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The RESEARCHER

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Welcome to the November 2017 issue of *The Researcher*.

This issue of *The Researcher* promises some very interesting reading and we are particularly grateful to Patricia Brazil, Barrister-at-Law, Averil Deverell Lecturer in Law, Trinity College Dublin for her article, Advancing gender based asylum claims in Irish law.

It has been a busy year with a lot of developments not least the commencement of the International Protection Act, 2015 (2015 Act), the implications for Family Reunification, are presented by Rose Gartland of UNHCR Ireland with her article Potential for Positive Change.

Brian Collins, senior solicitor at the Irish Refugee Council, comments on the Opinion of Advocate General Wahl in Case C-473/16F on psychologists' expert opinion.

David Hand considers the development of Article 3 jurisprudence in the context of medical refoulement.

And David Goggins of the Refugee Documentation Centre writes on the Biafran separatist movements in Nigeria.

As always we are very grateful to all our contributors for supporting *The Researcher*.

Elisabeth Ahmed
Refugee Documentation Centre (Ireland)

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

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Advancing gender based asylum claims in Irish law



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Introduction

It has long been recognised that the Convention definition of a refugee emphasises civil/political rights over socio-economic rights.¹ Whilst the definition of a refugee is ostensibly gender neutral, in practice difficulties can arise in securing recognition as a refugee for reasons relating to gender. It is well recognised in the research that substantive and procedural obstacles can arise in relation to advancing women's refugee claims.² In particular, the focus on civil/political rights can operate in such a way as to privilege male dominated "public" activities over the activities of women, which may take place in the private sphere. This article will consider gender as a particular social group and the issue of gender-based persecution and will review some recent decisions of the High Court that may be of assistance in securing protection in such cases.

Gender as a particular social group

The UNHCR Guidelines on Gender Related Persecution recognise that gender can "influence, or dictate, the type of persecution or harm

¹ See Kelly "Gender-Related Persecution: Assessing the Asylum Claims of Women" (1993) 26 Cornell International Law Journal 625 at 627.

² See Bhabha "Embodied Rights: Gender Persecution, State Sovereignty, and Refugees" (1996) 32 Public Culture 3.

suffered and the reasons for this treatment."³ The Guidelines also recognise that while "gender-related claims may be brought by either women or men ... due to particular types of persecution, they are more commonly brought by women..."⁴ It is clear that gender is capable of being accommodated within the "particular social group", either on the basis of gender as an innate or unalterable characteristic,⁵ or a characteristic which is fundamental to identity, conscience or the exercise of human rights.⁶ Thus gender is clearly capable of coming within the "reasons for persecution" as provided by section 8(1)(d) of the International Protection Act 2015, which provides:

"(d) a group shall be considered to form a particular social group where in particular—

(i) members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, or

(ii) that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society..."

Despite this longstanding recognition that gender can constitute a particular social group, in practice it is not uncommon for gender-based claims to be refused on the basis of a failure to establish a Convention nexus. An example of this can be seen in the recent High Court decision of *SM v Refugee Appeals Tribunal*.⁷ The applicant was an Albanian national who was raped by her employer. At the time of the rape, she was three months pregnant by her husband. Three days later the applicant reported the rape to the police. The police subsequently informed the applicant's employer and his wife of the rape complaint. As a result of the police having informed the employer of the rape allegation, his wife left him taking their

³ UNHCR, 'Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees' (2002)

⁴ *Ibid.*

⁵ *Matter of Acosta* 20 Immigration & Nationality Decisions 211 (BIA 1985).

⁶ *Attorney General v Ward* (1993) 2 SCR 689.

⁷ [2016] IEHC 638.

child. The police did not pursue any further investigation into the rape as, according to the applicant, her employer bribed the police. After she complained to the police, the applicant's employer began a daily campaign of harassment of her and regularly threatened to kill her for reporting the matter. The applicant reported the harassment and threats to the police but no action was taken. The applicant's in-laws with whom she and her husband lived became concerned at the extent of the harassment and intimidated that their son would either have to divorce the applicant or that the couple would have to leave their home. The applicant and her husband then made a decision to leave Albania to get away from her assailant. In the course of their journey, the applicant became separated from her husband. She arrived in Ireland in November 2012 and applied for asylum. Her claim was refused at first instance by the Refugee Applications Commissioner on the basis that (i) the incident she complained of was an isolated criminal act; (ii) the incident did not have a nexus to the Convention; (iii) the applicant was lacking in credibility in that, inter alia, she had denied having applied for a visa to come to Ireland previously and the information given by her regarding her travel to the State and her documentation was inconsistent with her background and education; and (iv) State protection and internal relocation were available to the applicant.

The applicant appealed to the Refugee Appeals Tribunal. Written submissions together with the applicant's own written statement were furnished along with medical reports corroborating the applicant's account, together with country of origin information on the situation of women in Albania. Because she continued to be traumatised from the events in Albania, and having found the process before the Commissioner difficult, the applicant opted to waive her right to an oral hearing before the Tribunal. Accordingly, her appeal was determined on the papers.

The Tribunal's decision issued on 18th March 2015, affirming the Commissioner's recommendation. The applicant's claim to have been raped in the circumstances described by her was accepted, as was her claim to have suffered harassment at the hands of her assailant. Her claim to have been denied police protection was also accepted based on country of origin information referable to the issue of bribery of the police. Her explanations concerning her Irish visa application and her account of her travel to Ireland were not accepted, although these

matters were held to be peripheral only and not central to her refugee claim. On the issue of the Convention nexus, the Tribunal Member found as follows:

"The Tribunal finds that the appellant was not raped or persecuted by her former boss 'on account of' membership of a social group, or for any other Convention reason. Neither was his motivation in threatening her after she reported the rape to the police 'for reasons of' her social group. The question then is whether the state of Albania would be unable or unwilling to offer protection to the appellant for a Convention reason.

The appellant submitted that she made a complaint to the local police in Albania but that no action was taken because the assailant bribed the local police. She stated that her assailant was not a man of note, but just the owner of the crèche in which she worked...

The Tribunal finds that where the police were bribed by the man who raped the appellant and therefore failed to afford her protection, such failure of protection was not for a Convention reason. That is, the police did not refuse to assist the appellant for reasons of her membership of a particular social group or other Convention ground, but rather for money."

The applicant subsequently challenged the decision by way of judicial review inter alia claiming that the Tribunal erred in law in finding that her claim did not have a Convention nexus. Faherty J. noted that the crux of the challenge to the Tribunal decision on the "nexus" ground centred on whether it could be said that the circumstances put forward by the applicant established a nexus to the Convention under the particular social group reason, and referred to the judgment of Bingham J. in *K and Fornah v Secretary of State for the Home Department*⁸ on the causal connection, where he stated:

"17. The text of article 1A(2) of the Convention makes plain that a person is entitled to claim recognition as a refugee only where the persecutory treatment of which the claimant has a well-founded fear is causally linked with the Convention

⁸ [2007] 1 A.C. 412.

ground on which the claimant relies. *The ground on which the claimant relies need not be the only or even the primary reason for the apprehended persecution. It is enough that the ground relied on is an effective reason.* The persecutory treatment need not be motivated by enmity, malignity or animus on the part of the persecutor, whose professed or apparent motives may or may not be the real reason for the persecution. What matters is the real reason. In deciding whether the causal link is established, a simple 'but for' test of causation is inappropriate: the Convention calls for a more sophisticated approach, appropriate to the context and taking account of all the facts and circumstances relevant to the particular case." [Emphasis added]

Faherty J. accepted that "as a matter of first principle, there is no question but that women, generally, or women who are subjected to gender-based violence, may constitute a particular social group for the purposes of the Convention", citing the seminal decision of the House of Lords in *Shah and Islam*.⁹ Faherty J. noted that the claim advanced before the Tribunal was not concerned with persecution of the applicant at the hands of the Albanian State, but rather at the hands of a non-state actor. Faherty J. accepted that there was nothing in the subjective account given by the applicant of the rape and harassment, or in the objective evidence which was before the Tribunal, to persuade the court that the Tribunal Member was in error when she concluded that the assailant's motivation in raping the applicant and in threatening her thereafter was not Convention related.

However, Faherty J. noted that the present case essentially concerned whether the Albanian authorities inability or unwillingness to provide protection to the applicant had its basis in a Convention reason. The Tribunal Member, albeit finding that the applicant would not be afforded State protection, was of the view that the failure of protection arose because of bribery (which she found was supported by COI). In contending that the Tribunal Member erred in her determination that the absence of State protection was not Convention related, the applicant's principal argument was that the decision-maker neglected

to consider whether the country of origin information before the Tribunal had the necessary elements to illustrate that female victims of sexual violence in Albania are not afforded state protection by reason of their being women, thereby rendering them a particular social group for the purposes of the Convention. Counsel for the applicant relied on the content of country of origin information which was before the decision-maker, namely the US State Department "2013 Country Reports on Human Rights Practices – Albania" (27th February 2014). The essence of the case put on behalf of the applicant was that there was objective material before the Tribunal sufficient to put the decision-maker on enquiry as to whether the failure of the police to afford her protection was because of discrimination on account of her gender. Faherty J. noted that "the question of whether there may be another reason (e.g. bribery) for the failure of State protection over and above any Convention-related reason would not ... defeat a claim for protection under the Convention, if there was evidence that the Convention ground was 'a relevant contributing factor'", citing the UNHCR 2002 Guidelines and the decision in *Fornah*.

