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The RESEARCHER

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Welcome to the April 2019 issue of *The Researcher*

We are grateful to John Stanley, deputy chairperson at the International Protection Appeals Tribunal for keeping us informed on matters relevant to international protection law with his review of case law for the second half of 2018.

Marking International Women's Day and Ireland's ratifying the 'Istanbul Convention' Emer Slattery of UNHCR comments on the Istanbul Convention and International Protection in Ireland.

David Goggins of the Refugee Documentation Centre investigates the situation in Zimbabwe since the ousting of Robert Mugabe.

Katherine Byrne and Hailey O'Shea recent interns with the International Protection Appeals Tribunal discuss the risks facing failed asylum seekers upon return to the Democratic Republic of Congo.

Patrick Dowling of the Refugee Documentation Centre reflects on a recent presentation given by Dr. Paul Rollier.

As always we are grateful to all our contributors and welcome contributions to future issues.

Elisabeth Ahmed
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Review of Case Law on International Protection: July to December 2018

John Stanley, Deputy Chairperson of the International Protection Appeals Tribunal

Below is a summary of the case law from the Irish Superior Courts from July to December 2018 on matters relevant to international protection law.

Systemic challenge to decision-making at first instance – request for a stay

RS v The Chief International Protection Officer [2018] IECA 322, unreported, Court of Appeal (Peart J., McGovern and Baker JJ. concurring), 19 October 2018

The applicant contended that no lawful examination of his international protection and permission to remain claims had been made in that the person who carried out the first instance considerations on these matters was engaged under a contract for services not permitted by the legislation. The applicant did not want to have his appeal before the Tribunal heard and determined until a "test case" on the matter was determined, lest the application become moot.

In the judgment of the Court of Appeal, the High Court, in its decisions dealing with the issue of a stay/injunction, had erred by attaching too little weight to the prejudice to the applicant, and to similarly situated applicants, if the proceedings were to become moot. In particular, the Court observed, once the appeal was determined (and if it is negative) the applicant (and any similarly situated applicant) would be at risk of deportation. The Court of Appeal saw no benefit in processing appeals where to do so would render the application for judicial review moot, and put the applicant at risk of deportation. The Court accepted that granting the stay/injunction in this and similar cases would give rise to significant disruption to the processing of appeals before the Tribunal, and that the trial judge was right to attach weight to this. However, the Court concluded that the constitutional right of an applicant to litigate his or her claim, or to benefit from any success from the case chosen as a test case, on the balance of justice, outweighed the, albeit regrettable, disruption caused by the granting of a stay/injunction.

Note the earlier decisions of the High Court re whether to grant a stay on this issue: *NA v The Chief International Protection Officer [2018] IEHC 499*, unreported, High Court, Humphreys J., 10 September 2018**;** *IG (Albania) v The Chief International Protection Officer [2018] IEHC 509*, unreported, High Court, Humphreys J., 17 September 2018.

The Methodology of the IPAT

The High Court described in positive terms the Tribunal's methodology in ***AJA (Nigeria) v International Protection Appeals Tribunal*** [2018] IEHC 671, Humphreys J., 14 November 2018. The applicants in that case alleged that a "quest to disbelieve" negatively affected a refugee claimant's evidence. The Court criticised this as polemical. In the Court's judgment:

> "It is not a hugely helpful notion to introduce into the discussion because it runs the risk of perpetuating a very out-of-date notion that the tribunal's methodology is questionable or is in need of regular correction by the court. There is no basis to suggest any generalised problems in the IPAT as it currently functions, leaving aside of course the possibility that individual decisions may not withstand judicial review. To suggest that the tribunal or its members are involved in a "quest to disbelieve" is not much more than a smear and unfairly imputes a lack of integrity to their processes and a degree of bad faith that cannot honourably be made the subject of a casual allegation."

In the same case, the Court emphasised the importance of the Tribunal's quasi-judicial role:

> "One must not lose sight of the fact that the tribunal member has seen and heard the witness and it is not necessarily appropriate for the court to sift through the papers and quash a decision made by an independent quasi-judicial statutory office-holder who did see the witness simply because the court takes a different view of the evidence or of what it thinks is credible or incredible. Many tales look credible on paper – but less so when one sees and hears the teller, particularly when tested by cross-examination."

Jurisdiction of the Tribunal in international Protection Appeals

In ***AL (Algeria) v International Protection Appeals Tribunal*** [2018] IEHC 553, High Court, Humphreys J., 24 September 2018 the Court clarified the jurisdiction of the Tribunal in respect of substantive international protection appeals in the following terms: '[t]he Tribunal is not engaged in judicial review and it is neither necessary nor appropriate for the tribunal to give its views on how the Commissioner handled any given application. The tribunal is simply coming to its own view on the evidence, and that is what this tribunal member did.'

In ***JH (Albania) v International Protection Appeals Tribunal*** [2018] IEHC 752, High Court, Humphreys J., 14 December 2018 the Court commented that *MARA v Minister for Justice and Equality* [2015] 1 IR 561 allows for the possibility that certain findings would not be the subject of an appeal, but that means adverse findings. It is not open to an applicant to ring-fence favourable findings from being reviewed on appeal if other, adverse, findings are appealed. A consideration by the tribunal of the latter may necessitate reconsideration of the former, particularly if the applicant's credibility comes under challenge; which is what happened here.'

Burden of Proof

The applicant in ***MH (Bangladesh) v Refugee Appeals Tribunal*** [2018] IEHC 496, unreported, High Court, Humphreys J., 26 June 2018, a national of Bangladesh, sought international protection on the basis that he was being threatened in his country of origin due to his failure to repay a loan. The applicant claimed that the Tribunal erred in stating in its decision that it could not find an offence for which the applicant could be imprisoned. The Tribunal had checked the penal code of Bangladesh and did not find such an offence, and was not pointed to one. In the judicial review application the applicant submitted that s.55(1) of the (Bangladeshi) Code of Civil Procedure 1908 provides for imprisonment of debt. In the judgment of the Court, it was "complete gaslighting of the tribunal to run crying to the High Court about a point like this that an applicant could not be bothered researching prior to the hearing before the tribunal". In the Court's judgment, the tribunal discharged its burden by asking the applicant's legal advisors for references to relevant legal provisions.

In ***JH (Albania) v International Protection Appeals Tribunal*** [2018] IEHC 752, High Court, Humphreys J., 14 December 2018, considering in particular the issue of an **'**aged out' unaccompanied minors duty to substantiate his or her claim, the Court said that '[a]n applicant's status as an unaccompanied minor at the time of the application does not in itself prevent him from seeking appropriate documentary evidence as an adult. It does not convert his application from one lacking in appropriate substantiation into one that does not require such substantiation.'

Shared Duty to Assess the Application

In dismissing the judicial review before it, in which the applicant claimed that the tribunal had failed in its shared duty to assess the appeal, the Court ***AAL (Nigeria) v International Protection Appeals Tribunal*** [2018] IEHC 792, High Court, Humphreys J., 21 December 2018, held that the appellant's characterisation of the tribunal as simply 'an inquisitor' was not accurate. Rather:

> 'There is a spectrum of types of inquisitorial process. International protection decision-making is not to be structured purely on the basis of *ad hoc* judgments of the Superior Courts of Ireland. It is a *sui generis* procedure, which rests on the bedrock of EU asylum and subsidiary protection law set out in European directives and supplemented by recognised EU guidelines. It is not up for reinvention in every new case. The mere use of the word *"inquisitorial"* as shorthand in some of the caselaw does not either sweep away or affect in any way the well-established meaning of the shared duty.'

The Court summarised the shared duty as follows:

(i) Under art. 4(1) of the directive 2004/83/EC it is generally for the applicant to submit all elements needed to substantiate the application: see *M.M*.

(ii) It is the duty of a Member State to cooperate with the applicant at the stage of determining the relevant elements of the application: see *M.M*. This involves cooperation with the applicant as opposed to a fully inquisitorial procedure. It also involves identifying the elements of the application actually made, not an application that the applicant could have made but did not.

(iii) The elements of the application fall broadly into two categories: the country situation and factors personal to the applicant.

(iv) Insofar as information regarding the country situation is concerned, Member States have an investigative burden with regard to the information listed in art. 4(3) of the qualification directive: see EASO judicial analysis. This is closer to the traditional understanding of the inquisitorial function.

(v) A Member State may also be better placed than an applicant to gain access to certain types of documents: see *M.M*. This is more likely to arise in relation to country documentation. State protection bodies are not in a position to obtain documents personal to an applicant because attempting to do so identifies the applicant to third parties as a protection seeker, contrary to the International Protection Act 2015, s. 26.

(vi) Insofar as factors personal to the applicant are concerned, the primary responsibility to describe the facts and events which fall into his or her personal sphere is that of the applicant: see authority cited in *B.B.A. (India).*

(vii) If the applicant fails to assemble the elements of his or her claim that are personal to him or her, the State therefore has only a limited role in supplying the deficit, as it is unlikely to be in a "*better position*" to do so than the applicant (see *M.M*.).

Standard of Proof in Respect of the Assessment of Facts

The Court, in its judgment in ***MEO (Nigeria) v International Protection Appeals Tribunal*** [2018] IEHC 782, High Court, Humphreys J., 7 December 2018 upheld as correct the judgment of the Court in *ON v Refugee Appeals* Tribunal [2017] IEHC 13, in respect of the standard of proof in the assessment of facts in international protection applications.

The Court rejected arguments based on EU law, ECHR law, and the Refugee Convention that that standard was incorrect. In respect of the latter arguments, the Court commented that the Tribunal (in its adoption of the balance of probabilities test, in conjunction with the benefit of the doubt) could not be faulted as its methodology has been adopted in close consultation with the UNHCR. The Court also commented that 'insofar as there is any suggestion that the IPAT is out of line with international standards, it is clear from the affidavit of Ms. Hilkka Becker, chairperson of the tribunal, that the approach it adopts as to past facts, balance of probabilities plus benefit of the doubt, is in line with UNHCR guidance.

The Court noted, however, that 'as far as past or present facts are concerned, it is clear from the tribunal's methodology that not all facts have to be accepted on the balance of probabilities test, and facts which have a "reasonable chance of being true" […] can be accepted if the benefit of the doubt is extended to them.'

Benefit of the Doubt

The Court in ***JH (Albania) v International Protection Appeals Tribunal*** [2018] IEHC 752, High Court, Humphreys J., 14 December 2018 held that s.28(7) of the International Protection Act 2015 does not apply unless the applicant's general credibility is established.'

Nationality, statelessness and country of habitual residence

The applicant in *BD* ***(Bhutan and Nepal) v The Minister for Justice and Equality*** [2018] IEHC 461, unreported, High Court, Humphreys J., 17 July 2018 was born in Bhutan and of Nepalese ethnicity. The Court said that he appeared to have

been a citizen of Bhutan, and that there was evidence of Bhutan revoking the citizenship of ethnic Nepalese. The Tribunal held that the applicant had no nationality and assessed his claim by reference to Nepal.

For the Court, the key question was whether the discriminatory nature of a law depriving persons of nationality is relevant to the determination of citizenship for the purposes of refugee status or statelessness. In the Court's judgment, it is not.

In the Court's judgment, the appropriate questions to be asked by the decision maker in a situation such as arose in the instant case are as follows:

(i) Does the applicant have one or more nationalities assessed in terms of the law of the countries concerned as that law is applied by such country (as opposed to the question of whether such law meets international human rights standards).
(ii) If so, is the applicant unable or unwilling to avail himself of the protection of all of these countries due to a well-founded fear of persecution for a convention reason.
(iii) If the applicant has no nationality does he or she have one or more countries or former habitual residence.
(iv) If so is the applicant unable or unwilling to return to any of those countries due to a well-founded fear of persecution for a convention reason.
(v) If the answer to questions 2 or 4 is yes, is he or she recognised by the competent authorities of any country in which he or she has taken residence as having the rights and obligations attaching to the possession of nationality of that country (the UNHCR guidance note on this issue accepts that those rights should be those of citizenship 'possibly with limited exceptions" (para.2 of guidance note)).

Applying those principles to the instant case, the Court concluded:

(i) The applicant was deprived of Bhutanese nationality by Bhutanese law, and even assuming arguendo that such law is contrary to international human rights standards, the applicant must be regarded as stateless, as found by the tribunal.
(ii) Question 2 did not arise.
(iii) The applicant's country of former habitual residence as a stateless person and the only such country is Nepal as found by the Tribunal. Bhutan is not a country where the applicant was formerly habitually resident as *a stateless person*.
(iv) The applicant is not unable or unwilling to return to Nepal due to a well-founded fear of persecution for a convention reason as found by the tribunal.
(v) Question 5 did not arise.

Credibility and Assessment of Facts

Credibility Indicators

The applicant in ***BDC (Nigeria) v The International Protection Appeals Tribunal*** [2018] IEHC 460, unreported, High Court, Humphreys J., 20 July 2018 argued that the Tribunal's decision was unsound in finding that an aspect of the applicant's claim was uncertain, without having regard to the totality of the evidence, and that an unambiguous finding was required. In the court's judgment, the applicant's claim was misconceived in that the particular finding of uncertainty focused on by the applicant had to be seen as part of the wider findings of the Tribunal which included a finding that all material facts asserted by the applicant was rejected (***XE v International Protection Appeals Tribunal*** [2018] IEHC 402, Keane J., 4 July 2018 considered).

On the facts of ***KM (Pakistan) v International Protection Appeals Tribunal*** [2018] IEHC 510, High Court, Humphreys J., 10 July 2018, the Tribunal held that nothing emerged that satisfactorily resolved the inconsistencies in the applicant's explanations. In the Court's judgment, while it might have been sufficient for the tribunal member to have stated that he had formed the view from seeing and hearing the applicant that his memory difficulties were selective and his evidence evasive, the phrase used was too opaque to provide adequate guidance on the tribunal's reasoning.

The Court in ***AA (Pakistan) v International Protection Appeals Tribunal*** [2018] IEHC 769, High Court, Humphreys J., 18 December 2018 stated that '[m]erely because an applicant is consistent about something does not make that something the tribunal has to accept. Otherwise

one would be handing out international protection merely for keeping one's story straight, whether fabricated or otherwise.'

