ie](mailto:Refugee_Documentation_Centre@legaidboard.ie)

You may also email in a query form as you would for a COI query.