Faherty J. then summarised the country of origin information that was before the Tribunal Member, noting that it established that "pervasive corruption in all branches of government and discrimination against women were 'significant human rights problems' in Albania". Faherty J. concluded as follows (at para.70):

"the country information which referred to discrimination against women and the lack of effective enforcement of laws prohibiting rape, together with the applicant's submissions in respect thereof should have been specifically considered by the Tribunal Member in the context of her assessment as to whether a nexus had been established, in the same way as she referenced the COI in aid of her finding that the absence of state protection arose because of bribery. Given the submissions that were made, it was not sufficient for the decision-maker, simply because the applicant had said that the police had been bribed, to accept that that was the reason for the failure of protection (even where the COI corroborated the applicant in this regard), in circumstances where the COI also had the potential to assist the decision-maker in deciding whether the absence of protection could

⁹ *Fornah and Islam v Secretary of State for the Home Department and R v. Immigration Appeals Tribunal ex parte Shah* [1999] 2 A.C. 609.

be said to arise because of discriminatory practices surrounding the prosecution of or enforcement of laws against rape or sexual harassment respectively.”

The decision of Faherty J. is significant for its findings on the appropriate test for causation in relation to establishing a Convention nexus, and for requiring a careful consideration by refugee decision-makers of the reasons for a lack of State protection and in particular whether the absence of such protection is for reasons of gender.

However, despite progress being made in such cases as *SM*, it is clear that challenges remain in advancing gender-based asylum claims in Ireland. The decision of the High Court in *LAA (Bolivia) v Refugee Appeals Tribunal*¹⁰ is one such example. The applicant was a Bolivian national who sought asylum on the basis of a fear of persecution at the hands of her husband who had subjected her to extensive domestic violence. Her claim was dismissed at first instance by the Refugee Applications Commissioner which found that this violence was motivated by her husband’s alcoholism, not by the applicant’s race, religion, nationality, membership of a particular social group or political opinion, and that her claim therefore had no Convention nexus. On appeal, the Tribunal upheld the negative recommendation of the Commissioner. It is interesting to note that the decision of the Tribunal referred to country of origin information which had been submitted in support of the appeal, which stated:

“According to the Human Rights Reports on Bolivia, violence against women is a pervasive and under-reported problem. 70% of Bolivian women suffer some form of abuse. There is apparently a Police Family Protection Brigade but this lacks financial support and sufficient personnel to follow up and pursue unreported cases.”

Stewart J. dismissed the applicant’s challenge to the decision by way of judicial review, holding (at para.17):

“when the decision is read as a whole, the tribunal member rejected the applicants’ claim on the basis that, given the family’s particular circumstances, state protection would be available to the family if they were to seek it. The tribunal member was

particularly mindful of the difficult circumstance of the second named applicant and referred to the medical evidence before him. Nevertheless, he found that a consideration of those circumstances was not related to the claim of persecution and not within the jurisdiction of the tribunal.”

On the adequacy of State protection, Stewart J. referred to the decision of Clarke J. in *VI v Minister for Justice, Equality and Law Reform*¹¹ and concluded (at paras 19-20):

“State protection can never be perfect protection. The existence of legislation proscribing certain practices is not enough to show the existence of state protection. These laws must also be enforced by the state. An applicant for a grant of refugee status must show that the state authorities are failing in some way to protect persons, and this will be with particular regard to their claim, region and other such circumstances.

According to the country of origin information before the decision-maker, domestic violence appeared to be endemic in Bolivia. The tribunal member then went on to assess whether the first named applicant’s husband’s connections were such that he could reasonably prevent her securing state protection. The tribunal found that his connections were not so influential so that state protection would not be forthcoming to the applicant. This amounts to an assessment of the adequacy of the state protection given the applicant’s particular circumstances and therefore, I reject the applicants’ contention that such an assessment was not performed. This assessment is within the jurisdiction of the tribunal and it is not open to this court on judicial review to supplant its own assessment for that of the decision-maker.”

It is difficult to understand how a finding that State protection was available could be sustained in the face of country of origin information which established that domestic violence was “pervasive” and that 70% of Bolivian women suffer some form of abuse. In contrast to the decision of Faherty J. in *SM*, Stewart J. did not

¹⁰ [2016] IEHC 12.

¹¹ [2005] IEHC 150.

consider whether the adequacy of the State response was itself motivated by a Convention reason, ie gender. It is submitted that the decision of Faherty J. in *SM* is more consistent with the international best practice guidelines including the UNCHR 2002 Guidelines, and for that reason should be regarded as the more persuasive authority.

Gender based persecution

Bhabha has suggested that “the refugee par excellence was someone heroically seeking to assert his (typically male) individuality against an oppressive state.”¹² Furthermore, as Kelly notes, the Refugee Convention has “largely failed to recognize the political nature of seemingly private acts of and harm to women.”¹³ For example, rape is often viewed as a private matter even when committed by a government official or in a political context.

An example of this trend in the Irish context can be found in the case of *MM (Zimbabwe) v Refugee Appeals Tribunal*.¹⁴ The applicant was a Zimbabwean national who claimed that she was a supporter of the Movement for Democratic Change (MDC) although she was not a member of the party. In or around April 2008 she attended a church meeting. ZANU-PF, the government party, wrongly believed that this was an MDC meeting and attacked it. The applicant and a number of other women were abducted and taken to a ZANU-PF camp where she was raped by four soldiers. She later contracted HIV which she attributed to this incident. She did not tell her husband about the rape and she could not support herself in Zimbabwe. She subsequently left Zimbabwe and after her arrival in the State in February 2008 she applied for asylum. The Refugee Applications Commissioner made a recommendation that the applicant’s testimony fell short of what would be required in terms of credibility for her to be given the benefit of the doubt and therefore the applicant had failed to establish a well-founded fear of persecution in Zimbabwe based on a Convention ground. She appealed against this recommendation. Solicitors on behalf of the applicant submitted substantial grounds of appeal and in particular substantial country of origin information. The Tribunal subsequently affirmed the recommendation of the

Refugee Applications Commissioner and the applicant instituted judicial review proceedings challenging the decision.

The two main grounds of challenge concerned a failure to make a clear finding on the applicant’s credibility in the light of the country of origin information, and whether the Tribunal Member’s conclusion that the applicant’s fear was purely subjective was unlawful. In particular, the applicant challenged the Tribunal Member’s finding that the attack on the applicant was only “random” to the extent that not everyone in the meeting was abducted and she had not been specifically targeted, but it was not random in the sense of being conducted purely for the sexual gratification of the soldiers but was motivated by their beliefs that the persons at the meeting were opposition supporters.

Eagar J. quashed the decision of the Tribunal that the applicant had not established a Convention nexus because the rape was a random act, holding (at para.51):

“Rape by four or five soldiers is an extraordinarily brutal event and one which undoubtedly would scar the applicant for many years. The word ‘random’ suggests having no definite aim or purpose. The attack on the applicant in this case had a purpose. It had the purpose of harassment and intimidation of MDC supporters following elections on 29th March 2008.”

The court referred to country of origin information which had been submitted to the Tribunal as follows (at para.53):

“The documentation by the Refugee Documentation Centre deals with the ZANU-PF militias and the state security forces punishing and intimidating MDC members and their suspected supporters (the court’s emphasis). Violence forced the leader of the MDC Morgan Tsvangiri to withdraw from the run off of the election between himself and Robert Mugabe in June 2008. Human Rights Watch documented numerous incidents of intimidation, violence and manipulation before, during and after the 27th June, 2008 run off vote and in the days before the vote ZANU-PF supporters rounded up and beat up scores of people in the suburbs of Harare. In the IRN news, in a section titled “Rape as a weapon” P.M.,

¹² Bhabha “Embodied Rights: Gender Persecution, State Sovereignty, and Refugees” (1996) 32 Public Culture 3 at 8.

¹³ *Op cit* at p.628.

¹⁴ [2015] IEHC 325.

the MDC spokesperson for the country's eastern province of Manicaland and the newly elected parliamentarian for Makoni South told IRN "the violence intensified after Mugabe was sworn in as President, two days after the vote on the eve of the African Union Summit in Egypt. In many instances the victims cannot remember the number of people who raped them but it is usually more than 20 and that increases the chances of infecting the victims with HIV/AIDS...several women including a 70 year old grandmother and a 15 year old girl have been gang raped while beatings and displacements continued." In a documentation prepared under the auspices of the Zimbabwe East Project in the midlands area of Zimbabwe where the applicant resided states "the provinces human rights profile is poised to worsen against the background of reported military and war veteran activism in some parts of Gokwe, Mberengwa, Zhombe, Gweru and Chundura. 184 breaches were recorded in July with high tolls in categories of all intimidation and assault making it the third hot zone of human rights violations." In a world news article submitted by the applicant "Zimbabwe's 2008 elections were marred by the widespread use of rape squads by President Robert Mugabe's supporters to intimidate political opponents...the report prepared by AIDS-Free World said that Mr Mugabe's supporters including youth militia and some veterans of Zimbabwe's 1970 independence war committed widespread rape in 2008."