Credibility and 'Peripheral' Matters

In ***POS (Nigeria) v International Protection Appeals Tribunal*** [2018] IEHC 670, High Court, Humphreys J., 9 November 2018 the applicant argued, *inter alia*, that the Tribunal's credibility assessment was unlawful because in considering evidence of travel that called the applicant's credibility into question it did not properly deal with the applicant's core claim. In rejecting this argument, the Court commented that:

> "Occasional suggestions that lies about travel should normally be regarded as peripheral are without any jurisprudential or principled foundation whatsoever. A decision-maker can and must consider all relevant matters, and untruthfulness about something that is capable of verification or assessment is unquestionably relevant to assessment of credibility about something less easily verified. That could include matters such as mendacity, undue hesitation or opacity about matters such as travel arrangements, or undue hesitation or disingenuousness about swearing an oath that one's account is true, just to take two examples. Unless, that is, the asylum and protection world is to be some sort of special reservation outside the laws of rationality; a primary-coloured applicants' playground walled-off from the normal rules of logic, common sense and legal reasoning."

In ***MSR (Pakistan) v International Protection Appeals Tribunal*** [2018] IEHC 692, High Court, Humphreys J., 26 November 2018, the applicants argued, inter alia, that the Tribunal's credibility assessment was unlawful because it did not impact on the applicants' core claims, In rejecting this argument, the Court stated at para.16 that:

> "[T]here is no obligation to address credibility exclusively by reference to the core claim. Where a person tells a cock-and-bull story on matters capable of rational assessment, that in itself is relevant to the assessment of a "*core claim*" that is not directly verifiable. Any other approach would be to create a one-way ratchet system whereby demonstrated lies are to be disregarded and an unverifiable subjective account must be accepted. The tribunal acted perfectly reasonably in rejecting the credibility of the applicants' accounts, having regard to all of the circumstances, including matters that the applicants would categorise as not being part of the "*core claim*". There is no legal obligation whatsoever to exclusively or primarily focus on the "*core claim*" or to evaluate it separately from a holistic view of all of the evidence – indeed it would be unlawful to so compartmentalise; and stepping outside the improperly closed box of asylum logic for a moment, we do not artificially compartmentalise an account in real life where assessment of credibility in any other context falls to be considered."

The Court in ***AA (Pakistan) v International Protection Appeals Tribunal*** [2018] IEHC 769, High Court, Humphreys J., 18 December 2018 stated that the tribunal was entitled to consider an applicant's reason for not applying for international protection in the UK, where he had resided before coming to Ireland, as a matter undermining his claim.

Credibility and Country Information

In ***RAK (Eswatini) v International Protection Appeals Tribunal*** [2018] IEHC 681, High Court, Humphreys J., 27 November 2018, the applicant claimed that she was at risk of persecution in Eswatini (previously, Swaziland) because of her involvement in PUDEMO. The Tribunal rejected her claim essentially on credibility grounds, finding, inter alia, that it was not believable that PUDEMO gave the applicant PUDEMO documentation and T-shirts in June 2014 when, after documented arrests of people with such documentation and T-shirts in April/May 2014, PUDEMO therefore would have been alive to the dangers of possessing such materials. The Tribunal upheld the applicant's complaint in this regard as the COI showed also that there were arrests previous to April/May 2014, which the Tribunal did not factor in, the reasoning of the decision was wanting.

In ***BC (Malawi) v International Protection Appeals Tribunal*** [2018] IEHC 705, High Court, Humphreys J., 10 December 2012 the applicant claimed that he had a twin sister who was murdered in Malawi because she had albinism.

The Tribunal's decision accepted that the applicant had a sister with Albinism, but said that 'no COI was found to support the proposition that the relatives of those suffering from albinism are at risk.' However, there were a number of pieces of country information before the Tribunal that did lead to such a conclusion. The Court found that it was not readily obvious what the Tribunal had in mind to reconcile the finding with the country information, and, accordingly, quashed the decision.

The Tribunal decision considered in ***KM (Pakistan) v International Protection Appeals Tribunal*** [2018] IEHC 510, High Court, Humphreys J., 10 July 2018 stated that 'the notice of appeal, submissions and all of the documents provided have been fully considered'. The Court commented that '[t]hat wording possibly could be improved, and it might be best if the tribunal expressly states that it has considered all up-to-date country material and has assessed credibility and the applicant's claim in the light of that. However, that it is implicit in the language used in the decision, but I might be permitted to say it might be better going forward if that were to be made explicit in tribunal findings.'

In ***BBA (India) v International Protection Appeals*** Tribunal [2018] IEHC 741, High Court, Humphreys J., 14 December 2018, the Court distinguished between 'mainstream' and other country information, indicating that the Tribunal has a general obligation to have regard to the former, and not the latter:

> 'It is not remotely workable for the tribunal and each of its members to maintain a round-the clock watch on the internet for newspaper articles about each and every country, or for such occasional statements, reports or press releases as might be issued from time to time by NGOs such as Amnesty International. The Human Rights Watch Annual Report, by contrast, is properly mainstream country information of the type to which one could argue that the tribunal can be expected to have general regard.'

Credibility and Medico-Legal Reports

In ***JUO (Nigeria) v International Protection Appeals Tribunal*** [2018] IEHC 710, High Court, Humphreys J., 4 December 2018, in seeking to make out her claim of past physical and sexual abuse, the applicant had furnished the Tribunal with a medical report from SPIRASI that said that injuries exhibited by the applicant were highly consistent with her account. The Tribunal, in finding against the applicant on credibility grounds, had said that "in arriving at the various credibility factors in this decision, the Tribunal has at all times taken account of the medico-legal, medical and counselling reports submitted on behalf of the applicant". In the judgment of the Court, this was a vital statement and had to be accepted unless the applicant discharges the onus of displacing it as untrue. In the Court's opinion:

> "Whether a report says that injuries or harm are consistent, or even as here highly consistent, with the account given, that does not mean that the harm was caused by the matters complained of in the account. It is a piece of evidence to be put in the balance with all other elements. It is not appropriate, or indeed lawful, for the tribunal to compartmentalise an assessment of the evidence by artificially divorcing the evidential ramifications of a medical report from all other evidence."

Credibility and the Best Interests of the Child

In ***OA (Nigeria) v International Protection Appeals Tribunal*** [2018] IEHC 661, High Court, Humphreys J., 20 November 2018, the High Court opined that the best interest principle is of limited or possibly no relevance to a purely factual finding such as that of past persecution, or the factual as opposed to the methodological element of the assessment of forward-looking risk.

Authenticating Documents

In ***RS (Ukraine) v International Protection Appeals Tribunal*** [2018] IEHC 743, High Court, Humphreys J., 3 December 2018, the applicants sought to appeal the Court's decision in *RS (Ukraine) v IPAT (No 1*) [2018] IEHC 512 on the basis, inter alia, of the following proposed question of exceptional public importance:

> "Is an international protection decision-maker obliged to determine the probative value to be afforded to a medico-legal report in relation to the material fact for which it is proffered, or can the decision-maker dispose of it as "insufficient" in the

> context of a general credibility assessment?"

In declining the application, the Court provided guidance on the interpretation of the judgment of the Court of Appeal in *RA v Refugee Appeals Tribunal* [2017] IECA 297 (Unreported, Court of Appeal 15 November, 2017). In that judgment, the Court of Appeal (Hogan J.) (at para. 62) said that:

> "given the alleged provenance of the documents and their obvious relevance to his claim, if true, it was incumbent in these circumstances on the Tribunal member to assess such documentary evidence - if necessary, by making findings as their authenticity and probative value - so that that very credibility could be assessed by reference to all the relevant available evidence",

The High Court respectfully suggested that this comment was *obiter*, and in tension with the *ratio* of RS, which the High Court considered to be that, per para.70 of RS, that "[t]he Tribunal member's obligation was to make an overall assessment of credibility based upon an evaluation of all potentially relevant information and not just some of that material".

The High Court, at para.9, said that it would be incorrect if the phrase "if necessary, by making findings as to their authenticity and probative value" was interpreted as meaning that (save in exceptional circumstances where the document's status was unquestionable) credibility could be determined in the light of, and thus by definition after, such "findings". In the judgment of the Court, if such a "distorted process" were to apply, the credibility assessment would not be one carried out by reference to all of the evidence, but "by reference to a blinkered and truncated process involving improperly premature and artificially compartmentalised findings in relation to documents, divorced from a holistic assessment of the evidence overall".

In the judgment of the Court, that one could make findings on documents in advance of an assessment of the applicant's account overall could only apply in "exceptional circumstances" where the authenticity of the document can be indubitably established independently of the applicant's credibility, and this, in the Court's opinion, is what Hogan J. can only have meant by "*if necessary*" (para.10).

Duty to Consider Documents

In ***JM (Malawai) v International Protection Appeals Tribunal*** [2018] IEHC 663, High Court, Humphreys J., 20 November 2018, the Tribunal Member refused to accept late submission (after the oral hearing) of a previous Tribunal decision and a medical report. The Tribunal's rationale not to accept the late submission was that "the said other decision is not conceivably relevant or of probative value."

However, in the Court's judgment, a previous decision of the Tribunal is something on which an applicant is entitled to rely. The Court commented on the usefulness of previous Tribunal decisions in an appeal before the Tribunal:

> "[W]here a tribunal member has heard a case and is considering deciding it a particular way, he or she may consider it worthwhile to check other similar decisions before making his or her mind up finally. That is not a question of natural justice as such, but rather of the tribunal informing itself generally of the broad approach being adopted by other colleagues, before settling on a specific approach in the given case. This does not require recalling the parties to inform them that he or she has looked at a particular case or cases unless perhaps the tribunal member is planning to cite such cases in the decision."

Moreover, on the facts of the case, the previous decision on which the applicant had sought to rely was not available at the time of his oral hearing. In the Court's judgment, an applicant should be entitled to make a point based on a previous decision and have it considered, and to hold that the Tribunal was entitled to decline to consider something that was not available previously would be an unfair Catch-22.

Having regard to the judgment of the Court of Appeal in RA v Refugee Appeals Tribunal [2017] IECA 297, the Court, in its judgment in ***KM (Pakistan) v International Protection Appeals Tribunal*** [2018] IEHC 510, High Court, Humphreys J., 10 July 2018, commented that it saw 'a certain theoretical difficulty with divorcing an assessment of the reliability of documents from an assessment of the reliability of the person producing them' as such issues inform one another. The Court recommended:

> "The safest course is probably for the tribunal to endeavour to identify how reliable the document is on a prima facie basis or alternatively, which amounts to the same thing, to ask how much weight should prima facie be placed on the document before going on to consider an applicant's evidence more generally, following which the documents can be revisited if necessary. A decision-maker can lawfully find a document to be prima facie reliable or not to be reliable, or by way of an intermediate position to be not particularly reliable, where for example it cannot be verified and could easily be forged. A decision-maker can also lawfully avoid having to decide that issue by stating that even if the document is reliable it does not significantly advance the applicant's claim. Any such decision is perfectly permissible so long as it is rational and lawful.'

In the instant case, the tribunal simply said it was not in a position to verify the authenticity of the documents but they were not in themselves capable of establishing the truth of the claim'. This, in the Court's judgment, was not a finding that stood up to scrutiny on the facts of the case. While it might have been open to the tribunal to reject the documents, or some of them, it was irrational in finding that they did not materially assist the applicant.

Decisions Involving the Same Witnesses

In ***C v International Protection Appeals Tribunal*** [2018] IEHC 755, High Court (Barrett J.), 21 December 2018, the Court heard how the Tribunal, on one set of evidence in one application, concluded that Mr O, an applicant for subsidiary protection, established that he was gay. In another set of evidence in another application, the Tribunal concluded that Mr C, also an applicant for subsidiary protection, did not establish that he was gay. Mr O and Mr C claimed to be in a gay relationship. Mr C sought to quash his decision. The Tribunal rejected this application, observing that the applications were different applications, yielding different decisions on different evidence. The Tribunal validly reached its conclusion concerning Mr C by reference to all the evidence.

Future Risk

In ***DU (Nigeria) v International Protection Appeals Tribunal*** [2018] IEHC 630, High Court, Humphreys J., 6 November 2018, the applicant sought international protection on the basis that he would be targeted in his country of origin because he is bisexual. The Tribunal rejected his appeal on the grounds that the credibility of his claim was rejected. The applicant sought judicial review on the basis, inter alia, that the Tribunal failed to consider future risk due to his sexual orientation. In rejecting the application for judicial review, the Court stated that there was no obligation to consider a future risk based on the applicant's orientation if the claim regarding an orientation was not accepted by the Tribunal. The Court quoted, with approval, the following comments in *MAMA v RAT* [2011] IEHC 147 [2011] 2 IR 729 (High Court, Cooke J.):

> "In practical terms, however, the precise impact of the finding of lack of credibility in that regard upon the evaluation of the risk of future persecution must necessarily depend upon the nature and extent of the findings which reject the credibility of the first stage. This is because the obligation to consider the risk of future persecution must have a basis in some elements of the applicant's story which can be accepted as possibly being true."

The Court commented that the phrase "possibly being true" in this passage means "possibility having regard to what is accepted or rejected by the tribunal." In the judgment of the Court:

> "[w]here an applicant alleges a fact that could give rise to future risk and that fact is accepted, then there may be an obligation to consider any future risk based on that fact. Where such a fact is not accepted, the need to consider a future risk based on that alleged fact simply does not arise."

The Court commented in its judgment in ***MEO (Nigeria) v International Protection Appeals Tribunal*** [2018] IEHC 782, High Court, Humphreys J., 7 December 2018 that 'the tribunal is only obliged to consider the forward looking risk in the light of the facts as found, not by reference to the facts as rejected.'

The Court stated in ***KM (Pakistan) v International Protection Appeals Tribunal***

[2018] IEHC 510, High Court, Humphreys J., 10 July 2018 that the test is for the tribunal to form its own view of whether any forward looking risk remained by reason of factors independent of an applicant's credibility, if any, notwithstanding the rejection of such credibility.

Persecution - Conscientious objectors

The applicant in ***GE v Refugee Appeals Tribunal*** [2018] IEHC 564, unreported, Keane J., 3 October 2018 was an Israeli national who had applied for refugee status on the ground of political opinion due to her conscientious objection to compulsory military service. The Tribunal rejected the claim on the basis, *inter alia*, that there was a system in Israel by which legal address may be achieved to lawfully avoid military service.

Application of the concept of 'persecution' to conscientious objectors

The applicant claimed that the Tribunal adopted an unduly narrow definition of acts of persecution. In particular, the applicant argued that the form of persecution described in art.9(2)(e) of the Qualification Directive is narrower than that described in paragraphs 167-174 of the UNHCR Handbook, and that the Tribunal wrongly considered the applicant's position under the former rather than the latter. The Tribunal rejected this argument for three reasons. First, because there was no suggestion that the applicant made this case to the Tribunal. Secondly, because the Tribunal's decision applied the judgment in *AM v Refugee Appeals Tribunal* [2014] IEHC 388, unreported, High Court, McDermott J., 29 July 2014, which addressed the relevant paragraphs in the UNHCR Handbook at length. Thirdly, the authority cited by the appellant for claiming there was a narrower definition in the Directive as compared with the UNHCR Handbook (*dicta* of Lord Bingham's in *Sepet*) related specifically to the basis of a putative right of conscientious objection. Moreover, there was no question in any case of the Tribunal in the instant case rejecting the applicant's claim on the basis that there is no right of conscientious objection.

In an *obiter* comment, the Court expressed surprise that the Tribunal did not rely in the first place on the following principle in *Shepherd*:

> "the refusal to perform military service must constitute the only means by which the applicant for refugee status could avoid participating in the alleged war crimes, if [she] did not avail [herself] of a procedure for obtaining conscientious objector status, any protection under Article 9(2)(e) if [the Qualification Directive] is excluded, unless that applicant proves that no procedure of that nature would have been available to [her] in [her] specific situation".

Standard of proof re prosecution of war crimes and crimes against humanity

The applicant claimed that the Tribunal misapplied the judgment in *Shepherd* by requiring sufficient evidence that the applicant "will be reasonably likely to be required to engage in war crimes, genocide or other excludable acts". The appellant argued that in the light of paragraphs 41-43 of the judgment in *Shepherd* such a requirement is limited in its application to situations where it has been established that the state concerned prosecutes war crimes or that the military operations concerned have been carried out under a mandate of the UN Security Council, or on the basis of a consensus of the international community. In the Court's judgment, however, there is no suggestion in Shepherd that it is only where such factors are present that the scope of the situations covered by art.9(2)(e) is limited to those in which it is "highly likely" rather than "reasonably likely" that war crimes will be committed.

The Court drew support for its conclusion from the following commentary on Shepherd in Heilbronner and Thym, *EU Immigration and Asylum Law*, 2nd ed. (Munich, 2016), at p.1179:

> "The ECJ makes clear that it is for the applicant to establish with '**sufficient plausibility'** that his unit carries out operations assigned to it, or has carried them out in the past, in such conditions that it is '**highly likely**' that acts constituting **a war crime will be committed**. Such plausibility will, in principle, be lacking when an armed intervention is engaged upon on the basis of a resolution adopted by the **UN Security Council** or when the operation gives rise to an international consensus". (emphasis in original)

Reasoned departure from previous decision

The applicant argued that the Tribunal breached fair procedures in failing to provide a reasoned explanation for coming to a different conclusion of fact than that in a previous decision of the Tribunal (decision re applications 69/2393/06A&B from 2010). In the previous decision, the Tribunal had allowed an appeal in respect of Israeli nationals whose claim rested on the Convention ground of political opinion for reasons of conscientious objection to compulsory military service. The Court rejected this argument for two reasons. First, because the Tribunal had provided reasons for coming to a different decision than the earlier decision, i.e., (1) the Tribunal's decision was based on the body of evidence before it, whereas the evidence upon which the earlier decision was based was not clearly identified; and (2) that there had been developments in the case-law, most notably in Case C-472.13 *Shepherd v Germany*. Thus, "[t]here is no necessary inconsistency where different decisions are reached on different evidence or by reference to intervening developments in the jurisprudence, or both". (*YY v Minister for Justice* [2017] IESC 61, unreported, Supreme Court, 27 July 2017*; PPA v Refugee Appeals Tribunal* [2007] 4 IR 94 considered.)

Objective bias

The second reason the Court rejected the applicant's argument that the Tribunal breached fair procedures for failing to provide a reasoned explanation for coming to a different decision as compared with its earlier decision was that the earlier decision, in the Court's judgment, had a "fundamental infirmity", i.e., an expression of opinion in the earlier decision of the Tribunal, that Israel flouted international law in the past, established objective bias on the part of the previous Tribunal member that required her to recuse herself or to raise the issue of her recusal (*Dublin Well Woman Centre Ltd. v Ireland*, unreported, Supreme Court, Denham J., nem. Diss., 21 December 1994 followed). In the judgment of the Court, the failure of the Tribunal member to recuse herself or raise the issue of her recusal deprived the previous decision of any authority.

Persecution - Destitution

The Court in ***OA (Nigeria) v International Protection Appeals Tribunal (No. 2)*** [2018] IEHC 753, High Court, Humphreys J., 18 December 2018 stated that '[b]ecoming destitute because of the cold, impersonal working of the free-market economic system simply does not constitute persecution for the purposes of international or Irish law.'

Convention Nexus

The Court in ***OA (Nigeria) v International Protection Appeals Tribunal (No. 2)*** [2018] IEHC 753, High Court, Humphreys J., 18 December 2018 commented that the Tribunal only need consider the nexii claimed. The Court in its judgment in this matter held that the 'tribunal cannot plausibly be liable to have its decisions quashed on the basis of a failure to consider an applicant as a member of a social group that was never identified to it.

Failed asylum seekers

The Court in ***RC (Algeria) v International Protection Appeals Tribunal*** [2018] IEHC 694, High Court, Humphreys J., 3 December 2018 said that '[i]t is perfectly legitimate for the Tribunal to have made itself aware that Irish authorities do not disclose the status of deportees as failed asylum seekers. There is no obligation on the Tribunal to spell out reasons for it being aware of this well-known practice, a principal reasons being that it is contrary to Irish law to do so: see s. 26 of the International Protection Act 2015.'

Internal Protection Alternative

On the facts of ***AA (Pakistan) v The International Protection Appeals Tribunal*** [2018] IEHC 497, unreported, High Court, Humphreys J., 31 July 2018, the Tribunal refused the applicant's appeal in respect of both asylum and subsidiary protection. In respect of subsidiary protection, the Tribunal held that as the applicant, a citizen of Pakistan, could move to Karachi, an internal relocation option existed.

The applicant complained that as internal relocation was not an issue before the first instance decision maker, and as submissions on it were not invited by the Tribunal, and the applicant not made aware that it would be an issue, the Tribunal breached fair procedures. The court considered this complaint misconceived. In the court's judgment, at para.7:

> "The applicant put the subsidiary protection refusal in issue by appealing against it and therefore inherently opened up the question of internal protection or internal flight. An applicant does not need to be specifically notified of such a matter as it is an issue that arises automatically from the nature of appealing a subsidiary protection refusal. The applicant was put on notice in any event by questions posed at the hearing."

The applicant complained that the Tribunal failed to have regard to local and personal circumstances, and up-to-date country information. The court rejected this argument, stating, at para.8:

> "A detailed investigation of conditions in the proposed place of internal relocation can be explored in oral evidence. A detailed dossier of country information regarding that proposed place does not have to be narratively discussed provided there is before the decision-maker some appropriate country material, provided there is due notice of the point being made (including notice that is given by putting the point to the applicant at the hearing) and provided that the correct test is applied. The tribunal decision should not be condemned for a failure to engage in detailed narrative discussion about conditions in the proposed locus of internal relocation."

The court did however quash the tribunal's decision for its failure to pose the correct question in respect of the reasonableness of the proposed internal relocation alternative. The court observed that under s.32(1)(b) of the International Protection Act 2015 the test is whether the applicant "can reasonably be expected to settle there". As the tribunal did not ask this question, its decision had to be quashed.

Subsidiary Protection

The applicant in ***FD (Nigeria) v The International Protection Office*** [2018] IEHC 498, unreported, High Court, Humphreys J., 31 July 2018 challenged, *inter alia*, the refusal by the Minister to accept a late application for subsidiary protection. The applicant had initially applied for asylum in 2009. Upon being refused, he made representations against deportation, but did not apply for subsidiary protection. The applicant also did not apply for subsidiary protection within the 30 days allowed by the European Union (Subsidiary Protection) Regulations 2017 (S.I. No. 409 of 2017) (which regulations were made in response to the CJEU judgment in Case C-429/15 *Danqua*, which held that the 15 day time limit, post refusal of asylum, for applying for subsidiary protection under the previous Irish regulations was not in accordance with EU law). The applicant argued, it appears, that he ought not to have been precluded from the subsidiary protection process because of the failure of duty by his former solicitors.

In the Court's judgment, where an applicant's case is based on a claim of a failure of duty by former solicitors, there is a particular onus on the applicant to lay the evidential basis for that claim. In the instant case, the applicant "presented only the bare bones of an assertion", had not enlightened the court of the full range of contact with his erstwhile solicitor, or of any other details "which would throw light on the degree of his own culpability". The Court noted that: full files and attendance notes were not exhibited; dates of instructions were not referred to; the former solicitors were not put on notice; no affidavit from former solicitors was provided; and it had not been established in evidence that the applicant had instructed that subsidiary protection was to be applied for. In these circumstances, the evidential basis for the proceedings had not been laid. In any event, in the Court's judgment, it was fatal to the applicant's case that he had not availed of the 2017 Regulations, his failure to do so going unexplained.

The applicant also argued that the 2017 regulations were in breach of EU law. The judgment does not set out the applicant's arguments in this regard, but states that '[t]here is nothing to suggest that the 30-day period [under the regulations) was inadequate to facilitate the applicant here in his practical context'.

Permission to Remain

The Tribunal Member in the impugned decision at issue in ***JM (Malawi) v International Protection Appeals Tribunal*** [2018] IEHC 663, High Court, Humphreys J., 20 November 2018 commented in the decision that "it is not my role but it does seem to me that [the appellant] may be a good candidate for leave to remain or some other similar right. The High Court listed a number of

"fundamental problems" with such a comment, including (a) such considerations are not the function of the Tribunal; (b) assessment of leave to remain would require consideration of additional materials and issues of which the Tribunal has no knowledge, information, competence or expertise; (c) making such comments dilutes the Tribunal's statutory role; and (d) trivialises the process of leave to remain.

Subsequent Applications

The applicant in ***PNS (Cameroon) v The Minister for Justice and Equality*** [2017] IEHC 504, unreported, High Court, Humphreys J., 16 July 2018 asserted a right to remain in the State pending an appeal against a refusal to allow him to make a subsequent application for international protection. The applicant received from the IPAT a negative decision under s.22 of the 2015 Act. Article 7(1) of the Procedures Directive provides that a right to remain pending a first instance decision lasts "until the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III".

The applicant argued that the IPAT appeal decision was the first instance decision for the purposes of art.7(1) of the Procedures Directive, and that the High Court on judicial review constituted the "appeal procedure" for the purposes of Chapter V of that Directive in respect of applications to make a subsequent application for international protection. The court disagreed. In the court's judgment, notwithstanding that the IPO's decision was referred to in s.22 of the 2015 Act as a "recommendation", it should be viewed as a "decision" for the purposes of art.39(1)(c), and therefore of art.7(1), of the Directive, and the IPAT appeal was the effective remedy therefrom, with the Minister's later "refusal" a subsequent formalisation of that process. In the court's judgment, such an interpretation was more compatible with the Directive than the applicant's interpretation, which would render the IPAT appeal unnecessary under EU law.

The applicant in ***KJM v Minister for Justice and Equality*** [2018] IESCDET 159, Supreme Court (O'Donnell, MacMenamin, Charlton JJ.), 30 October 2018, a case similar to *PNS (Cameroon)* sought a "leapfrog" appeal to the Supreme Court to ask:

> (a) whether the applicant has a right to remain in Ireland pending the final formal decision of the Minister on the application pursuant to s.22 of the International Protection Act 2015; and
> (b) whether, on the assumption that the applicant had such a right to remain pursuant to the provisions of the Directive, the Court could nevertheless refuse an application for judicial review brought with a view to enforcing such, on grounds of general discretion.

The Supreme Court was satisfied that the appeal involved questions of general public importance, and that there were exceptional grounds permitting a leapfrog appeal to it from the decision of the High Court.

Duty to give reasons

YY v The Minister for Justice and Equality [2018] IEHC 469, unreported, High Court, Humphreys J., 31 July 2017 related to a challenge to a refusal to revoke a deportation order. In *obiter* comments relevant to international protection decision-making, however, the Court noted two important general points in relation to the duty to give reasons, i.e., (1) that reasons can, in certain circumstances, be short; and (2) that reasons must relate to the principal important controversial issues or the main issues in dispute. In this context, the Court provided the following guidance at para.11:

> "For example in an asylum or international protection context, the principal issues might be (a) whether the applicant is generally credible, (b) whether his fear of persecution or serious harm is well founded, and (c) whether there is an internal relocation or State protection option. The main issues would not extend to a duty to give reasons to each of the applicant's individual sub-points under any of those headings. The decision-maker has to give a reason for the decision on each of the main issues, but that is entirely distinct from an obligation to narratively discuss each and every one of an applicant's arguments, submissions or pieces of evidence under each heading. That is, at best, a counsel of perfection; the High Court certainly does not do that when resolving litigation. It would be hypocritical and inappropriate to impose a greater duty on administrative decision-

makers than the court is prepared to accept for itself".

In ***MEO (Nigeria) v International Protection Appeals Tribunal*** [2018] IEHC 782, High Court, Humphreys J., 7 December 2018 the Court stated that 'the duty to give reasons is only a duty to give the main reasons, so that a decision-maker is perfectly entitled to identify only the main reasons for that decision. As it is put in Fordham, Judicial Review Handbook, 6th ed. (Oxford, 2012) p. 667, reasons must relate to the "principle important controversial issues" the main issues in dispute'. The Tribunal's decision said that the reasons given by it for rejecting the appeal were a 'non-exhaustive list of reasons'. The Court commented that while in a perfect world the decision maker would have said 'the main reasons are as follows', saying the list was non-exhaustive had be read to mean the same thing.

Krupecki v The Minister for Justice and Equality [2018] IEHC 538, unreported, High Court, Humphreys J., 1 October 2018 relates to the role of the High Court on review, and its options in ensuring judicial oversight where reasons are lacking in an administrative decision, in the context of a judicial review of a decision of the Minister in respect of an exclusion order against a beneficiary of EU free movement rights under the European Communities (Free Movement of Persons) Regulations 2015 (S.I. No. 548 of 2015), the Court concluded that it has a discretion as to what order is appropriate where reasons are lacking.