Eagar J. thus granted an order of certiorari quashing the Tribunal decision (at para.54):

"Having regard to the description by the second named respondent of the appalling gang rape by members of ZANU-PF soldiers on the applicant as random acts of sexual desire rather than any politically motivated actions which is clearly documented in the country of origin information."

The decision in *MM (Zimbabwe)* is significant for its rejection of the attempt to characterise sexual violence as a purely private or criminal matter which is not within the scope of a Convention claim. It demonstrates the importance of sourcing and submitting relevant country of origin

information on the circumstances in the country of origin and in particular the use of sexual violence as a means of persecution.

Conclusions

It is clear from a review of the literature and the jurisprudence, both international and domestic, that the Refugee Convention is capable of accommodating gender-based asylum claims. However, as Kelly states, this requires "a reconceptualization of the presentation of women's cases, including an examination of the political nature of seemingly private acts and the ways in which many states fail to accord protection to their female populations."¹⁵ In addition to the substantive hurdles to securing recognition as a refugee in a gender based claim, it is undoubtedly the case that many procedural obstacles can also arise. Recurring issues include the challenge of establishing credibility, in particular in some cases how to prove persecution which has occurred largely in the private sphere; the impact of trauma and the possibility of delayed disclosure; the absence of relevant country of origin information which is seen by some decision-makers as evidence of a lack of persecution; and a tendency for women's claims to be presented as derivative of male partners/head of household.¹⁶ Despite some progress being apparent in some recent decisions of the High Court such as *SM (Albania)* and *MM (Zimbabwe)*, other decisions such as *LAA (Bolivia)* demonstrate the ongoing challenges that exist in advancing a gender based asylum claim in Irish law.



¹⁵ *Op cit* at p.642.

¹⁶ See further Kelly *op cit* at p.629. It is worth noting here that Crawley cautions against homogenised concept of the female refugee as a passive victim of male oppression: "Gender, persecution and the concept of politics in the asylum determination process" (2000) 9 Forced Migration Review 17.

Family Reunification in Ireland: Potential for Positive Change



Rose Gartland, UNHCR Ireland¹⁷

This article examines the current law around family reunification for beneficiaries of international protection in Ireland, and compares it with the old law under the Refugee Act 1996 as amended. It examines the amendments introduced by the International Protection Act 2015, most notably the limiting of the meaning of “member of the family” and the introduction of a 12 month time limit within which to make an application for family reunification, upon being granted refugee status or subsidiary protection. The article goes on to discuss the potential that there is at the moment to update the understanding of “member of the family” under Irish refugee law.

Article 41 of Bunreacht na hÉireann specifies that “the State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law”¹⁸. As such, the State “guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State”¹⁹. Other provisions upholding the importance of family are present in the Universal Declaration of Human Rights²⁰, the International Covenant on Civil and

Political Rights²¹, the International Covenant on Economic, Social and Cultural Rights²² and the European Convention on Human Rights²³. Although the 1951 Convention Relating to the Status of Refugees²⁴ does not expressly confer a right to family reunification for refugees, drafters of the Convention did consider it at the time, and noted that the unity of the family is an essential right of the refugee²⁵.

The Benefits of Family Reunification

Family reunification is extremely beneficial, not only to the family, but to wider society and to the State, enhancing the integration prospects and well-being of refugees, facilitating the adjustment of refugees to their new homeland and lowering social costs in the long term²⁶. Restoring families can also ease the sense of loss that accompanies many refugees who, in addition to family, have lost their country, network and life as they knew it²⁷.

Family reunification promotes the integration of migrants and refugees already in the host country²⁸. Crosscare has emphasised the importance of facilitating family reunification for

²¹ Article 23 (1) of ICCPR – Available at <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=3ae6b3aa0&skip=0&query=international%20covenant%20on%20civil%20and%20political%20rights>

²² Article 10 (1) of ICESCR – Available at <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=3ae6b36c0&skip=0&query=international%20covenant%20on%20economic%20social%20and%20cultural%20rights>

²³ Article 8 of the ECHR safeguards the right to respect for private and family life – Available at http://www.echr.coe.int/Documents/Convention_ENG.pdf

²⁴ Ireland acceded to the 1951 Convention on 29 November 1956

²⁵ Recommendation B – Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons – available at <http://www.unhcr.org/en-ie/protection/travaux/40a8a7394/final-act-united-nations-conference-plenipotentiaries-status-refugees-stateless.html>

²⁶ UNHCR (2001) ‘Protecting the Family: Challenges in Implementing Policy in the Resettlement Context’, p.11. Available at <http://www.unhcr.org/3b30baa04.pdf>

²⁷ UNHCR, ‘Refugee Family Reunification: UNHCR’s Response to the European Commission Green Paper on the Right to Family Reunification of Third Country Nationals Living in the European Union (Directive 2003/86/EC), February 2012, p.3 – Available at <http://www.refworld.org/docid/4f55e1cf2.html>

²⁸ Samantha Arnold & Emma Quinn, ‘Family Reunification of Non-EU Nationals in Ireland’ May 2017, European Migration Network, p.viii – Available at http://emn.ie/files/p_201706070500182017_FamilyReunification_online.pdf

¹⁷ Protection Intern, UNHCR Ireland. Any views expressed are the author’s own.

¹⁸ Bunreacht na hÉireann, Article 41.1.1 – Available at <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=47a70815d&skip=0&query=irish%20constitution>

¹⁹ Ibid Article 41.1.2

²⁰ Article 16 (3) of the UDHR – Available at <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=3ae6b3712c&skip=0&query=universal%20declaration%20of%20human%20rights>

extended family members, as applicants may rely on them to provide additional family support, for example to allow parents access the labour market²⁹. The right to be reunified with family members is a basic human necessity, and is important for the well-being of refugees.

UNHCR has consistently promoted liberal criteria in identifying family members who can be admitted in order to encourage a comprehensive reunification of the family in any given refugee situation³⁰. Simply, put “given the disruptive and traumatic factors of the refugee experience, the impact of persecution and the stress factors associated with flight to safety, refugee families are often reconstructed out of the remnants of various households, who depend on each other for mutual support and survival”³¹. Often these “reconstructed” families don’t fit into the notion of the nuclear family, and this is where the main problem lies.

The Meaning of Family

Family reunification for beneficiaries of international protection is a process in Ireland which allows for these beneficiaries to apply for their family member to join them and live in Ireland. That family member will be entitled to the same rights and privileges as specified for the beneficiary³², however they may have a lesser period of residency³³.

There is no standard, internationally agreed upon definition of the family. As such, this concept varies from state to state. UNHCR encourages states to adopt a broad and flexible criteria for family reunification purposes³⁴. UNHCR Executive Committee Conclusion No. 24 recommends that “countries of asylum will apply liberal criteria in identifying those family members who can be admitted with a view of promoting a

comprehensive reunification of the family”³⁵. UNHCR acknowledges that “there is a justification in giving priority to safeguarding this basic unit” of the nuclear family, but it calls on governments “to give positive consideration to the inclusion of other family members – regardless of age, level of education, marital status or legal status – whose economic and social viability remains dependent on the nuclear family”³⁶.

When assessing what it means to be a “member of the family” UNHCR advocates for the following interpretations: for couples, this is not limited to legal unions but also couples who are engaged to be married, those who have entered a customary marriage, or couples who have lived together for a substantial period establishing family unity. As such, UNHCR recognises same sex partnerships as unions for the purposes of family reunification³⁷. UNHCR also advocates for the recognition of unions formed during flight. In reality, many beneficiaries of protection have spent many years in exile in their region of origin or in an EU Member State prior to being recognised as a refugee and may have formed a family during that time³⁸. For children, while many countries make a distinction between minor children and those who have reached 18 years of age, UNHCR promotes the reunification of dependent unmarried children, regardless of age, with their parents³⁹. If and when assessing dependency, UNHCR considers extended family members, such as single adult brothers and sisters, aunts, cousins etc., as potentially eligible for family reunification, when it can be demonstrated that such persons were part of the family unit in the country of origin, and depended upon the family unit for sustenance⁴⁰.

Ireland’s previous legal framework under the Refugee Act 1996 has recently been narrowed in terms of family reunification. The definition of family member under the Act was:

- (i) In the case the refugee is married, his or her spouse (provided that the marriage is subsisting when the

²⁹ Ibid p.32

³⁰ See UNHCR, ExCom, Conclusion no. 88 (L) 1999 – Protection of the Refugee’s Family - <http://www.unhcr.org/en-ie/excom/exconcl/3ae68c4340/protection-refugees-family.html>

UNHCR, ExCom, Conclusion no.15 1979 – Refugees without an Asylum Country - <http://www.unhcr.org/en-ie/excom/exconcl/3ae68c960/refugees-asylum-country.html>

UNHCR, Note on Family Reunification, July 1983 – available at <http://www.refworld.org/docid/3bd3f0fa4.html>

³¹ Supra n10, p. 1

³² International Protection Act 2015, S. 56 (4) – Available at <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=56ded0f24&skip=0&query=international%20protection%20act%202015>

³³ Ibid s. 54 (2)

³⁴ Supra n 10, p. 8

³⁵ UNHCR ExCom, Conclusion, No. 24, Family Reunification – Available at <http://www.unhcr.org/en-ie/excom/exconcl/3ae68c43a4/family-reunification.html>

³⁶ UNHCR, Resettlement Handbook, 2011, p.180 – Available at <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=4ecb973c2&skip=0&query=unhcr%20resettlement%20handbook>

³⁷ Supra n 10, p. 6

³⁸ Supra n 11 p.9

³⁹ Supra n 10 p.7

⁴⁰ Ibid p.8

refugee's application for protection was made);

- (ii) In the case the refugee is, on the date his or her application for protection is made, under the age of 18 and is unmarried, his or her parents; or,
- (iii) A child or a refugee who, on the date of the refugee's protection application, is under the age of 18 years and is not married⁴¹.

The 1996 Act also gave the Minister for Justice and Equality discretion to "grant permission to a dependent member of the family" meaning "any grandparent, parent, brother, sister, child, grandchild, ward or guardian of the refugee who is dependent on the refugee or is suffering from a mental or physical disability to such extent that it is not reasonable for him or her to maintain himself or herself fully"⁴².

Changes under the International Protection Act 2015

In the aftermath of large-scale arrivals of asylum seekers and refugees in Europe in 2015, 2016 was repeatedly marked by new national measures throughout Europe aimed at restricting family reunification channels for those granted protection⁴³. In 2016, Ireland introduced comprehensive legislative reforms in order to streamline the asylum process into a single procedure. Coinciding with this welcome procedural reform came a change in the area of family reunification.

The understanding of "member of the family" was narrowed under the International Protection Act 2015. Sections 56 and 57 of the Act defines "member of the family" in relation to the sponsor (beneficiary of refugee status or subsidiary protection) as meaning:

- (a) Where the sponsor is married, his or her spouse (provided that the marriage is subsisting on the date that the sponsor

⁴¹ Refugee Act 1996, S. 18 (3) (b) (i) – (iii) – Available at <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=3ae6b60e0&skip=0&query=refugee%20act%201996>

⁴² Ibid S. 18 (4) (a) & (b)

⁴³ Asylum Information Database (AIDA), 'Refugee rights subsiding? Europe's two-tier protection regime and its effects on the rights of beneficiaries', 2016, European Council on Refugees and Exiles (ECRE), p.16 – Available at http://www.asylumineurope.org/sites/default/files/shadow-reports/aida_refugee_rights_subsiding.pdf

made the application for international protection in the State);

- (b) Where the sponsor is a civil partner, his or her civil partner (provided that the civil partnership is subsisting on the date the sponsor made the application for international protection in the State);
- (c) Where the sponsor is, on the date of the application for family reunification, under the age of 18 years and is not married, his or her parents and their children who, on the date of the application, are under the age of 18 and are not married; or
- (d) A child of the sponsor who, on the date of the application for family reunification, is under the age of 18 years and is not married.⁴⁴

The Irish Naturalisation and Immigration Service (INIS) has confirmed that adopted minor children, and indeed any minor children where legal guardianship can be proven, are eligible for family reunification under the 2014 Act, even though they are not explicitly referred to in the legislation⁴⁵.

It may be argued that the amended legislation, which narrowed the definition of the family for the purposes of family reunification is out of step with societal changes and the view of the family more generally in modern Ireland. Ireland does not simply see the nuclear family as the only family anymore. Recent statistics from the 2016 Census show that there are 218,817 one parent families in Ireland⁴⁶. The number of cohabiting (unmarried) couples with children increased by 25.4% between 2011 and 2016, and the number of same sex couples in Ireland increased by just under 50% in that same time period⁴⁷. The reality of the situation in Ireland and around the world, is that the family is understood to be more than just the nuclear family of a married mother and father, and their minor children.

Other amendments introduced by the 2015 Act may result in difficulties for refugees and beneficiaries of subsidiary protection in pursuit of

⁴⁴ Supra n 16, S.56 (9) (a) – (d)

⁴⁵ Supra n 12, p.30

⁴⁶ CSO, Census 2016, Profile 4 Households and Families – available at

<http://www.cso.ie/en/releasesandpublications/ep/p-cp4hf/cp4hf/>

⁴⁷ CSO, Census 2016, Profile 4 Households and Families – available at

<http://www.cso.ie/en/releasesandpublications/ep/p-cp4hf/cp4hf/fmls/>

family reunification. Section 56 (8) of the 2015 Act introduced a 12 month time limit on the making of an application for family reunification, upon being granted a refugee declaration or subsidiary protection⁴⁸. This procedural requirement fails to consider the practical difficulties that many refugees face when seeking to be reunified with their family. Often, families are broken up in their journey and pursuit of safety. Following a grant of international protection, some beneficiaries simply do not know where their family are, and family tracing may still be ongoing when the 12 months' time limit of the Act expires.

Some refugees and beneficiaries of subsidiary protection, when granted, will have spent months, or years in the direct provision system, without the right to work or seek employment⁴⁹. When granted protection, many cannot directly afford to bring their family members over, and would rather seek employment and work to create a secure environment for their family before reuniting with them. If beneficiaries of international protection apply for family reunification within 12 months, and are successful, in some cases they may be bringing their family over to a situation of homelessness and destitution. With the current housing and homelessness crisis, it could ease these societal and family pressures to give sponsors more time to get on their feet, establish themselves and create a secure environment before applying for family reunification.

Potential for Change

The changes to family reunification that were introduced under the 2015 Act brought much disappointment for asylum seekers who hoped for family reunification for wider family members in the future. This could be resolved by a change to Sections 56 and 57 of the 2015 Act to expand the definition of "member of the family" and to remove procedural restrictions such as the 12 month time limit for applying for family reunification.

⁴⁸ Supra n 16, s. 56 (8) reads: "an application under subsection (1) shall be made within 12 months of the giving under section 47 of the refugee declaration or, as the case may be, subsidiary protection declaration to the sponsor concerned"

⁴⁹ This ban on the right to work for asylum seekers will be changing over the next few months, to allow asylum seekers seek employment in limited circumstances. See The Irish Times, 'Ministers to approve work rights for asylum seekers' 3 November 2017, available at <https://www.irishtimes.com/news/social-affairs/ministers-to-approve-work-rights-for-asylum-seekers-1.3278384>

A Private Members' Bill put forward in the Seanad in July of this year, sponsored by members of the Seanad Civil Engagement Group and developed with Nasc, Oxfam and the Irish Refugee Council, put forward a number of key provisions to be introduced to amend the family reunification section of the 2015 Act:

- It proposed to widen the scope of "member of the family" to include "any grandparent, parent, brother, sister, child, grandchild, ward or guardian of the sponsor who is dependent on the qualified person or is suffering from a mental or physical disability to such extent that it is not reasonable for him or her to maintain himself or herself fully"⁵⁰.
- It proposed to remove the 12 month time limit introduced for a sponsor to make an application for family reunification.

Though the fate of this Bill is unknown, it is argued by supporters that more can be done to reflect the understanding of family in Ireland in 2017. One aspect not addressed in this proposal is the potential to amend the 2015 Act to facilitate reunions for LGBTI applicants.

Though the current law allows for beneficiaries to apply for their spouse or civil partner⁵¹, there is no provision for LGBTI beneficiaries that have a long-term partner in their country of origin or country of former habitual residence. An applicant for international protection may be granted refugee status in Ireland on the basis of their LGBTI status but when it comes to family reunification, this finding will not assist them. Even if a beneficiary marries their partner in Ireland or abroad, after making their international protection application, they will not be entitled to family reunification under the 2015 Act⁵². I believe further amendment to the Act should be considered to add another definition to "member of the family" namely "where the sponsor has a long-term partner, his or her long-term partner (provided that this long-term relationship can be

⁵⁰ International Protection (Family Reunification) (Amendment) Bill 2017, (Bill 101 of 2017) Available at <https://data.oireachtas.ie/ie/oireachtas/bill/2017/101/eng@initiated/b10117s.pdf>

⁵¹ Provided that the marriage/civil partnership is subsisting on the date the sponsor made an application for international protection in the State

⁵² S. 56 (9) (a) of the 2015 act states that "member of the family" includes 'where the sponsor is married, his or her spouse (provided that the marriage is subsisting on the date the sponsor made an application for international protection in the State)'.

established)". In Finland, for example, an applicant may apply to be reunified with their partner, if they had been living continuously in a marriage-like relationship in the same household for at least two years⁵³. In the United Kingdom, an applicant may be joined by an unmarried or same-sex partner over the age of 18 years, provided that they were living together in a relationship like marriage or a civil partnership for at least two years before the date of application⁵⁴. Similarly, the temporal restriction in the law should be removed so that marriages and civil partnerships established since a person's departure from his/her country of origin are also taken into account for the purposes of family reunification.