In the Court's judgment, if a decision in a given case is lacking in reasons, the Court can do either of the following things:

(a) quash the decision;
(b) make a final order declining to quash it, but directing further reasons; if those further reasons are inadequate, there is the possibility of further separate proceedings being brought by a given applicant;
(c) make an order directing further reasons and adjourning the application insofar as it seeks to quash the decision pending the outcome of that process;
(d) adjournment simpliciter with the opportunity being given to the respondent to supplement the decision by way of a statement of reasons in whatever form, including by filing a further affidavit or by furnishing such reasons directly to the applicant;
(e) deal with individual elements of the decision separately so that it could be quashed in part, with the balance of proceedings dismissed in part of adjourned in part; and
(f) combine one or more of the above with a process whereby the applicant can be facilitated in seeking to review, revisit or reopen the impugned decision.

In the Court's view, it had a discretion to exercise whichever of these options is just and appropriate in any given set of circumstances, having regard to factors such as the risk of retrospective creation of reasons, whether it is practicable to require the decision-maker to state the original reasons, and whether the lapse of time since the original decision is such that reasons cannot be identified.

Importance of Clear Findings

The applicant in ***JA (Bangladesh) v Refugee Appeals Tribunal (No 2)*** [2018] IEHC 629, High Court, Humphreys J., 6 November 2018 sought subsidiary protection on the basis that he faced a risk of serious harm in Bangladesh in the form of severely harsh prison conditions after being wrongly convicted of a crime in his country of origin in absentia. The Minister's decision on subsidiary protection (the case was subject to the 2015 Act's transitional provisions), in the opinion of the Court, used contradictory language in that it rejected the applicant's credibility (which the Court considered to imply rejection of the account of likely imprisonment), while also referring to the applicant "fleeing prosecution", implying some degree of acceptance of the possibility of imprisonment. Quashing the decision, the Court commented that the case emphasised the need for findings of a clear and unambiguous nature.

KA (Ghana) v Minister for Justice and Equality [2018] IEHC 511, High Court, Humphreys J., 17 September 2018 concerned a decision by the Minister under s.49 of the International Protection Act 2015, rather than a decision for which the Tribunal has jurisdiction. Nonetheless, the Court's ruling provides useful guidance for the Tribunal. The impugned s.49 analysis contained the sentence "the country of origin information does not indicate that the applicant would be at risk of refoulement if the applicant returned to Ghana." The Court observed that in a situation like this,

the Minister can find that there is no risk of refoulement because (a) any such risk depends on the applicant's account and such account is disbelieved, or (b) even if the applicant's account is correct, the country material does not support a risk of refoulement. Given that there is such an ambiguity, but finding that it would be disproportionate to quash the decision, the Court directed that the Minister provide further reasons.

Alternative Findings

On the facts of ***AL (Algeria) v International Protection Appeals Tribunal*** [2018] IEHC 553, High Court, Humphreys J., 24 September 2018, in making an alternative finding, after rejecting the appellant's claim for subsidiary protection on one basis (i.e., in respect of the geographical scope of an armed conflict), the Tribunal Member introduced the alternative proposition of whether there were factors peculiar to the appellant's circumstances as a ground for subsidiary protection with the word 'furthermore', rather than with words equivalent to 'even if I am wrong'. Thus, in the Court's judgment, it was not possible to say that the considerations in respect of the first matter were entirely excluded from the Tribunal's thinking in terms of the latter matter. The Court commented that it might have been otherwise if the Tribunal Member had said that there were no factors personal to an applicant even if the armed conflict was to be taken as in existence throughout Algeria or in the applicant's home area.

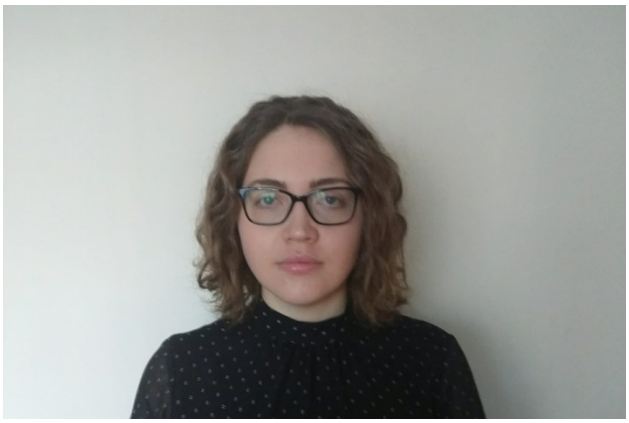
In its judgment in ***RS (Ukraine) v International Protection Appeals Tribunal*** [2018] IEHC 512, High Court, Humphreys J., 17 September 2018 the Court complimented the "well-organised" decision of the Tribunal, which in particular illustrated the 'commendable option of considering matters on an "even if I am wrong" basis. In the Court's opinion, '[s]uch an approach enables a judicial review court to deal with a situation where two alternative grounds are given for a particular finding such that even if one of those grounds cannot be sustained the ultimate conclusion may survive if the alternative independent ground is held to be valid.'

Stare Decisis – Status of IPAT Decisions

The Court clarified in ***RC (Algeria) v International Protection Appeals Tribunal*** [2018] IEHC 694, High Court, Humphreys J., 3 December 2018 that stare decisis does not apply to the tribunal. Rather:

> 'To say that some super-special weight has to be attached to previous decisions would create an irresistible levelling-up whereby any decision, however outlying, would have to result in a general grant of protection to persons that could in any way be viewed as similarly situated. That would amount to a one-way ratchet system that would rapidly render the asylum process unsustainable. It is not necessary for the tribunal to distinguish any previous different decision as each turns on its own facts under our system; apart, of course, from cases where the applicants are all part of the same transaction, such as being family members. For any given country there are bound to be some favourable decisions and some unfavourable. It is not a legitimate process for an applicant to try to gather together any favourable ones and cry foul if they are not "followed". That would be a massive distortion of the process and would compromise the statutory independence of the tribunal member as well as obscuring the inherent differences on the facts between different cases.'

The Istanbul Convention and International Protection in Ireland



Emer Slattery, UNHCR[1]

Introduction

On 8 March 2019, International Women's Day, Ireland ratified the Council of Europe Convention on preventing and combating violence against women and domestic violence (commonly referred to as the 'Istanbul Convention').[2] Announcing the ratification, Minister for Justice Charles Flanagan TD said that "The Government will continue to work in providing protections to victims of domestic and sexual violence and holding perpetrators to account. The prevalence of this violence means we cannot lessen our efforts in this regard. Rather ratification signals a renewal of our commitments.**"**[3] The ratification symbolizes an undertaking by the State to implement a gender-based approach to the determination of asylum applications. It also represents an opportunity to reflect on the meaning of a gender-sensitive interpretation of the legal framework for international protection and its impact on individual applications. As persecution and serious harm can take many gender-specific forms it is necessary to have a gender-sensitive interpretation of asylum-seekers' individual international protection needs. This article will discuss the ways in which gender can be an important factor in asylum applications, how to interpret the international protection definitions in a manner which addresses women's experiences and Ireland's obligations towards refugee women under the Istanbul Convention.

A gender-sensitive interpretation of international protection

In order to avail of international protection under the 1951 Convention Relating to the Status of Refugees as amended by its 1967 Protocol (hereinafter 'the 1951 Convention' or 'the Convention') asylum claims must be rooted in "a well-founded fear of persecution" experienced for reasons of one or more of the Convention grounds of race, religion, nationality, membership of a particular social group or political opinion.[4] Within the domestic context, the implementation of the single procedure for international protection in Ireland under the International Protection Act 2015 requires that all forms of international protection (refugee status and subsidiary protection) are assessed during the same procedure at first instance.[5] A gender-based interpretation should be undertaken when assessing whether an asylum-seeker is eligible for refugee status and subsidiary protection. According to the United Nations High Commissioner for Refugees' (UNHCR) Gender Guidelines (hereinafter the 'Gender Guidelines'): "Even though gender is not specifically referenced in the refugee definition, it is widely accepted that it can influence, or dictate, the type of persecution or harm suffered and the reasons for this treatment. The refugee definition, properly interpreted, therefore covers gender-related claims".[6] Gender is a relevant consideration in the determination of all aspects of the refugee and subsidiary protection definitions including internal relocation. However, this article specifically focuses on the interpretation of persecution, the

[1] Emer Slattery is Protection Intern at UNHCR Ireland. Any views expressed are the author's own.
[2] Council of Europe, 'Ireland ratifies treaty to end violence against women**'**, 2019, Press Release Ref. DC 040(2019). Available online at: https://search.coe.int/directorate_of_communications/Pages/result_details.aspx?ObjectId=0900001680936750.
[3] Department of Justice and Equality, **'**Minister Flanagan announces ratification of the Istanbul Convention by Ireland on International Women's Day', 2019. Available online at: http://www.justice.ie/en/JELR/Pages/PR19000066.
[4] 1951 Convention Relating to the Status of Refugees as amended by its 1967 Protocol, Article 1 (A) (2). Available online at: https://www.unhcr.org/3b66c2aa10.
[5] International Protection Act 2015, Section 34. Available online at: http://www.irishstatutebook.ie/eli/2015/act/66/enacted/en/print#sec34.
[6] UNHCR, 'Guidelines on International Protection No. 1: Gender-Related Persecution within the context of Article 1 (A) (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees', 7 May 2002, Section II (A) (6). Available online at: https://www.unhcr.org/publications/legal/3d58ddef4/guidelines-international-protection-1-gender-related-persecution-context.html.

1951 Convention grounds and the definition of serious harm from a gender perspective.

Gender-related persecution

Persecution may often be perpetrated in a gendered manner and gender-specific persecution may emanate from both State and non-State actors.[7] UNHCR has long recognized that gender-specific harm can amount to persecution requiring protection.[8] The persecution of a person as a result of their gender and/or gender identity can take many forms. For example, sexual and gender-based violence (hereinafter 'SGBV') can calculatedly or opportunistically be inflicted as a form of persecution towards women and men alike. In situations of armed conflict gender can impact on the ways in which war is fought and the methods of warfare implemented with rape and sexual violence frequently being used as strategic weapons of war. UNHCR has held that

"Sexual and gender-based violence, including rape, human trafficking, sexual slavery and conjugal slavery/forced marriage, are common forms of persecution in many situations of armed conflict and violence. Sexual and gender-based violence may be used as an unlawful and criminal tactic, strategy or policy during situations of armed conflict and violence, in order to overwhelm and weaken the adversary directly or indirectly, by victimizing women and girls and/or men and boys. Irrespective of the motivation of the individual perpetrator, sexual and gender-based violence may form part of a deliberate military or political strategy to debase, humiliate, terrorize or destroy civilian populations in pursuit of broader goals, or rooted in gender-related and other forms of discrimination, thus linking it to one or more of the Convention grounds."[9]

SGBV and other forms of persecution and harm can be perpetrated against people of all genders, including women/girls and men/boys.[10] In particular, international humanitarian law acknowledges that gender-based persecution can be experienced by women during and after conflict.[11]

Gender-specific persecution is not confined to situations of armed conflict or war. Gender can also impact on the general peacetime treatment of women both at a societal level and in the private sphere. Social constructions of masculinity and femininity and gendered roles in society can leave women (including cisgender and transgender women) at risk of persecution in different ways to men including by way of forced marriage, honour-related violence (such as bride burning), domestic violence and the practice of female genital mutilation/cutting (FGM/C).

At the local level in some countries of origin the socially prescribed role of women in society, often as the provider and caregiver, can place women at heightened exposure to risks of persecution. Tasks such as gathering water and food or taking care of relatives can leave women at greater exposure to violence and less able to escape from harm.[12] Transgender people can equally experience persecution on the basis of their gender identity. UNHCR has held that "Harm as a result of not conforming to expected gender roles is often a central element" in gender identity-related asylum claims.[13]

[7] n 5, Section 7 (f) and Section 28 (4) (c).
[8] n 6.
[9] UNHCR, 'Guidelines on International Protection No. 12: Claims for refugee status related to situations of armed conflict and violence under Article 1 (A) (2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the regional refugee definitions', 2016, Section II (A) (26). Available online at: https://www.unhcr.org/en-ie/publications/legal/58359afe7/unhcr-guidelines-international-protection-12-claims-refugee-status-related.html.

[10] UNHCR, '"We Keep It in Our Heart" - Sexual Violence Against Men and Boys in the Syria Crisis', 2017, pp. 12-15. Available online at: https://www.refworld.org/docid/5a128e814.html.
[11] United Nations Security Council, UN Security Council Resolution 1325, 2000, Article 10. Available online at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/N00/720/18/PDF/N0072018.pdf?OpenElement. Article 10 of the UN Security Council Resolution 1325 recognises that women and girls can face gendered persecution during conflict as it "Calls on all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict".
See also: Council of Europe, 'Overview of Legal Protection against Sexual Violence Afforded to Women During Situations of Armed Conflict', 2009. Available online at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680593fc6. The Council of Europe's Ad Hoc Committee on Preventing and Combating Violence against Women and Domestic Violence (CAHVIO) published this document which summarises the provisions of international humanitarian law relevant to prohibiting SGBV against women.
[12] Carol Cohn, *Women & Wars,* Polity Press, 2013. p. 29.
[13] UNHCR, 'Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation

Convention nexus in gender-related asylum applications

A gender-based interpretation should be undertaken when asylum applications are being examined under the 1951 Convention. For the purposes of refugee protection there must be a link to one or more of the Convention grounds: race, religion, nationality, political opinion or membership of a particular social group (hereinafter 'MPSG'). UNHCR has provided further guidance on the presence of a causal link:

"In cases where there is a risk of being persecuted at the hands of a non-State actor (e.g. husband, partner or other non-State actor) for reasons which are related to one of the Convention grounds, the causal link [to the 1951 Convention] is established, whether or not the absence of State protection is Convention related. Alternatively, where the risk of being persecuted at the hands of a non-State actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for reasons of a Convention ground, the causal link is also established".[14]

This means that a Convention ground nexus can arise where non-State actors have committed the persecution and where there is no effective State protection accessible to the individual concerned. However, in many cases of gender-based persecution it may be difficult to establish that the persecution experienced was based on a Convention ground. This can particularly be the case where non-State actors are the persecutors such as in situations of domestic abuse. UNHCR has noted that

"a wife may not always be able to establish that her husband is abusing her based on her membership in a social group, political opinion or other Convention ground. Nonetheless, if the State is unwilling to extend protection based on one of the five grounds, then she may be able to establish a valid claim for refugee status: the harm visited upon her by her husband is based on the State's unwillingness to protect her for reasons of a Convention ground".[15]

Conversely the nexus may also be established relating to a woman's membership of a particular social group on account of her husband's (as her persecutor in society) perception of women. Accordingly, if an applicant for international protection is unable to demonstrate that persecution suffered was perpetrated on the basis of a Convention ground then a lack of protection by the State for a Convention reason may bring the persecution within the scope of the 1951 Convention.