Use of discretion and other avenues for reunification

There are alternative avenues in place for the admission of extended family members under the provisions of the Non-EEA Policy Document on Family Reunification⁵⁵. This allows non-EEA migrants in Ireland to apply for family reunification, including beneficiaries of international protection⁵⁶. Income requirements are applied under these applications, however. Detailed financial statements, including bank statements from sponsors and family members, must be submitted to INIS to show that they have sufficient funds to support dependent family members. The minimum income level is €30,000⁵⁷. Many refugees and beneficiaries of

subsidiary protection spend long periods of time in the asylum process, without access to the labour market. Research suggests that time spent in the asylum process can lead to high rates of unemployment and negatively impacts future employment prospects when individuals are granted status⁵⁸; this can compromise the ability of beneficiaries to fulfill the economic criteria asked of them⁵⁹. Charlie Flanagan, TD, Minister for Justice and Equality, has noted that he can and does apply discretion as regards the economic conditions and in cases of humanitarian need – "such applications on humanitarian grounds are examined on a case-by-case basis"⁶⁰. Though the Minister can apply discretion, this lack of a legislative basis has led to uncertainty for applicants. Some NGOs have argued that a reliance on discretion has resulted in inconsistencies with decision-making⁶¹. While discretion can be seen as a positive, as it can be used to waive income requirements on a case-by-case basis, the lack of clarity and inconsistency may lead to unfair outcomes for beneficiaries.

The Minister for Justice and Equality has stated that in changing the law by way of the 2015 Act, it sought to "bring Ireland closer to EU norms"⁶² however a number of EU Member States allow for applications for family reunification to be made for "non-nuclear" family members for dependency reasons. In the Netherlands, for example, the law allows a family member of a refugee who has been granted temporary asylum residence permit to apply for a dependent asylum residence permit for a family member. A family member of a refugee includes an unmarried partner in a durable, exclusive relationship and the young adult children of the refugee up to 25 years old⁶³. In Italy, family members include adult children if they cannot provide for their own needs, due to disabilities and/or serious health conditions, as well as parents of beneficiaries of international protection, if they are dependent and have no

⁵³ Finland, Aliens Act of 2004, Section 37 (2) – Available at <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=4b4d93ad2&skip=0&query=finland%20aliens%20act>

⁵⁴ UK Home Office, Immigration Rules part 11: Asylum, Rule 352A, Available at <https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-11-asylum>

⁵⁵ Irish Naturalisation and Immigration Service, 'Policy Document on Non-EEA Family Reunification', December 2016 – Available at <http://www.inis.gov.ie/en/INIS/Family%20Reunification%20Policy%20Document.pdf/Files/Family%20Reunification%20Policy%20Document.pdf>

⁵⁶ For the purposes of the document, the different categorisations of the family are:

- (a) Immediate Family:
 - Nuclear family – spouse and children under the age of 18 (this can be extended to the age of 23 where the child is in full time education and remains dependent upon the parent);
 - De facto partners – a de facto relationship is a cohabiting relationship akin to marriage including cohabitation for 2 years prior to the application
- (b) Parents;
- (c) Other family

⁵⁷ Supra n 12, p.26

⁵⁸ UNHCR, 'Towards a New Beginning: Refugee Integration in Ireland' May 2014 p.34, financially supported by the European Refugee Fund of the European Commission – available at <http://www.refworld.org/docid/52ca8a6d4.html>

⁵⁹ Supra n 12 p.31

⁶⁰ Private Members' Business: International Protection (Family Reunification) (Amendment) Bill 2017 – Seanad Second Stage – Speech by the Minister for Justice and Equality, Charlie Flanagan T.D., 19 July 2017. Available at <http://www.justice.ie/en/JELR/Pages/SP17000257>

⁶¹ Supra n 12, p. ix

⁶² Supra n 45

⁶³ The Netherlands, Ministry of Security and Justice, Immigration and Naturalisation Service – accessed at <https://ind.nl/en/asylum/Pages/Family-member-of-refugee.aspx>

other children in their country of origin, or who are over 65 years of age, have a certified health problem and no other children can provide for them⁶⁴.

The right of family reunification is necessary to restore basic dignity to a refugee's life, and allows for emotional, social and economic support for a refugee making the difficult adjustment to a new cultural and social framework⁶⁵. There is potential in Ireland to positively impact the lives of international protection beneficiaries – by updating Sections 56 and 57 of the International Protection Act 2015 to include long term partners, to allow for applications to be made for dependent family members, and to remove the procedural restriction of the 12 month time limit for making an application.



Note on the Opinion of Advocate General Wahl in Case C-473/16F



Brian Collins, Irish Refugee Council

This note briefly considers the Opinion of Advocate General Wahl in Case C-473/16F⁶⁶ regarding the possibility to rely on psychologists' expert opinions for assessing the credibility of asylum seekers fearing persecution on account of their sexual orientation. The Advocate General rejects the idea that 'psychological tests' can determine with sufficient certainty that the applicant's averred sexual orientation is as stated by them. He argues that there may be value for the input of a psychologist during the asylum procedure, in a more general sense.

Persons seeking protection on account of their sexual orientation can experience distinct challenges in evidencing their claims. As with many applicants for protection, they may have little if any documentary evidence to substantiate their claim and they may be almost exclusively reliant on their personal testimony to 'prove' their asylum claim.⁶⁷ However, the core of the claim – i.e. their averred sexual orientation may be particularly difficult to prove. Asylum claims based on sexual orientation can also present distinct challenges for decision makers who, for most cases, must make a finding as to whether the applicant's identification as an LGBT individual is

⁶⁴ Italy, Legislative Decree No. 286 of 1998, Testo Unico sull'Immigrazione, 25 July 1998, Consolidated act of provisions concerning regulations on immigration and rules about the conditions of aliens in force as of 26 June 2014, Articles 29 and 29bis - available at <http://www.refworld.org/docid/54a2c23a4.html>

⁶⁵ Supra n 10, p. 2

⁶⁶ Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62016CC0473>

⁶⁷ See Samantha K. Arnold: 'The Culture of Credibility in the United Kingdom and Ireland and the Sexual Minority Refugee'. *Irish Law Times*, (2012) 30 ILT 55

credible, in order to properly assess if the applicant has a well-founded fear of persecution for reasons of sexual orientation.⁶⁸ The CJEU has already ruled on the limits which apply to the assessment of credibility in such cases,⁶⁹ however some ambiguities remain. In light of this, a preliminary ruling has been sought by the Administrative and Labour Court in Hungary⁷⁰ from the Court of Justice of the European Union (CJEU) on how national authorities are to verify the credibility of statements made by an asylum seeker who fears persecution on account of his or her sexual orientation. In particular, the Hungarian court sought clarification from the CJEU on whether EU law precludes reliance by authorities on psychologists' expert opinions.

The applicant in the main proceedings is a Nigerian national who sought asylum in Hungary on the basis of his sexual orientation. At first instance, his credibility was assessed by means of a number of personal interviews. The Hungarian Immigration and Asylum Office later appointed a psychologist to examine his 'personality', from which it was claimed his sexual orientation could be inferred. After an examination of his personality, including a variety of psychological tests,⁷¹ the appointed psychologist deduced that the results of the tests did not support the applicant's assertion that he was gay. Consequently, the applicant's claim was refused by the decision maker due to a finding of a lack of credibility in relation to his averred sexual orientation. On appeal, the applicant argued that the carrying out of such tests infringed his fundamental rights. In addition, he argued that such tests were unsuitable for 'proving' sexual orientation.

Advocate General Wahl noted that he was not convinced that a psychologist's expert opinion could 'determine with sufficient certainty if the sexual orientation declared by the applicant is

⁶⁸ Advocate General Wahl acknowledges at paragraphs 29 & 30 of his Opinion (Case C-473/16F) that regardless of the applicant's 'real' sexual orientation, a particular sexual orientation may be imputed to an individual; for example in some cases the simple act of behaving in a way that from a traditional point of view is perceived to be 'gender non-conforming' may put an individual at risk in their country of origin.

⁶⁹ See CJEU - Judgment in Joined Cases C-148/13 to C-150/13 *A, B and C v Staatssecretaris van Veiligheid en Justitie*, 2 December 2014.

⁷⁰ Szegedi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Szeged, Hungary).

⁷¹ The psychological tests carried out were as follows: 'Draw-a-Person-in-the-Rain', Rorschach's and Szondi's tests.

correct.⁷² He noted that 'homosexual men and women are not distinguishable, from a psychological point of viewpoint, from heterosexual men and women.' The AG found that a psychological analysis of an individual's sexual orientation would inevitably involve the use of 'stereotyped notions as to the behaviour of homosexuals.'⁷³ He went on to note that this was an approach which the CJEU has already found to be problematic, as it does not permit full account to be taken of the individual situation and personal circumstances of the asylum applicant. As such, he rejected the idea that 'psychological tests' could determine with sufficient certainty that the applicant's averred sexual orientation is as stated by them.

However, as a matter of principle, the AG did not see any reason why competent authorities should not be able to seek advice from persons trained and qualified in psychology, including in relation to claims based on sexual orientation. He saw that there may be value for the input of a psychologist during the asylum procedure, in a more general sense. For example the AG argues that the presence of a psychologist during an interview could 'make it easier' for an applicant to talk openly about past persecution and their fears on return to their country of origin. In addition, he argues that the assistance of a psychologist may be helpful to evaluate the general credibility of an applicant's narrative.⁷⁴ AG Wahl noted that this is a significant aspect of the assessment carried out by the competent authorities since, if the applicant's credibility is established (and provided that the other cumulative conditions set out in Article 4(5) of Directive 2011/95 are also met), 'the sexual orientation declared by the applicant, despite not being supported by documentary or other evidence, need not be confirmed.'⁷⁵

Advocate General Wahl went on to outline the specific circumstances in which he argues a psychologist's expert opinion could be admissible: (1) the applicant has given his full consent, after he or she is given sufficient knowledge of all elements and implications of the psychological examinations; (2) the examination is carried out with respect to the applicant's dignity, private and family life; (3) the examinations are based on methods, principles and notions generally accepted by the scientific community, or are

⁷² See paragraph 36.

⁷³ See paragraph 37.

⁷⁴ See paragraphs 34 & 35.

⁷⁵ See paragraph 35.

sufficiently reliable. The AG noted that examinations based on disputed or unrecognised science can hardly be regarded as having probative value. He also noted that examinations carried out using methods that have been misapplied or applied in the wrong context cannot be said to produce sufficiently reliable results.⁷⁶

The AG concludes his Opinion by arguing that a national court that asks for an expert opinion cannot consider itself to be bound, under all circumstances, by the findings of the expert. He argues that Article 46 of Directive 2013/32, when interpreted in the light of Article 47 of the Charter, requires national courts to be able to carry out an 'in-depth, independent and critical review of all relevant aspects of fact and law.' The AG argues that this must include the possibility of disregarding the findings of an expert where a judge finds them to be 'biased, unsubstantiated or based on controversial methods and theories.'⁷⁷

Conclusion: We await the judgment of the CJEU, however it is submitted that the AG's rejection of the use of 'psychological tests' to determine the credibility of sexual orientation is to be welcomed. Such tests could effectively amount to a one-size-fits-all 'check list' which could not take account of the totality of the asylum applicant's individual situation and personal circumstances. As UNHCR notes, the experiences of LGBTI persons vary greatly and are strongly influenced by their cultural, economic, family, political, religious and social environment.⁷⁸ In such deeply complex and nuanced circumstances, it is not difficult to imagine situations where psychological 'tests' would reach erroneous and unreliable findings, to the detriment of applicants for protection.



⁷⁶ See paragraphs 39-49.

⁷⁷ See paragraph 52.

⁷⁸ UN High Commissioner for Refugees (UNHCR), Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 23 October 2012, HCR/GIP/12/01, available at: <http://www.refworld.org/docid/50348afc2.html> [accessed 14 November 2017]

"Very exceptional circumstances": The development of medical refoulement jurisprudence under Article 3 of the European Convention on Human Rights.



David Hand, BA LLM

*Article 3 of the European Convention on Human Rights (ECHR) absolutely prohibits torture, inhuman and degrading treatment or punishment. In addition to being non-derogable, the European Court of Human Rights (ECtHR) has imparted considerable flexibility onto Article 3, so that it has been interpreted to prohibit refoulement, including very restricted circumstances where an applicant with a serious illness would be bereft of appropriate medical facilities if returned to their home country. The following commentary considers the development of Article 3 jurisprudence in the context of medical refoulement, in broad strokes typified by the cases of *D v. UK*, *N v. Secretary of State for the Home Department*, *N v. UK*, and the latest decision in *Paposhvili v. Belgium*.*

D v. UK

The case of *D v. UK*⁷⁹ concerned a national of St Kitts who upon arrival at Gatwick Airport in 1993 was arrested for possession of a substantial quantity of cocaine. He was denied leave to enter the UK and was subsequently convicted of drug-trafficking offences. D received a six-year prison sentence during which he was diagnosed with AIDS. By the time of his release on licence in

⁷⁹ Application no. 30240/96 (1997) 24 EHRR 423.

1996 he was in the advanced stages of the illness⁸⁰ and dependent on a charitable organisation for free accommodation and food. In addition, D was receiving counselling therapy, the purpose of which was to prepare him for death, and he had developed a strong rapport with his therapist.⁸¹

Immediately before his release on licence, the immigration authorities directed that D be returned to St Kitts. His request to the Chief Immigration Officer for leave to remain in the UK on compassionate grounds was refused as was his application to the High Court for judicial review of the Home Office's decision.⁸² A letter from a consultant doctor indicated that D's prognosis if returned to St Kitts was "extremely poor" without access to appropriate treatment to mitigate the effects of opportunistic infections.⁸³ A professor of immunology reported that the damage to D's immune system was irreparable and that the drug therapy he was receiving in the UK was now approaching the limits of its effectiveness. D's prognosis was estimated at little more than eight to twelve months on the therapy he was receiving, and less than half of that time if the treatment were withdrawn.⁸⁴

In response to a request for information by the managing medical officer at the prison, the High Commission for the Eastern Caribbean States reported that the island of St. Kitts did not have the facilities to provide D with the medical treatment he required.⁸⁵ The UK government's own investigation concluded that there were two hospitals in the federation of St Kitts and Nevis catering for AIDS patients until well enough to be discharged, and that AIDS sufferers on the island nation were increasingly likely to live with relatives for care.⁸⁶ Nevertheless, D did not have any close family in St Kitts. His mother lived in the United States and, owing to health and financial difficulties would not have been able to return to St Kitts to care for her son if he were deported. It was understood that D had no other relatives in St Kitts who would have been able to care for him.⁸⁷

In June 1996, D's application to the European Commission on Human Rights was declared

admissible. His proposed removal to St Kitts, it was claimed, would breach Articles 2, 3 and 8 ECHR, while it was further alleged that he had been denied an effective remedy in the UK to challenge his removal contrary to Article 13 ECHR. The Commission's report, while indicating that it had found no cause to examine D's application in light of Articles 2, 8 and 13, expressed concern by a majority over a real risk of circumstances amounting to inhuman and degrading treatment in breach of Article 3.⁸⁸ D submitted that his removal to St Kitts would force him to spend his last months in extreme poverty, isolation, squalid conditions, untreatable pain and without access to financial or social support. His health would be significantly compromised by unsanitary conditions on the island and local hospitals would be ill-equipped to thwart the onset of infections induced by the harsh living conditions. The combination of these factors was argued to constitute inhuman and degrading treatment within the meaning of Article 3.⁸⁹

In reply, the UK government submitted that the applicant's circumstances stemmed entirely from the nature of his illness and deficiencies in the health care system of St Kitts and Nevis, making his plight no different from any other AIDS sufferer on the island. Further, the applicant had been the architect of his own demise in that he would have been free to return to St Kitts in happier circumstances had he not taken it upon himself to attempt to traffic controlled drugs into the UK.⁹⁰

The Grand Chamber, although sympathetic to the respondent's right to control the entry and expulsion of aliens, as well as the challenges associated with curbing the traffic of controlled drugs, were mindful that Article 3 "enshrines one of the fundamental values of democratic societies", and applied irrespective of the reprehensible conduct of the applicant.⁹¹ Whatever the legal circumstances of D's entry, he was physically present in the UK and therefore within that jurisdiction for the purpose of Article 1 ECHR.⁹² Thus, he was accorded the protection of Article 3,⁹³ a provision that owing to its

⁸⁸ *Ibid*, para. 37.

⁸⁹ *Ibid*, para. 40.

⁹⁰ *Ibid*, para. 42.

⁹¹ *Ibid*, paras. 46-7. The ECtHR alluded to the recent judgments of *Ahmed v. Austria*, 17 December 1996 (para. 38) and *Chahal v. UK*, 15 November 1996 (paras. 73-4).

⁹² "The High Contracting Parties shall ensure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

⁹³ *D v. UK*, para. 48.

⁸⁰ *Ibid*, paras. 7-8.

⁸¹ *Ibid*, para. 19.

⁸² *Ibid*, paras. 11-12.

⁸³ *Ibid*, para. 14.

⁸⁴ *Ibid*, para. 15.

⁸⁵ *Ibid*, para. 16.

⁸⁶ *Ibid*, para. 17.

⁸⁷ *Ibid*, para. 18.

fundamental character demanded “sufficient flexibility” to operate where anticipatory inhuman or degrading treatment emanated from the effects of a naturally occurring illness, as opposed to intentional actions of state or non-state actors.⁹⁴

Taking into account the beneficial effects of the palliative care and sophisticated drugs that sustained what remained of D's life in the UK, in contrast with what awaited him in St Kitts, the ECtHR concluded that the applicant if returned would be made to endure “acute mental and physical suffering”.⁹⁵ The culmination of these “exceptional circumstances”, unique to the applicant's circumstances and at a critical stage in a “fatal illness”, would therefore have amounted to inhuman treatment within the meaning of Article 3 ECHR.⁹⁶

Importantly, the ECtHR added a final caveat that aliens who are subject to expulsion could not in principle invoke the ECHR to assert entitlement to medical services provided by a signatory state. Essentially its decision rested on what the ECtHR determined to be “very exceptional circumstances” and “compelling humanitarian considerations”.⁹⁷ The tenor of its concluding remarks on the matter suggested that the ECtHR had little intention of ever again enforcing Article 3 to meet a medical refoulement claim.