In gender-based asylum claims there can be a Convention nexus under one or more of the Convention grounds depending on the individual circumstances of the claim. The following are some examples of the ways in which a Convention nexus can arise in gender-related asylum claims. Persecution for reasons of race and/or nationality can take a gendered form as women may be viewed as propagating an ethnic or racial identity and as such persecution may be inflicted through sexual violence or control of reproduction as an attempt to assert dominance between different ethnic groups.[16] Religious persecution may take place in situations where religion assigns particular roles or behavioural codes to women and men respectively and where punishment follows if these roles are not fulfilled or abided by.[17] In practice, given the nature of these claims there may also be an overlap with the Convention ground of political opinion. As for MPSG, women can be identified as members of a particular social group by virtue of being women as they are a group who are "defined by innate and immutable characteristics, and who are frequently treated differently than men."[18] Furthermore, in some cases women may be subjected to persecution as a result of being defined as being part of the social group of their family.[19] Women can be "attributed with political

and/or Gender Identity within the context of Article 1 (A) (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees.', 2012, Section IV (A) (13). Available online at: https://www.unhcr.org/509136ca9.pdf.

[14] UNHCR, 'UNHCR Position Paper on Gender- Related Persecution', 2000, Section II (A). Available online at: https://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=type&docid=3bd3f2b04&skip=0&publisher=UNHCR&type=POSITION&querysi=GENDER&searchin=fulltext&sort=date.
See also: n 6, Section II (C) 21; and n 5, Section 7 (3).

[15] UNHCR, 'Guidelines on International Protection No. 2: "Membership of a particular social group" within the context of Article 1 (A) (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees.', 2002, Section II (B) (22). Available online at: https://www.refworld.org/docid/3d36f23f4.html.

[16] n 6.

[17] ibid.

[18] ibid. See also: n 5, Section 8 (3) (b).

[19] EU Qualification Directive (Recast), 'Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-

opinions of their family or male relatives, and subjected to persecution because of the activities of their male relatives."[20] Persecution on the basis of actual or imputed political opinion can also take a gendered form. Women may sometimes be "involved in 'low level' political activities that reflect dominant gender roles" such as preparing meals for militants or undertaking administrative duties for political parties.[21] These activities can result in persecution due to a political affiliation that is imputed to them whether or not they possess that political opinion: the perception of the persecutor is key in terms of establishing the Convention ground nexus.[22] Moreover, refusing to take part in such activities may also result in persecution. Overall, gender can influence the ways in which people are viewed and expected to behave by societies and persecution can often result when a person acts or is perceived to act in contravention to these norms or expectations. This can be as a result of the way they act or dress; how they engage in politics or conflict; through their sexual orientation and behaviour; or by reason of their reproductive capabilities.

Each of the Convention grounds can present in a gendered manner and one or more of the Convention grounds may be applicable. Take the following examples: a woman who refuses to participate in the practice of FGM and becomes targeted by her community for breaching social and religious values and practices; the situation of LGBTI persons in societies in which homosexuality is illegal or against religious values; or a woman in a society in which so-called 'honour' crimes occur by family members and there is no available State protection by virtue of being a woman. These scenarios demonstrate that one or more Convention ground can often be applicable to an individual's circumstances. UNHCR has stated that "Ensuring that a gender-sensitive interpretation is given to *each* of the Convention grounds is important in determining whether a particular claimant has fulfilled the criteria of the refugee definition" [emphasis added].[23] Therefore, while women as a collective may constitute a 'particular social group' for the purposes of the Convention it is also necessary to ensure that a gendered interpretation is given to each of the other Convention grounds.[24] Oosterveld has explained that

> "When the reason underlying the persecution is the victim's gender, then "membership of a particular social group" may be the best category. Where the gender of the victim dictates the manner of persecution (i.e. the persecution is carried out in a gender-specific manner, such as through rape and other forms of sexual violence, forced marriage, forced abortion, forced sterilization or forced pregnancy), but is not necessarily the reason for the persecution itself, then other Convention grounds might be more applicable."[25]

Oosterveld has also noted that it is "important for adjudicators to avoid an automatic reliance on MPSG and instead consider the other Convention grounds, especially political opinion."[26] Accordingly, the implementation of a comprehensive gender-based interpretation of the Convention grounds ensures that asylum claims may be accurately decided and avoids a protection gap for asylum-seekers.

Subsidiary Protection and Gender-Related Serious Harm

Subsidiary protection, as a complementary tool to refugee protection, should only be assessed after a full and inclusive examination of an asylum-seeker's claim from a gender perspective under the refugee definition. This reflects the fact that the 1951 Convention takes primacy in the assessment of international protection needs.[27]

country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)', 2011, Recital 36. Available online at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011L0095&from=EN.

[20] n 6, Section II (C) (33).

[21] ibid.

[22] n 19, Article 10 (1) (e).

[23] n 6, Section II (D) (22).

[24] n 6, Section II (D) (28). UNHCR has noted that in some instances "the emphasis given to the social group ground has meant that other applicable grounds, such as religion or political opinion, have been over-looked. Therefore, the interpretation given to this ground cannot render the other four Convention grounds superfluous".

[25] Valerie Oosterveld, 'Women and Girls Fleeing Conflict: Gender and the Interpretation and Application of the 1951 Refugee Convention', UNHCR Legal and Protection Policy Research Series, 2012, p. 32 Section IV. Available online at: https://www.unhcr.org/en-ie/protection/globalconsult/504dd7649/29-women-girls-fleeing-conflict-gender-interpretation-application-1951.html.

[26] ibid.

[27] UNHCR, 'Annotated Comments on the EC 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 (OJ L 304/12 of

Nevertheless, it is of equal importance to apply a gendered approach to the assessment of eligibility for subsidiary protection. As part of the definition for subsidiary protection under the International Protection Act 2015 - as incorporated from Article 15 of the recast Qualification Directive - "substantial grounds" must be shown to the effect that the applicant "if returned to his or her country of origin, would face a real risk of suffering serious harm and who is unable or, owing to such risk, unwilling to avail himself or herself of the protection of that country."[28] 'Serious harm' is defined as comprising "(a) death penalty or execution, (b) torture or inhuman or degrading treatment or punishment of a person in his or her country of origin, or (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in a situation of international or internal armed conflict."[29] In a similar manner to persecution serious harm may also be perpetrated in a gender-specific manner. When assessing serious harm within armed conflict the Court of Justice of the European Union (CJEU) has provided guidance in the case of *Elgafaji v Staatssecretaris van Justitie.*[30] The Court held that "the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection."[31] The so-called 'Elgafaji sliding scale'[32] requires decision makers to give due regard to personal circumstances when assessing whether a person is at risk of serious harm for the purposes of subsidiary protection. Personal circumstances include, among other aspects, gender. Resultantly, if it can be shown that by virtue of being a woman an applicant is at an increased risk of serious harm in an armed conflict then the threshold or level of indiscriminate violence required may be lowered.[33] As SGBV in the form of rape and sexual violence is prevalent in many conflicts around the world gender may be a distinguishing factor in assessing the risk of serious harm in a situation of armed conflict. Similarly, a person's gender may be relevant in terms of assessing the risk of inhuman and degrading treatment upon return to a country of origin in accordance with section 15(b) of the recast Qualification Directive.[34] As shown above a gender-based interpretation of the principle of 'serious harm' is necessary in an assessment of subsidiary protection.

Implementing a gender-based approach to international protection in Ireland

The Istanbul Convention makes specific provision for gender-based asylum claims and is a legally-binding instrument.[35] Consequently, its ratification by Ireland acknowledges the necessity of a gendered interpretation of the international protection framework and has explicitly committed the State to implementing a gender-based approach towards international protection. Chapter VII of the Istanbul Convention is dedicated to the areas of migration and asylum. Articles 60 and 61 are of particular relevance [emphasis added]:

> **"Article 60 – Gender-based asylum claims**
>
> 1 Parties shall take the necessary legislative or other measures to ensure that gender-based violence against women may be recognised as a *form of persecution* within the meaning of Article 1, A (2), of the 1951 Convention relating to the Status of Refugees and as *a form of serious harm* giving rise to complementary/subsidiary protection.
>
> 2 Parties shall ensure that a *gender-sensitive interpretation* is given to each of the Convention grounds and that where it is established that the persecution feared is for one or more of these grounds,

30.9.2004)', 2005. p. 11. Available online at: https://www.refworld.org/pdfid/4200d8354.pdf. See also: n 19, Recital 33.

[28] n 6, Section 2; and n 19, Article 15.

[29] ibid.

[30] Judgment of the Court (Grand Chamber) of 17 February 2009 (reference for a preliminary ruling from the Raad van State (Netherlands)) — M. Elgafaji, N. Elgafaji v Staatssecretaris van Justitie (Case C-465/07). Available online at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62007CA0465&from=EN and https://www.asylumlawdatabase.eu/en/content/cjeu-c-46507-meki-elgafaji-noor-elgafaji-v-staatssecretaris-van-justitie.

[31] ibid, para. 39.

[32] ibid.

[33] Christel Querton, *Women fleeing armed conflict,* 2013, in Arbel, Dauvergne and Millbank (eds.), *Gender in Refugee Law: From the margins to the centre*, Routledge Research, 2014. p. 236.

[34] n 19.

[35] Council of Europe, 'Council of Europe Convention on preventing and combating violence against women and domestic violence. Istanbul, 11.V.2011.', 2011. Available online at: https://www.coe.int/fr/web/conventions/full-list/-/conventions/rms/090000168008482e.

applicants shall be granted refugee status according to the applicable relevant instruments.

3 Parties shall take the necessary legislative or other measures to develop *gender-sensitive reception procedures and support services* for asylum-seekers as well as *gender guidelines and gender-sensitive asylum procedures*, including refugee status determination and application for international protection.

Article 61 – Non-refoulement

1 Parties shall take the necessary legislative or other measures to *respect the principle of non-refoulement* in accordance with existing obligations under international law.

2 Parties shall take the necessary legislative or other measures to ensure that victims of violence against women who are in need of protection, regardless of their status or residence, shall not be returned under any circumstances to any country where their life would be at risk or where they might be subjected to torture or inhuman or degrading treatment or punishment."[36]

The inclusion of these articles in the Istanbul Convention gives recognition to the distinct protection which must be extended to asylum seeking women. UNHCR has previously noted that "Some states, when applying the 1951 Refugee Convention, fail to acknowledge a gender-sensitive dimension, which may result in inconsistent asylum decisions and deprive many women and girls of international protection"; and has expressed support for the Istanbul Convention by saying that it "establishes an obligation to introduce gender-sensitive procedures, guidelines and support services in the asylum process."[37] Moreover, Article 4 of the Istanbul Convention provides that its implementation should be "secured without discrimination on any ground" including on the basis of sex, gender, sexual orientation, association with a national minority or disability.[38] Therefore, Ireland's ratification of the Istanbul Convention, upon correct implementation, will ensure that a gender-based interpretation of the 1951 Convention and of the International Protection Act 2015 is in place in the assessment of the international protection needs of all asylum applicants in Ireland. This will impact not only the assessment of international protection needs but also procedural matters in the asylum process along with the reception facilities in place for refugee women and girls.

The following are some suggestions for the implementation of the Istanbul Convention within the context of international protection. Firstly, UNHCR's Guidelines should be incorporated into operational practice by the decision-making authorities in Ireland. To this end, training on gender-based asylum claims, including refresher training, should be provided to decision-makers. A gender perspective should be mainstreamed through all international protection training but a comprehensive gender-specific training module should also be developed. A training initiative of this nature would enable decision makers to not only identify and be aware of gender-related issues but also respond to and interpret asylum applications in a gender-sensitive manner.[39] Furthermore, a detailed set of gender guidelines could be developed to assist decision-makers as has been established in other jurisdictions.[40] Incorporating and responding to the unique position of refugee women and girls in existing and future national strategies and related national action plans will also be important in implementing the Istanbul Convention. Currently, the Department of Justice and Equality's Second National Strategy on Domestic, Sexual and Gender-based Violence 2016–2021 makes no explicit reference to asylum-seekers or refugee

[36] ibid, Article 60 and 61. In addition, Article 59 of the Istanbul Convention may also be relevant in the context of family reunification as it provides for recognition of residence status of family members who are dependent on a beneficiary of international protection.

[37] UNHCR, 'UNHCR welcomes Council of Europe convention on combatting violence against women', 2014. Available online at: https://www.unhcr.org/news/latest/2014/8/53da56749/unhcr-welcomes-council-europe-convention-combatting-violence-against-women.html?query=Istanbul%20convention.

[38] n 35, Article 4.

[39] Maria Hennessy, *Training and strategic litigation: tools for enhanced protection of gender-related asylum applicants in Europe*, 2014, in Arbel, Dauvergne and Millbank (eds.), *Gender in Refugee Law: From the margins to the centre*, Routledge Research, 2014. pp. 181-183.

[40] See for example: United Kingdom Home Office, 'Gender issues in the asylum claim', 2018. Available online at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/699703/gender-issues-in-the-asylum-claim-v3.pdf.

women and girls.[41] However, the strategy can and should be implemented in a way which meets the needs of and protects refugee and asylum-seeking women. Similarly, the upcoming Third National Action Plan on Women, Peace and Security (on the implementation of UN Security Council Resolution 1325) could include concrete recommendations towards ensuring a gender-sensitive approach to international protection.[42] Finally, it can be noted that Ireland was the 34th State to ratify the Istanbul Convention. This presents Ireland with the opportunity to observe the ways in which the 33 preceding States have been implementing its provisions. The country monitoring reports undertaken by the Council of Europe's Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO)[43] are publicly available and include matters related to refugee women and girls along with recommendations. These are just some ways in which the Irish authorities can implement the provisions of the Istanbul Convention in a way which meets the needs of refugee women and girls. The above measures would be useful steps towards achieving and ensuring the continuity of a gender-based approach to international protection in Ireland.

Conclusion

Overall, it is essential for a gender-sensitive approach to asylum application determination to be implemented in order to ensure that the protection needs of asylum-seekers are met. The successful implementation of the provisions of the Istanbul Convention by the Irish authorities will be necessary in order to meet these protection needs.

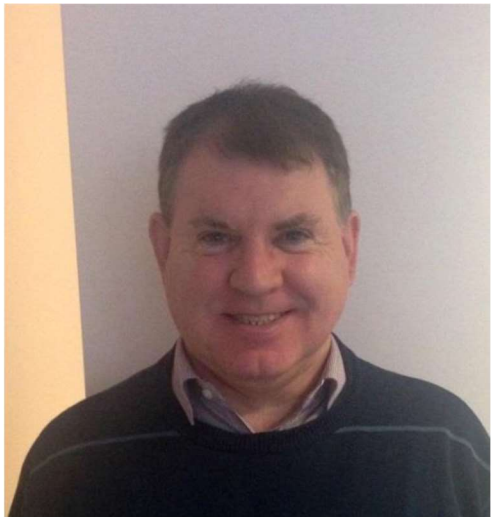
[41] Cosc and Department of Justice and Equality, 'Second National Strategy on Domestic, Sexual and Gender-based Violence 2016–2021.', 2016. Available online at: http://www.cosc.ie/en/COSC/Second%20National%20Strategy.pdf/Files/Second%20National%20Strategy.pdf.

[42] Department of Foreign Affairs, 'Public Consultation Paper for Ireland's Third National Action Plan Women, Peace and Security: Open Invitation for Submissions', November 2018. Available online at: https://www.dfa.ie/media/dfa/ourrolepolicies/peaceandsecurity/Third-National-Action-Plan-Consultation-Document.pdf.

[43] Council of Europe, Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) Country-Monitoring Work. Available online at: https://www.coe.int/en/web/istanbul-convention/country-monitoring-work.

Zimbabwe After Mugabe: Reformed or Unchanged

RDC Researcher David Goggins Investigates



David Goggins, Refugee Documentation Centre

Introduction

Robert Mugabe, leader of the Zimbabwean African National Union – Popular Front (ZANU-PF), ruled the Republic of Zimbabwe for 37 years, first as prime minister from 1980 to 1987 and then as president until November 2017. For many Zimbabweans, particularly among his own Shona ethnic group, Mugabe will always be the national hero who led the fight against white minority rule and brought about the liberation of the country's black majority. But many other Zimbabweans have come to regard him as a tyrant who has brought about the ruination of the country. Mugabe was initially seen as a moderate leader who called for reconciliation with the white population and who guaranteed the creation of a democracy with respect for human rights for all. But despite his early promises it soon became apparent that Mugabe would be an authoritarian ruler who was not prepared to tolerate any dissent, even going so far as to unleash the North Korean-trained Fifth Brigade against his perceived enemies, resulting in the massacre of as many as 20,000 members of the minority Ndebele ethnic group in the Matabeleland region during the period 1983-1984.

A Mismanaged Economy

Zimbabwe has many natural resources including fertile farming land and rich diamond deposits and

has the potential to become one of Africa's wealthiest nations. Unfortunately the Mugabe regime did little to develop a modern economy, instead seeing the country's resources as something to be plundered by the ruling elite and their closest supporters. As a result of this approach Mugabe and his inner circle became wealthy even as the general population experienced increasing hardship.

Regarding Mugabe's mismanagement of Zimbabwe's resources the Irish Times states:

"When Robert Mugabe assumed power in the 1980s, Zimbabwe, with its huge agricultural output, was known as the bread basket of Africa. At the end of his 37-year reign, it had become one of Africa's economic basket cases."[44]

As the economic situation grew worse Mugabe sought to deflect the blame from himself, instead alleging plots by various enemies both within the country and abroad, an attitude summed up in a BBC News report which states:

"He always blamed Zimbabwe's economic problems on a plot by Western countries, led by the UK, to oust him because of his seizure of white-owned farms. His critics firmly blamed him, saying he had no understanding of how a modern economy worked."[45]

Downfall of Mugabe

Mugabe's removal from power in November 2017 came about not because of his economic incompetence, human rights abuses or the widespread corruption of his regime, but was instead the result of a power struggle within ZANU-PF to appoint a successor. Zimbabwe's vice president Emmerson Mnangagwa, a former liberation war veteran and long-time ZANU-PF member, had expected to become president when Mugabe finally retired from office. Mnangagwa's ambition was threatened when it became increasingly clear that Mugabe's own preference as his successor was his wife Grace Mugabe, a woman who had become notorious for her extravagant expenditure abroad despite the widespread poverty experienced by the majority of the population. Grace Mugabe had the support of a group of younger members of Zimbabwe's new elite known as the G-40 but more importantly, Mnangagwa had the support of the older generation of senior military figures who controlled the country's powerful army. On 7 November 2017 Mugabe abruptly dismissed Mnangagwa as vice-president. A week later the army staged what was effectively a coup, placing Mugabe under house arrest and installing Mnangagwa as interim president.

Explaining the army's motivation for removing Robert Mugabe from power former US ambassador to Zimbabwe Charles Ray states:

"Though some of the military's motivation may be attributed to the desire of senior officers and party officials to protect their access to the public trough, to fund the lavish lifestyle that many of them lead, one cannot underestimate the long-standing schism between those who participated in the liberation struggle and those who didn't."[46]

Mugabe's removal from power was widely celebrated by the general population, who were cautiously optimistic that the change of president would bring about long-overdue reforms. The new leader promised to hold democratic elections, respect human rights and fix an economy destroyed by the actions of the regime which had misruled the country since independence.

A Contentious Election

The promised elections were held on 30 July 2018 and resulted in a narrow victory for Mnangagwa over Nelson Chamisa, leader of the opposition party Movement for Democratic Change (MDC). This outcome was disputed by the MDC which alleged that there had been many irregularities during the poll. The ensuing protests by supporters of the defeated candidate soon became violent, resulting in a brutal crackdown by the security forces. Amnesty International accused the authorities of using excessive force to suppress the protests, reporting that:

"Political tensions between MDC and Zimbabwe African National Union – Patriotic Front (ZANU-PF) heightened following the poll and on 1 August, protests erupted in the capital Harare over delays in releasing elections results. Authorities deployed armed police and military

[44] The Irish Times (1 June 2018) Positive signs since Mugabe's departure but Zimbabwe is still on its knees
[45] BBC News (21 November 2017) Robert Mugabe: Is Zimbabwe's ex-president a hero or villain?
[46] The Foreign Service Journal (March 2018) Zimbabwe After Mugabe: Dark Before the Dawn?

personnel to stop protests. Armed police and military personnel used live ammunition and beat up protesters, using batons, boots and sjamboks leaving six people dead and 35 others badly injured."[47]

Reporting on the events of 2018 in Zimbabwe Human Rights Watch states:

"Relatively peaceful national elections marred by disputed results and post-election violence signified that little had changed in Zimbabwe in 2018. The declaration of Emmerson Mnangagwa as winner of the July 30 presidential race, which for the first time in 30 years did not have former President Robert Mugabe on the ballot, was followed by a military crackdown on political opponents."[48]

Among the reasons for Mnangagwa's success were the advantages of incumbency, the loyalty of ZANU-PF's rural supporters and the withholding of the vote from the country's three million strong diaspora. Another significant factor was the ruling party's total control of the state media, which has always acted as a ZANU-PF propaganda machine.

Passing its verdict on this election the New York Times states:

"For most Zimbabweans, who had not known any other leader than Mr. Mugabe, his ouster last year had raised expectations of a new era. But the victory by Mr. Mnangagwa, who was Mr. Mugabe's right-hand man and was behind some of his most repressive policies, underscored that power was passing from one ZANU-PF die-hard to another. Neither in Zimbabwe nor in the rest of southern Africa has a liberation party ever lost power."[49]

Among international observers opinion was divided in regard to the legitimacy of the election result, with the International Crisis Group stating:

"The European Union mission and the joint mission of the U.S.-based National Democratic Institute and International Republican Institute, for example, gave much greater attention than the African Union, Southern African Development Community and African National Congress missions to media bias and abuse of state resources."[50]

New Boss, No Change?

Despite his promises President Mnangagwa soon disappointed those who had hoped that he would bring about meaningful reform of Zimbabwe's economy. In an article published on The Conversation website Robert Rotberg of the Harvard Kennedy School explains the reasons for this failure as follows:

"When President Emmerson Mnangagwa campaigned in July for Zimbabwe's presidency, he promised to be a business friendly leader, and to return his country's economy to twentieth century times of plenty and prosperity.

But Mnangagwa has already shown himself incapable of jettisoning the state centrist, rent-seeking predilections of his predecessor. A "big-bang" sharp break with Zimbabwe's recent past is essential to reassure consumers and capitalists. Yet Mnangagwa and his cronies have so far rejected anything forward-looking and sensible."[51]

The Fuel Rise Protests

Zimbabweans were hit by a fresh crisis in January 2019 arising from a massive increase in the price of fuel. Explaining the cause of this crisis International Crisis Group states:

"On 12 January, in response to persistent fuel shortages compounded by manipulation and mismanagement of a currency crisis, President Emmerson Mnangagwa announced a fuel price hike of over 200 per cent to $3.31 per litre – making the country's petrol price the highest in the world."[52]

This massive price sparked a general strike and widespread protests, many of which turned violent. The government responded to these protests by using both the police and the army to brutally crack down on anyone suspected of

[47] Amnesty International (8 February 2019) 'Open for Business, Closed for Dissent'
[48] Human Rights Watch (17 January 2019) World Report 2019 - Zimbabwe
[49] The New York Times (2 August 2018) Zimbabwe Elects Mnangagwa, the Man Who Ousted Mugabe
[50] International Crisis Group (21 August 2018) After Elections, Zimbabwe Government's Legitimacy in Limbo
[51] The Conversation (21 October 2018) Zimbabwe's economy is collapsing: why Mnangagwa doesn't have the answers
[52] International Crisis Group (18 January 2019) Revolt and Repression in Zimbabwe

involvement. There were numerous reports of excessive force used in suppressing the protests, among which was a report from UK newspaper The Guardian which states:

"At least 12 people were killed and 78 treated for gunshot wounds, according to the Zimbabwe Human Rights NGO Forum, which recorded more than 240 incidents of assault and torture. About 700 people have been arrested and remain in custody, including five opposition MPs."[53]

Human Rights Watch has also accused the regime of committing human rights abuses during the protests, alleging that:

"Zimbabwe security forces used excessive lethal force to crush nationwide protests in mid-January 2019. President Emmerson Mnangagwa's sudden announcement of a fuel price increase of 150 percent resulted in three days of demonstrations throughout Zimbabwe in which security forces fired live ammunition, killing 17 people, and raped at least 17 women."[54]

The Guardian followed up its reports on the protests with an editorial which states:

"People do not always want to be proved right. Many Zimbabweans watching the brutal crackdown on protests this weekend were the same people who had celebrated Robert Mugabe's ousting in 2017. But they had tempered their optimism by warning that only very limited and superficial improvements were likely. They predicted that the successful coup would further embolden the military, and that putting in charge the feared security chief Emmerson Mnangagwa was a recipe for further repression."[55]

An Associated Press International report states:

"More than 600 people have been arrested, among them a prominent pastor and activist, Evan Mawarire, who has supported the protests on social media and faces a possible 20 years in prison on a subversion charge."[56]

[53] The Guardian (22 January 2019) Mnangagwa promises investigation of brutal Zimbabwe crackdown
[54] Human Rights Watch (12 March 2019) Zimbabwe: Excessive Force Used Against Protesters
[55] The Guardian (23 January 2019) The Guardian view on Zimbabwe's crackdown: Mugabe went, but the regime lives on
[56] Associated Press International (18 January 2019) Zimbabwe in 'total internet shutdown' amid deadly crackdown

Reporting on the treatment of persons arrested during these protests Amnesty International states:

"In total, 1055 people were tried by courts countrywide in charges related to the protests between 16 January - 31 January. Of these, only 48 adults have been granted bail, while 995 were denied bail."[57]

Economic Collapse?

The editorial board of the Financial Times appraises the current state of Zimbabwe's economy as follows:

"The recent violence stems from a slow-motion economic collapse. The country — which has no currency of its own after hyperinflation destroyed the Zimbabwe dollar a decade ago — has stopped generating the export dollars it needs to survive. It depends almost entirely on remittances from millions of Zimbabweans forced to seek a living abroad. The central bank has run out of dollars, forcing it to pump out ever more of the electronic money that passes for a currency.

Another bout of hyperinflation beckons. Zimbabwe appears to be heading for a Venezuela-style meltdown. The World Food Programme worries that 8m of the estimated 14m-16m population face food insecurity. Some 38 years of theft and incompetence by Zanu-PF have brought the breadbasket of southern Africa to this."[58]

Further Discontent

The rise in fuel prices was not the only source of discontent among Zimbabweans. The mishandling of Zimbabwe's economy also seriously affected the country's health system. Regarding action taken by the country's doctors Voice of America states:

"At the turn of the year, junior doctors held a 40-day strike for better pay and conditions that crippled public hospitals. It ended without a deal

[57] Amnesty International (8 February 2019) 'Open for Business, Closed for Dissent'
[58] The Financial Times (31 January 2019) Zimbabwe's economy is in slow-motion collapse

being reached and with doctors threatening further stoppages."[59]

There were further protests by doctors in March 2019, which The Guardian reported as follows:

"A doctor's strike in Zimbabwe entered its second day on Wednesday with health workers claiming patients in the biggest state hospital are dying due to a lack of drugs and medical supplies."[60]

Doctors were not the only group to express grievances, with discontent over low pay leading to a nationwide strike by public school teachers in February 2019.

The Current Situation

The inability of the new regime to bring about economic reform and an improvement in living standards has confirmed the worst fears of those Zimbabweans who were sceptical that a change of president would solve the country's problems. Commenting on the increasing disillusionment of ordinary people an Associated Press report states:

"Zimbabweans had briefly rejoiced when Mnangagwa succeeded Mugabe, who was forced out in late 2017, thinking the new president would deliver on his refrain that the country 'is open for business.' But frustration has reached new highs as Zimbabweans sleep in their cars in hours-long fuel lines that have replaced hours-long bank lines as the country's symbol of despair."[61]

This assessment of the current situation is shared by the International Crisis Group which states

"The optimism that accompanied the ouster of long-time President Robert Mugabe in November 2017 has evaporated. For a time, many Zimbabweans thought his replacement, Mnangagwa, might be a reformer, though he had long been a ruling-party stalwart who was Mugabe's vice president. The international community, including a number of critics, were prepared to give him the benefit of the doubt. Now, however, cynicism is growing in many quarters, albeit for different reasons. There are signs of discontent even among ZANU-PF loyalists and members of the security forces, who are also bearing the brunt of economic decay."[62]

The views of one Zimbabwean were expressed in an Al Jazeera article which quotes him as follows:

"The day we marched, I really felt like Mnangagwa was the hope of the people, but it seems like the suffering we experienced under Mugabe hasn't changed.