N v. Secretary of State for the Home Department

While ostensibly similar to the D case, the 2005 case of *N v. Secretary of State for the Home Department*⁹⁸ is notable for its antithetical judgment, delivered by the House of Lords and upheld by the ECtHR.⁹⁹ The appellant N, a Ugandan national, arrived in the UK in March 1998 under a false passport.¹⁰⁰ She applied for asylum on the grounds that she had been held captive and subjected to ill-treatment, including rape, by rogue elements of the National Resistance Movement in Uganda.¹⁰¹ It was evident that her health was poor, and, within hours of her arrival N was admitted to hospital where she was diagnosed HIV-positive with

disseminated tuberculosis.¹⁰² Her CD4 cell count had dwindled to a critical level of 10 (the CD4 cell count of a healthy individual is over 500) and she subsequently developed Kaposi's sarcoma, an aggressive form of cancer typically associated with the advanced stages of AIDS. Following a prolonged course of chemotherapy and antiretroviral treatment, N's condition stabilised so that by 2002 her CD4 count had risen to 414 and her health had improved.¹⁰³

It was not until April 2001 that N's asylum application was refused by the UK authority.¹⁰⁴ The Secretary of State for the Home Department, unconvinced by the credibility of her claim or the existence of a threat from the Ugandan authorities, directed her removal from the UK.¹⁰⁵ N unsuccessfully appealed the decision to the Immigration Appeal Tribunal and to the Court of Appeal, where an evidential medical report described her present condition as “stable” and indicated that she was “likely to remain well for decades” if permitted to stay in the UK. On the other hand, it warned that N “would not have the full treatment she required [in Uganda] and would suffer ill-health, pain, discomfort and an early death as a result.”¹⁰⁶ The treatment N required was only available at considerable expense in Uganda and would have been in limited supply in her home town. Moreover, while she still had relatives there, it seemed that none of them would have been willing or able to provide her with accommodation and care.¹⁰⁷ A supplementary report compiled by a consultant physician opined that she would live for another two years at most if returned to Uganda.¹⁰⁸

In a robust judgment, the House of Lords adopted a cautious stance towards the application of Article 3 in that kind of case.¹⁰⁹ Lord Hope found that N's circumstances were not of a sufficiently exceptional nature, and that any finding to the contrary would have inappropriately extended the

¹⁰² *Ibid*, para. 73.

¹⁰³ *Ibid*, para. 2.

¹⁰⁴ C. Sawyer, “Insufficiently inhuman: removing AIDS patients from the UK”, *Journal of Social Welfare and Family Law*, 26(3) (2004), 281-288 (281-2).

¹⁰⁵ D. Stevens, “Asylum seekers and the right to access health care”, *Northern Ireland Legal Quarterly*, 61(4) (2010), 363-390 (372).

¹⁰⁶ *N v. Secretary of State for the Home Department*, para. 73.

¹⁰⁷ *Ibid*, para. 51.

¹⁰⁸ *Ibid*, para. 73.

¹⁰⁹ V. Bettinson and A. Jones, “Is inadequate medical care insufficient to resist removal? The return of foreign nationals with HIV/AIDS and article 3 ECHR”, *Journal of Social Welfare and Family Law*, 28(1) (2006), 70-80 (70).

⁹⁴ *Ibid*, para. 49.

⁹⁵ *Ibid*, paras. 51-2.

⁹⁶ *Ibid*, para. 53.

⁹⁷ *Ibid*, para. 54.

⁹⁸ [2005] UKHL 31.

⁹⁹ *N v. UK*, Application no. 26565/05 (2008) 47 EHRLR 39.

¹⁰⁰ *N v. Secretary of State for the Home Department*, para. 97.

¹⁰¹ *Ibid*, para. 57.

“exceptional category of case” exemplified by *D v. UK*.¹¹⁰ In the substantive body of Lord Hope's judgment it was conspicuously remarked that such an extension of the scope of Article 3:

[W]ould risk drawing into the UK large numbers of people already suffering from HIV in the hope that they too could remain here indefinitely so that they could take the benefit of the medical resources that are available in this country.¹¹¹

The fallout from such a ruling would have been “a very great and no doubt unquantifiable commitment of resources” never intended by the signatories of the ECHR.¹¹² While the ECHR was indeed to be regarded as a “living instrument”, open to interpretation over and above a literal reading of its text, an expansion of Article 3 would have applied to all contracting states, not merely the UK. The question therefore, as Lord Hope emphasised from the beginning, was whether such an enlargement of Article 3 was one by which all contracting parties would have agreed to be bound.¹¹³

Baroness Hale acknowledged that N had arrived in the country not to obtain medical treatment, but to escape harassment and ill-treatment. Certainly, it was not disputed that N was not aware of her HIV status prior to her being admitted to hospital.¹¹⁴ For guidance, both she and Lord Hope invoked the concurring opinion of Judge Pettiti, who in *D v. UK* had emphasised that the ECHR was not concerned with differing standards of health care between states, and, by extension, was not concerned with whether an obligation existed to provide treatment for aliens where it was unobtainable in their home countries. Rather, the ECtHR had been moved by the very exceptional circumstances of D's case: the implications of removing an individual whose life was drawing to a close from a fatal illness.¹¹⁵ These humanitarian considerations merely served as a qualification to the general rule that aliens subject to expulsion could not “in principle claim any entitlement to remain in the territory of a contracting state in order to continue to benefit from medical, social or other forms of assistance

¹¹⁰ *N v. Secretary of State for the Home Department*, paras 51-2.

¹¹¹ *Ibid*, para. 53.

¹¹² *Ibid*, para. 53.

¹¹³ *Ibid*, para. 21.

¹¹⁴ *Ibid*, para. 57.

¹¹⁵ Judge Pettiti in *D v. UK*, cited in *N v. Secretary of State for the Home Department* by Lord Hope, paras. 34-5 and by Baroness Hale, para. 68.

provided by the expelling state.”¹¹⁶

The implication of the *D* judgment was, as Lord Hope saw it, that the appellant's present medical state was crucial to determining whether their claim gave rise to an obligation under Article 3.¹¹⁷ Unlike *D*, N had not reached a critical stage in her illness. N's drug regime, as was noted by Lord Nicholls, promised decades of good health. Her immune system was heavily supplemented by medication, the effects of which mitigated her susceptibility to opportunistic infections without restoring her to a natural state of health.¹¹⁸ Lord Hope admitted that the stability of N's present condition depended entirely on the advanced course of antiretroviral therapy she was receiving in the UK. In that respect, the treatment was akin to a life support machine and he conceded it was “somewhat disingenuous” to concentrate on the applicant's present state of health in circumstances where it was irrefutably linked to the very treatment she stood to lose if expelled.¹¹⁹

Nevertheless the consequences of dismissing N's appeal could not be “sensibly detached” from the implications of a decision in her favour.¹²⁰ Lord Hope's review of Strasbourg's jurisprudence suggested that medical refoulement cases after *D* had given considerable weight to the applicants' present state of health,¹²¹ irrespective of significant progress in the treatment of HIV/AIDS since the *D* ruling in 1997.¹²² These cases indicated that *D* was the gold standard for what would be accepted under the rubric of “very exceptional circumstances.” Because N's medically enhanced state of health was not consistent with the humanitarian considerations at play in the *D* case, her appeal could not have succeeded without the House of Lords upsetting a narrowly-construed exception, something the ECtHR had been at pains to avoid in *D*.¹²³ The appeal was unanimously dismissed.

¹¹⁶ *D v. UK*, at [54] and cited by Lord Hope in *N v. Secretary of State for the Home Department*, para. 35.

¹¹⁷ *N v. Secretary of State for the Home Department*, paras. 36 and 43.

¹¹⁸ *Ibid*, para. 3.

¹¹⁹ *Ibid*, para. 49.

¹²⁰ *Ibid*, para. 21.

¹²¹ *BB v. France* (9 March 1998, RJD 1998-VI), *Karara v. Finland* (Application No. 40900/98, 29 May 1998, SCC v. Sweden (Application No. 46553/99, 15 February 2000), *Henao v. The Netherlands* (Application No. 13669/03, 24 June 2003), *Ndangoya v. Sweden* (Application No. 17868/03, 22 June 2004), *Amegnigan v. The Netherlands* (Application 25629/04, 25 November 2004).

¹²² *N v. Secretary of State for the Home Department*, para.

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¹²³ *Ibid*, para. 48.