'It's like the army just kicked out a dictator so they could enjoy power for themselves. There is nothing for us in this new dispensation,' he said."[63]

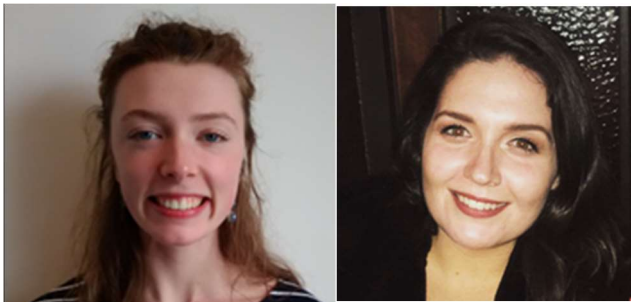
A report published by the Nederlands-based Foundation Max van der Stoel concludes that:

"Ever since independence in 1980 there has not been a moment of true freedom in Zimbabwe. The presidents ruling the country have always used violence to control their population. Mnangagwa is no different, he might even be worse."[64]

All documents and reports referred to in this article may be obtained upon request from the Refugee Documentation Centre.

[59] Voice of America (13 March 2019) Striking Zimbabwe Doctors Say Patients Dying Due to Drug, Equipment Shortages
[60] The Guardian (14 March 2019) Doctors in Zimbabwe 'sending patients away to die as drug shortages bite
[61] Associated Press International (January 18 2019) Zimbabwe in 'total internet shutdown' amid deadly crackdown
[62] International Crisis Group (18 January 2019) Revolt and Repression in Zimbabwe
[63] Al Jazeera (14 November 2018) A Year after Mugabe, hopes for a new Zimbabwe still low
[64] Foundation Max van der Stoel (1 February 2019) Zimbabwe after Mugabe: new president Mnangagwa does not bring promised change

Risks faced by failed asylum seekers returning to the Democratic Republic of the Congo



Katherine Byrne and Hailey O'Shea[65]

Risks faced by deportees may be categorised into three forms – inhumane and degrading treatment, insecurities in the hands of state agents and economic and psychological risks. [66] The threshold for refoulement is reached when a risk of torture or inhumane or degrading treatment as set out in the 1951 Geneva Convention and Article 3 of the European Convention on Human Rights is faced by returned unsuccessful asylum seekers.[67] The DRC is included in a list of countries compiled by the International Refugee Rights Initiative where "return-related risks" are created by the practices of the state authorities there.[68]

Questioning by state authorities

Congolese nationals who return to the Democratic Republic of the Congo (DRC) are interviewed by the Direction générale de migration (DGM) and National Intelligence Agency (Agence nationale de reseignements). Returnees are asked questions relating to their activities abroad, the duration of their stay abroad and the reasons for their deportation.[69] Amnesty International prepared expert opinion for a case before the UK Upper Tribunal of the Immigration and Asylum Chamber in 2015 which indicated the authorities who are responsible for dealing with returnees are corrupt and that failed asylum seekers may be subject to mistreatment and/or detention at the hands of the DGM and ANR officers.[70]

Detention

In some cases, returnees are imprisoned without access to a lawyer and are often held in poor conditions. [71] It has been reported that some returnees were forced to sign a document which stated that they had left the airport they had arrived in without complications, but were subsequently arrested at their homes a short while later. The Congolese authorities denied such detentions when attempted interventions by the United Nations Organisation Stabilisation Mission in the DR Congo MONUSCO took place.[72]

Occupation of former homes

A UNHCR report in 2014 showed that returnees to the DRC who attempted to go back to their homes in the North Kivu, South Kivu and surrounding areas found that they had been occupied by former militia members or families of different ethnic backgrounds.[73]

Travelling on a false passport

The UK Home Office has reported that it is considered illegal for a Congolese citizen to travel on a false passport and that such a crime may be punishable with a prison sentence of up to five years.[74]

Applying for asylum considered to be an act of treason

The mere application for asylum in another country may be viewed by the Congolese authorities as an act of treason. Individuals who have left the DRC are forced to admit they have committed treason by falsely claiming persecution in asylum applications or are accused of betraying

[65] Former Interns with IPAT. Any views expressed are the authors own.
[66] Stichting Landelijk Ongedocumenteerden Steunpunt, Post Deportation Risks: *A Country Catalogue of Existing References* (20 June 2017) 5.
[67] ibid.
[68] Immigration and Refugee Board of Canada, *Democratic Republic of Congo: Situation of people returning to the country after they either spent time abroad, claimed refugee status or were seeking asylum* (10 July 2017).
[69] Ibid.
[70] Ibid.
[71] Alpes, Blondel, Preiss & Monras, *Forced Migration Review Post-deportation risks for failed asylum seekers* (February 2017).
[72] Ibid.
[73] UN High Commissioner for Refugees, *UNHCR Position on Returns to North Kivu, South Kivu and Adjacent Areas in the Democratic Republic of Congo Affected by on-going Conflict and Violence in the Region,* (September 2014).
[74] Blondel, Conciatori, Preiss, Monras, Seiller, Uhlmannsiek, *Post-deportation risks : Criminalised departure and risks for returnees in countries of origin* (May 2015).

their country through an "act of terrorism."[75] In 2011, returned asylum seekers were monitored by Justice First. It was found that every monitored returnee experienced imprisonment, torture, extortion or sexual harassment upon their return to the DRC.[76]

Extortion

It was reported by some returnees that DGM and ANR officers ask returned asylum seekers for money or clothing "on occasion".[77] In some cases, sums of money ranging between $6000 and $25000 were demanded by officials.[78]

The British Organisation Still Human, Still Here has reported that "returning Congolese are likely to be interviewed by DGM officials and subjected to systematic searches and extortion of their private belongings, e.g. shirts, pants shoes, watches, lighters, as well as money if for example, the vaccination certificate isn't valid. This may continue into the parking area, after leaving the passenger zone of the airport, as individuals from the security forces rightly or wrongly believe that returnees have a lot of money and goods with them"[79]

Justice First has also reported that large ransom sums are often paid for the unofficial release of returnees.[80]

Physical violence and ill treatment

According to the UK Home Office, returnees are questioned and their belongings are searched through in order to determine the returnees' political affiliations. The Congolese special forces and ANR are often involved in the disappearance of some individual returnees. Justice First has recorded that failed asylum seekers returning to the DRC are persecuted as they believed to be opponents or "infiltrés". Those who are regarded as political opponents suffer ill treatment by authorities.[81]

Relevant Case Law in Ireland

The applicant in *V(F) v RAT & Minister for Justice, Equality and Law Reform* was a national of Togo and submitted that his fear of persecution was based on his status as a failed asylum seeker who would be perceived to be an opponent of the ruling regime if refouled to Togo. It was confirmed in this case that it generally falls within the remit of the Refugee Appeals Tribunal (replaced in 2016 by the International Protection Appeals Tribunal) to consider all issues that would subsequently be relevant to the question of refoulement and found the RAT to be in error in declining jurisdiction to consider the applicant's fear of being returned to Togo as a failed asylum seeker.[82] The Court held the RAT had both the duty and the jurisdiction to adjudicate upon this element of the applicant's fear; persecution can be forward looking and thus, returning as a failed asylum seeker may amount to such. The Court also found that failed asylum seekers are not members of a particular social group *per se*. However, a person may fall within the definition of a refugee due to his or her fear of persecution by virtue of his or her status as a failed asylum seeker where a clear convention nexus is made out:[83]

"an asylum seeker must show a well-founded fear of persecution for a Convention reason, that is by reason of his or her race, religion, nationality, membership of a particular social group or political opinion. The court is not satisfied that failed asylum seekers per se are members of a particular social group or that they necessarily hold any particular political opinions. It seems to this Court, however, that where a clear Convention nexus is shown, a person's fear of persecution by virtue of his or her status as a failed asylum seeker might be capable of bringing him or her within the s.2 definition." [84]

The applicant *in PBN v Minister for Justice, Equality and Law Reform* based her Section 17(7) application on the asserted fear of being subjected to persecution if returned to Kinshasa as a failed asylum seeker.[85] It was submitted that the RAT failed to base its decision on up-to-date country of origin information. It was found that the applicant had not put before the Minister any "new elements" or findings" which would "significantly"

[75] Expert witness opinion given by Mr Alex M Ntung, Secretary of State for the Home Department v Gauthier (L) PA00092/2017 [16].
[76] Alpes, Blondel, Preiss & Monras, (n6).
[77] Immigration and Refugee Board of Canada, (n3).
[78] Alpes, Blondel, Preiss & Monras, (n6).
[79] Blondel, Conciatori, Preiss, Monras, Seiller, (n9).
[80] Ibid.
[81] Ibid.
[82] [2009] IEHC 268 [29]
[83] Ibid [33]
[84] Ibid
[85] [2013] IEHC 435 [8]

contribute to the likelihood of qualification for refugee status. Failed asylum seekers are not *per se* members of a particular social group and the applicant failed to present any new evidence to establish a Convention nexus.[86] With regard to concerns relating to questioning by the Congolese authorities which the applicant may have been subjected to, it was noted that, depending on the travel documents an individual may travel with, questioning is common practice across the world and is a regular process within the system of immigration control.[87] This case also dealt with the issue of corruption within the Congolese authorities:

"The country of origin information undoubtedly suggests that there is a risk of any returnee being bribed by rogue airport officials but there is nothing in the country of origin information to suggest that this is officially sanctioned or condoned and while it is reprehensible, such a risk does not fall within the high threshold set by Article 3 ECHR […] such as would outweigh the public interest in the orderly implementation of a lawful deportation order."[88]

In *RWB v Minister for Justice, Equality and Law Reform*, the applicant did not wish to re-open the decision made by the International Protection Appeals Tribunal; rather he presented to the Minister as a failed asylum seeker, a status he did not have when making his original claim for asylum.[89] He claimed the information relating to the risks associated with such a status was not considered by the decision-maker. The information was contained in a report by Catherine Ramos entitled *Unsafe Return: Refoulement of Congolese Asylum Seekers.*[90] This report stated, among other risks, that returnees may be subjected to inhuman and degrading treatment by the Congolese authorities, that travel documentation which identifies failed asylum seekers puts returnees at further risk and that those refouled to the DRC who are suspected of having left the country on a false passport may be imprisoned. The applicant was granted leave for judicial review on the basis that it was arguable on substantial grounds that the aforementioned report by Catherine Ramos "was capable of meeting the threshold set by Section 17(7) of the 1996 Act as amended by the European Communities (Asylum Procedures) Regulations 2011 (S.I. 51/2011) (S.1. 51 of 2011) and that its apparent disregard by the review decisionmaker amounted to an unlawful fettering of the respondent's discretion pursuant to section 17(7)."[91] Leave was also granted on the basis that the decision-maker had breached the applicant's right to fair procedures by failing to consider the submissions which the applicant's legal representative had detailed in a letter to the decision-maker.[92]

The issue of the risk associated with clear identification of returnees to the DRC from Ireland as failed asylum seekers was raised in the case of *EKK v Minister for Justice, Equality and Law Reform.* The conflicting information regarding severity and consistency of risks faced by returnees was noted by the Court. Relief was granted nonetheless to quash the decision as it was found that the decision-maker had failed to reasonably assess the risk faced by the applicant if deported given that she had left the country on a false passport.[93]

Decisions of the International Protection Appeals Tribunal

There have been 12 Tribunal decisions concerning appellants from the Democratic Republic of Congo (DRC) in 2018 and 2017,[94] with only three considering claims on the basis of the Appellant becoming a failed asylum seeker once returned to the DRC if unsuccessful in their appeal for international protection. Two of the three claims were rejected on the basis of insufficient country of origin information before the Tribunal.

The rejection of failed asylum seeker claims by the Tribunal is in line with the decisions of the High Court, particularly that of Irvine J in *V(F) v RAT & Minister for Justice, Equality and Law Reform.*

A Convention nexus can only be established through *"cogent, authoritative and objective COI that failed asylum seekers were targeted for persecution in the person's country of origin."*[95] The threshold of acceptable country of origin information which goes towards proving a person

[86] Ibid [19]
[87] [2013] IEHC 435 [50]
[88] ibid
[89] [2017] IEHC 370 [17]
[90] Ibid [3]
[91] ibid [30]
[92] ibid [28]
[93] [2016] IEHC 38 [212]
[94] Two decisions in 2017, one decision in 2018.
[95] [2009] IEHC 268 [37].

will face persecution if returned to their country of origin as a failed asylum seeker has been set relatively high by the court in *V.* Similarly, the Court in *PBN v Minister for Justice, Equality and Law Reform* held that although some categories of people are likely to face mistreatment which amounts to persecution upon their return to their country of origin, the applicant concerned did not fall within such category.

In 2017, there was a total of seven decisions concerning Appellants from the DRC. Both of which decisions concerned failed asylum seeker submission were negative decisions. Tribunal Members followed the precedent set by the High Court, refusing to find that the return of the Appellant as a failed asylum seeker amounted to persecution on the basis of country of origin information submitted. For example, one Tribunal Member stated *"[t]he Tribunal notes from that COI that where a claimant is unsuccessful they are not without more, exposed to a real risk of persecution or serious harm."*[96] Similarly, in the second appeal, the Tribunal Member stated *"[t]here is no evidence from COI that all returned asylum seekers are at risk of harm if returned to the DRC."*[97] The lack of cogent and authoritative country of origin information proving that failed asylum seekers of the DRC are at risk of serious harm or persecution upon their return has not been brought before the Tribunal.

The decision concerning the DRC in 2018 is irrelevant in this analysis. The appellant was found to have established a fear of persecution on other grounds, thus his status as a failed asylum seeker returnee did not need to be considered by the Tribunal Member. [98]

The consensus with Tribunal decisions appears to be that appellants who claim they will face future persecution or serious harm on the basis of their return to their country of origin as a failed asylum seeker will be unsuccessful on that ground. Taking a country like Zimbabwe, the same reasoning has been put forward by Tribunal Members in making negative finding against Appellants on the basis of their status as a failed asylum seeker. For example, a Tribunal Member has stated in an appeal considering an appellant from Zimbabwe who made the claim that upon return she would face persecution due to her status as a failed asylum seeker that: *"[t]he Tribunal therefore finds that there are no substantial grounds for believing that should the Appellant return to her country of nationality she will face no real risk of serious harm on this basis."*[99]

Decisions in some other jurisdictions of claims by Congolese nationals of a fear of persecution or risk of serious harm due to their status as failed asylum seekers are generally in line with determinations made by Irish decision-makers. A decision of the Asylum and Immigration Tribunal (AIT), dated 18 December 2018 found that failed asylum seekers did not *per se* face a risk of serious harm or persecution upon their return to the DRC. There appears to be consistency in decision-making across Ireland and the UK regarding these types of claims made by Congolese nationals; decisions of *V(F)* in the High Court and those made by the IPAT as well as the AIT show that returnees to the DRC do not face a fear of persecution or risk of serious harm per se.[100]

Conclusion

While country of origin information indicates that failed asylum seekers returning to the DRC face numerous risks, proving persecution or risk of serious harm on the basis of an appellant becoming a failed asylum seeker upon their return to the country of origin is a difficult task. While the High Court has found in numerous cases that returnees to their country of origin are not members of a particular social group *per se,* a person may fall within the definition of a refugee due to his or her fear of persecution by virtue of his or her status as a failed asylum seeker where a clear Convention nexus is made out.

[96] IPAT Decision No: 1707717-SPAP-15.
[97] IPAT Decision No: 1716261-SPAP-15.
[98] IPAR Decision No: 1782011-IPAP-16.
[99] IPAT Decision No: 1733071-SPAP-16.
[100] Decision reference in *EKK v Minister for Justice, Equality and Law Reform* [2016] IEHC 38.

The visit of Pakistan expert Dr. Paul Rollier, September 2018

Patrick Dowling, Refugee Documentation Centre

Introduction

The majority of Christians in Pakistan are engaged in menial employment.[101] This was one of the issues raised in a COI presentation on Pakistan given by Dr. Paul Rollier in the offices of the Refugee Documentation Centre in September 2018. The status of Christians in Pakistan[102] and two other selected COI subject areas arising out of Dr. Rollier's narrative, will be augmented by COI sources in this brief retrospective.[103]

Christians

There were 1,467 attacks on Christians in Pakistan between November 2017 and October 2018.[104] As Christians in Pakistan mostly live in concentrated areas, this increases their vulnerability.[105] The Human Rights Commission of Pakistan for example, notes the precariousness of Christians in Balochistan province.[106] State protection is both perceived and experienced by Christians as decidedly limited.[107] This relationship with the state can even begin with children as some Pakistani schoolbooks deride Christianity.[108] This can continue into adolescence, as evidenced by, the recent increase in abductions of Christian girls who are often forcibly converted to Islam, thereafter compounded by state reticence.[109] Child labour, menial jobs, and bonded labour for adults, can be the fate for many Christians as reflecting their comparative status.[110] There have even been cases of menial jobs advertised as only open for Christian applicants.[111]

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[101] Open Doors (14 January 2019) *World Watch List 2019: Pakistan Country Dossier*, p.17 http://www.ein.org.uk/print/members/country-report/world-watch-list-2019-pakistan-country-dossier

[102] Department of Foreign Affairs and Trade of Australia (20 February 2019) *DFAT Country Information Report Pakistan*, p.42 https://dfat.gov.au/about-us/publications/documents/country-information-report-pakistan.pdf

[103] While this article derives from Dr. Rollier's presentation, any interpretations, including from sourced COI, are entirely those of the author.

[104] Open Doors *op.cit.*, p.9
See also:
Centre for Research & Security Studies (28 February 2019) *CRSS Annual Security Report, A comprehensive look at Pakistan's security situation from 2013 to 2018*, p.59 https://crss.pk/wp-content/uploads/2019/02/CRSS-Annual-Security-Report-2013-2018-1-1.pdf;
United States Department of State (29 May 2018) *2017 Report on International Religious Freedom: Pakistan*, p.1 http://www.ein.org.uk/print/members/country-report/2017-report-international-religious-freedom-pakistan;
European Asylum Support Office (October 2018) *Pakistan Security Situation*, p.17 https://www.ecoi.net/en/file/local/1446962/1226_1539768050_pakistan-security-situation-2018.pdf; &
South Asia Terrorism Portal (26 November 2018) *Pakistan: Sectarian Savagery*, p.2 http://www.ein.org.uk/members/country-report/pakistan-sectarian-savagery

[105] Department of Foreign Affairs and Trade of Australia *op.cit.*, p.42

[106] Human Rights Commission of Pakistan (December 2018) *A meaningful democracy, Mainstreaming the rights of women and religious minorities in Pakistan*, p.9 http://hrcp-web.org/hrcpweb/wp-content/uploads/2019/02/FNF-HRCP-report-2018.pdf
See also:
Open Doors *op.cit.*, p.12

[107] International Crisis Group (28 January 2019) *Pakistan: Challenges of a Weak Democracy*, p.3 https://www.crisisgroup.org/asia/south-asia/pakistan/pakistan-challenges-weak-democracy;
Open Doors *op.cit.*, p.18 http://www.ein.org.uk/print/members/country-report/world-watch-list-2019-pakistan-country-dossier;
Freedom House (2019) *Freedom in the World 2019, Pakistan*, p.7 https://freedomhouse.org/report/freedom-world/2019/pakistan;
United States Commission on International Religious Freedom (November 2018) *Limitations on Minorities' Religious Freedom in South Asia*, p.6 https://www.uscirf.gov/sites/default/files/Limitations%20on%20Minorities%20Religious%20Freedom%20in%20South%20Asia.pdf; &
United States Department of State *op.cit.*,p.1

[108] Christian Solidarity Worldwide (24 October 2018) *General briefing: Pakistan*, p.2 https://www.csw.org.uk/2018/10/24/report/4143/article.htm

[109] United States Commission on International Religious Freedom *op.cit.*, p.10; &
Christian Solidarity Worldwide *op.cit.* p.1

[110] Open Doors *op.cit.*, pp.4, 14

[111] United States Department of State *op.cit.*, p.20;
Open Doors *op.cit.*, p.8; &

Atheists

One such Christian seeking to eke out a living is Aasia Bibi, who, became widely known in a blasphemy case where, despite acquittal, was not released due to the violent reaction, and remains in protective custody.[112]

The accusation of blasphemy against Bibi arose out of a transaction where her behaviour was deemed transgressionary and accusations of blasphemy followed thereafter.[113] The Bibi case is high-profile example of a Christian accused of blasphemy and yet while all religious minorities have been subjected to charges of blasphemy, Christians have been disproportionally affected.[114]

Pakistan is a deeply religious country where blasphemy is an inflammatory issue and Dr. Rollier additionally noted in his presentation, the corresponding lack of secular space, including difficulties for atheists.[115] Atheists, like Christians, are vulnerable to charges of blasphemy and like Christians, are susceptible to extrajudicial punishment.[116] The current UNHRC position paper on Pakistan equates the risks faced by atheists to that of religious minorities and potentially in need of international protection accordingly.[117] Indeed for atheists, it is highly

Department of Foreign Affairs and Trade of Australia *op.cit.*, p.42

[112] The Guardian (9 February 2019) *Asia Bibi: Pakistani authorities barring her from leaving, friend says*, p.1 https://www.theguardian.com/world/2019/feb/09/asia-bibi-pakistani-authorities-barring-her-from-leaving-friend-says; &
Amnesty International (29 January 2019) *Pakistan: Asia Bibi must finally get her freedom* https://www.amnesty.org/en/latest/news/2019/01/pakistan-asia-bibi-must-finally-get-her-freedom/

[113] Amnesty international (6 November 2018) *Christian woman accused of blasphemy at risk* https://www.amnesty.org/download/Documents/ASA3393732018ENGLISH.pdf
Legislation on blasphemy is available at the following:
International Humanist and Ethical Union (29 October 2018) *Freedom of Thought Report 2018: A Global report on the rights, legal status and discrimination against humanists, atheists and the non-religious - Key Countries Edition – Pakistan*, p.4 http://www.ein.org.uk/print/members/country-report/freedom-thought-report-2018-global-report-rights-legal-status-and-1;
United States Commission On International Religious Freedom (July 2017) *Respecting Rights?, Measuring the World's Blasphemy Laws*, pp.75-77. https://www.uscirf.gov/sites/default/files/Blasphemy%20Laws%20Report.pdf;
Amnesty International (21 December 2016) *"As Good As Dead" - The Impact of the Blasphemy Laws in Pakistan*, p.10 https://www.amnesty.org/download/Documents/ASA3351362016ENGLISH.PDF; &
Agence France Presse (15 November 2018) *Asia Bibi: Pakistani Christian woman in limbo after blasphemy verdict*, p.1 https://www.lexisnexis.com/uk/legal/results/docview/docview.do?docLinkInd=true&risb=21_T28160109468&format=GNBFULL&sort=BOOLEAN&startDocNo=1&resultsUrlKey=29_T28160109473&cisb=22_T28160109472&treeMax=true&treeWidth=0&csi=10903&docNo=25

[114] Amnesty International (31 October 2018) *Pakistan: Aasia Bibi verdict is a landmark victory for religious tolerance* https://www.amnesty.org/en/latest/news/2018/10/pakistan-aasia-bibi-verdict-is-a-landmark-victory-for-religious-tolerance/;
Reuters (7 November 2018) *Pakistani Christian woman acquitted of blasphemy 'secure', out of jail*, p.2 https://www.reuters.com/article/us-pakistan-blasphemy/pakistani-christian-woman-acquitted-of-blasphemy-secure-out-of-jail-idUSKCN1NC2VJ;
Open Doors *op.cit.*, p.3;
Human Rights Watch (31 October 2018) *Pakistan's Aasia Bibi Finally Gets Justice* https://www.hrw.org/news/2018/10/31/pakistans-aasia-bibi-finally-gets-justice

[115] Encyclopædia Britannica (8 March 2019) *Pakistan, Religion*, p.1 https://www.britannica.com/place/Pakistan/Religion;
United States Department of State *op.cit.*, pp.1-3,7-8, &19;
International Humanist and Ethical Union *op.cit.*, pp.4-5;
Daily Times (16 January 2019) *Afghanistan voted as the most religious country of the world; Pakistan ranked #6* https://dailytimes.com.pk/344466/afghanistan-voted-as-the-most-religious-country-of-the-world-pakistan-ranked-6/;
Agence France Presse *op.cit.*, p.1;
Reuters *op.cit.*, p.2; &
Amnesty International *op.cit.*,

[116] United Kingdom Home Office (September 2018) *Pakistan: Christians and Christian converts*, p.20 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/741222/Pakistan_-_Christians_-_CPIN_-_v3.0__September_2018_.pdf;
BBC News (12 July 2017) *Pakistan's secret atheists*, p.1 https://www.bbc.com/news/magazine-40580196;
Open Doors *op.cit.*, p.3;
United States Department of State *op.cit.*, p.1;
Department of Foreign Affairs and Trade of Australia *op.cit.*, p.42;
European Asylum Support Office *op.cit.*, p.17;
Freedom House *op.cit.*, p.7;
International Crisis Group (28 January 2019) *Pakistan: Challenges of a Weak Democracy*, p.3 https://www.crisisgroup.org/asia/south-asia/pakistan/pakistan-challenges-weak-democracy;
Human Rights Watch *op.cit.*,;
The Guardian *op.cit.*, p.2;
Amnesty International (29 January 2019) *Pakistan: Asia Bibi must finally get her freedom* https://www.amnesty.org/en/latest/news/2019/01/pakistan-asia-bibi-must-finally-get-her-freedom/; &
Reuters *op.cit.*, p.2

[117] UNHCR (17 March 2017) *Eligibility Guidelines for Assessing the International Protection Needs of Members of Religious Minorities from Pakistan*, p.15 http://www.ein.org.uk/members/country-report/eligibility-guidelines-assessing-international-protection-needs-members

problematic to speak out at all and most such conversations tend to occur privately.[118]

Homosexuals

The covert manifestations of atheists in Pakistan is akin to the third topic in this briefing - that of homosexuality - where practitioners as noted by Dr. Rollier in his presentation, are inclined, due to societal and religious reasons, to keep their adherences private.[119] A Strident religious climate therefore informs the choices of those seeking any kind of homosexual identity.[120] Discrimination against homosexuals therefore becomes both official and societal.[121] This can mean everything from familial rejection to police abuse;[122] violence against homosexuals also occurs.[123] Same-sex sexual conduct remains criminalised in Pakistan and in March 2018 the government rejected all of the United Nations recommendations concerning LGBT rights under the Universal Periodic Review (UPR) review of human rights in Pakistan.[124]

Conclusion

The rights of and experiences of homosexuals, atheists, and Christians respectively, briefly discussed in this article, serve merely as an introduction to each of these human rights issues current in Pakistan. The visit of Dr. Paul Rollier, evidenced these and other human rights concerns in Pakistan, and as a COI researcher, I wish to thank him for the impartation of his expertise. Thanks are also due to the COI Pakistan Network for the facilitation of Dr. Rollier.

[118] International Humanist and Ethical Union *op.cit.*, pp.1-2; & BBC News *op.cit.*, p.2

[119] United States Department of State (20 April 2018) *2017 Country Reports on Human Rights Practices: Pakistan*, p.33 https://www.ein.org.uk/print/members/country-report/2017-country-reports-human-rights-practices-pakistan

[120] Department of Foreign Affairs and Trade of Australia *op.cit.*, p.53

[121] *Ibid*, p.54

[122] *Ibid*, p.53;
Freedom House *op.cit.*, p.11;
Human Rights Watch (17 January 2019) *World Report 2019: Pakistan*, p.6 https://www.hrw.org/world-report/2019/country-chapters/pakistan; &
United Kingdom Foreign and Commonwealth Office (16 July 2018) *Human Rights and Democracy Report 2017 – Pakistan*, p.2 http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=printdoc&docid=5b9109b6a

[123] Immigration and Refugee Board of Canada (17 January 2019) *Pakistan: Treatment of sexual and gender minorities by society and authorities; state protection and support services available (2017-January 2019)*, p.4 https://www.ecoi.net/en/document/1457384.html; &
Erasing 76 Crimes (28 March 2018) '*400 million LGBT people in jeopardy worldwide'*, p.3 https://76crimes.com/2018/03/28/400-million-lgbt-people-in-jeopardy-worldwide/
Human Rights Watch *op.cit.*,p.5

[124] United States Department of State *op.cit.*, p.33;
Human Rights Watch *op.cit.*, p.5; &
International Federation for Human Rights (15 March 2018) *Pakistan: Government's lack of commitment at UN rights review a missed opportunity*, p.3 http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=printdoc&docid=5bc83c6fa