N v. UK

N petitioned the Grand Chamber,¹²⁴ the majority finding that her removal to Uganda would not breach Article 3, and that it was unnecessary to examine an additional complaint under Article 8 ECHR. In its core judgment, the ECtHR drew attention to the “minimum level of severity” threshold which must be met for ill-treatment to fall under Article 3. The threshold, it stressed, is relative in nature and dependant on “all of the circumstances of the case”, including the nature and duration of the anticipated ill-treatment, its mental and physical effects, and, sometimes, the age, sex and health of the victim.¹²⁵

While maintaining that suffering which emanated from the effects of a naturally occurring illness, as distinct from intentional acts or omissions committed by state and non-state actors, could fall within the scope of Article 3, the ECtHR considered it appropriate to observe the high threshold set in *D v. UK* for inhuman and degrading treatment.¹²⁶ This threshold owed itself to the maxim that aliens who are subject to expulsion cannot claim entitlement to remain in a contracting state in order to continue to benefit from medical and social assistance provided by the expelling state. With that in mind, the ECtHR found that the applicant's circumstances, including the fact that her life expectancy would be significantly reduced following her removal from the UK, were not sufficient in themselves to engage Article 3.¹²⁷

Moreover, the ECtHR drew attention to the fact that while ECHR rights have “implications of a social or economic nature”, they were drafted primarily with the protection of civil and political rights in mind.¹²⁸ That Article 3's absolute character demanded sufficient flexibility to intervene in expulsion cases did not mean that contracting states were under an obligation to correct socio-economic disparity between states. It stressed that central to the whole of the ECHR was “a search for a fair balance” between the general interests of the community and the protection of individual rights. Notwithstanding improvements in medical care, the finding of an obligation to provide free and unlimited care to

aliens who did not have a right to remain in a state's jurisdiction would have exerted too great a burden on the contracting states.¹²⁹

Judges Tulkens, Bonello and Spielmann dissented jointly from the main judgment, citing “substantial grounds” to support the claim that N's case was one of “exceptional gravity”.¹³⁰ Turning to the ECtHR's past approach to “degrading treatment” as set out in Article 3 ECHR, the joint dissenting opinion remarked that treatment could be said to be degrading where it:

[H]umiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance.¹³¹

The dissenting opinion invoked the “Pretty threshold” (from *Pretty v. UK*), according to which “intense physical or mental suffering” which “flows from naturally occurring illnesses, physical or mental, may be covered by Article 3.”¹³² This rationale was bolstered by the ECtHR's recognition in *D v. UK* that state responsibility could arise from the risk of a serious illness being exacerbated by treatment arising from the conditions of expulsion. Provided the minimum level of severity was met, the dissenting judges saw fit to apply the ECtHR's definition of degrading treatment to situations where suffering resulted from a lack of facilities required to treat a naturally occurring illness in the receiving state.¹³³

The joint dissenting opinion rebuked the consensus that the ECHR is essentially geared towards the safeguarding of civil and political rights.¹³⁴ The opinion cited *Airey v. Ireland*,¹³⁵ in which it was stated that the ECHR “must be interpreted in the light of present-day conditions” in order to “safeguard the individual in a real and practical way as regards those areas with which it deals.”¹³⁶ In that case, the ECtHR had observed that “there is no watertight division” separating socio-economic rights from those articulated in the ECHR.¹³⁷ The dissenting judges also

¹²⁹ *Ibid*, para. 44

¹³⁰ *Ibid*, para. O-13.

¹³¹ *Pretty v. UK* (Application No. 2346.02) (2002) 35 EHRLR 1, cited in *N v. UK*, para. O-15.

¹³² *Pretty v. UK*, para. 52.

¹³³ *N v. UK*, para. O-15.

¹³⁴ *Ibid*, para. O-16.

¹³⁵ *Supra* n. 50, cited in *ibid*, para. O-16.

¹³⁶ *Airey v. Ireland*, para. 26.

¹³⁷ *Ibid*, para. 26.

¹²⁴ *N v. UK*, *supra* n. 21.

¹²⁵ *Ibid*, para. 29. The principle comes from *Ireland v. UK* (Series A, No. 25) (1979-80) 2 EHRLR 25.

¹²⁶ *Ibid*, para. 43.

¹²⁷ *Ibid*, para. 42.

¹²⁸ *Ibid*, para. 44. See *Airey v. Ireland* (1979-80) 2 EHRLR 305, at [26].

expressed dissatisfaction with the majority consensus that ECHR jurisprudence calls for a search for a fair balance between individual rights and community interests.¹³⁸ They pointed to the then recent judgment in *Saadi v. Italy*¹³⁹ which had emphatically rejected the use of a balancing test in the context of Article 3, whose absolute nature took precedence over countervailing state interests.¹⁴⁰

Although not articulated in explicit terms in the main judgement of *N v. UK*, the dissenting judges suspected that the majority was compelled by the belief that the UK's resources would be overstretched if directed to provide medical treatment to overseas patients suffering from serious illnesses.¹⁴¹ It will be recalled that the conclusion of the majority was that no obligation existed under Article 3 to provide "free and unlimited health care" to aliens who did not have a right to remain in a contracting state, since the state would otherwise assume "too great a burden".¹⁴² This echoed Lord Hope's concerns over the "very great and no doubt unquantifiable commitment of resources" arising from the finding of such an obligation by the House of Lords.¹⁴³ If Lord Brown was correct in his assessment, the expected annual cost to the state for providing N with antiretroviral therapy would have been £7000, a conservative figure given the likely addition of costs associated with social welfare and immigration control if, as was suggested, more AIDS sufferers would be drawn to the UK in the hope of qualifying for the same treatment.¹⁴⁴ Arguably, the judgment was couched in the terms of a thinly-veiled "floodgate argument",¹⁴⁵ a tacit fear of subjecting signatory states to being overwhelmed with the needs of aliens with serious illnesses.

Paposhvili v. Belgium

In the recent case of *Paposhvili v. Belgium*,¹⁴⁶ the ECtHR was afforded the opportunity to depart from what was described as the "excessively restrictive approach" adopted in *N*.¹⁴⁷ Paposhvili,

who died before the matter was finalised, was a Georgian national living in Brussels since 1998 with his wife and children. During his time in Belgium, he was refused asylum and was convicted for numerous offences including theft, robbery, and involvement in a criminal organisation.¹⁴⁸

In 2006 while serving a prison sentence, Paposhvili was diagnosed with chronic lymphocytic leukaemia, though no treatment was commenced at that stage.¹⁴⁹ The following year he was admitted to the prison hospital complex for chemotherapy, where it was reported that his condition was life-threatening.¹⁵⁰ At that point, he suffered from collateral diseases stemming from tuberculosis and hepatitis C.¹⁵¹ In 2010 Paposhvili was treated for respiratory problems and the hospital report recommended that he be treated as an outpatient in prison by a lung specialist and a haematologist. When that treatment failed to materialise,¹⁵² a visiting doctor reported that the leukaemia had advanced rapidly, having not been sufficiently monitored, and required a different course of chemotherapy.¹⁵³ By 2011 the leukaemia had reached its most advanced stage and chemotherapy was adjusted accordingly.¹⁵⁴

While in prison Paposhvili was the subject of a ministerial deportation order directing his expulsion from Belgium and barring re-entry for a period of 10 years. The order referred to his extensive criminal record, citing a "serious and ongoing risk of further breaches of public order." He lodged several requests for regularisation under the Aliens Act on exceptional or medical grounds, all of which were refused by the Aliens Office.¹⁵⁵ In tandem with a request for regularisation on exceptional grounds refused on 7 July 2010, an order was issued by the Aliens Office for Paposhvili to leave the country.¹⁵⁶ On application to the ECtHR for an interim measure under Rule 39, execution of that order was stayed pending the outcome of proceedings before the Aliens Appeals Board.¹⁵⁷

A haematologist's certificate following Paposhvili's

¹³⁸ *N v. UK*, para. O-17.

¹³⁹ Application no. 37201/06 (2009) 49 EHRLR 30.

¹⁴⁰ *Ibid*, para. 138.

¹⁴¹ *N v. UK*, para. O-18. V. Mantouvalou, "N v. UK: no duty to rescue the nearby needy?" *Modern Law Review*, 72(5) (2009), 815-828 (825).

¹⁴² *Ibid*, para. 44.

¹⁴³ *Ibid*, para. 53.

¹⁴⁴ *Ibid*, para. 92.

¹⁴⁵ Mantouvalou, pp. 815-6.

¹⁴⁶ Application no. 41738/10, judgment of 13th Dec 2016.

¹⁴⁷ *Ibid*, para. 165.

¹⁴⁸ *Ibid*, paras 12-17.

¹⁴⁹ *Ibid*, para. 34.

¹⁵⁰ *Ibid*, para. 35-6.

¹⁵¹ *Ibid*, paras. 49-53

¹⁵² *Ibid*, para. 37.

¹⁵³ *Ibid*, para. 38.

¹⁵⁴ *Ibid*, para. 39.

¹⁵⁵ *Ibid*, paras. 23-31 and 54-68.

¹⁵⁶ *Ibid*, para. 78.

¹⁵⁷ *Ibid*, para. 87.

release from prison warned that returning him to Georgia would expose him to inhuman and degrading treatment, identifying a “real risk of relapse” in those circumstances.¹⁵⁸ As his condition worsened over time, the specialist treating him advocated the continuation of chemotherapy and regular monitoring in a specialised setting. The specialist advised that the treatment was tailored to Paposhvili’s needs, that he was now “wholly dependent” on it and that “he would have no access [to it] in his country of origin.”¹⁵⁹ In addition, Paposhvili hoped to receive a donor transplant - his “only hope for a cure”.¹⁶⁰

In April 2015, the case was referred to the Grand Chamber alleging that substantial grounds had been shown that the applicant if returned faced *inter alia* a real risk of inhuman and degrading treatment, contrary to Article 3. Following Paposhvili’s death in June 2016, his family was permitted to pursue the application.¹⁶¹ The ECtHR turned to *N v. UK* for guidance with the applicant’s Article 3 claim, observing that alien’s suffering from illness could only be protected from removal in “very exceptional cases, where the humanitarian grounds against the removal were compelling.”¹⁶² Accordingly, the fact that the applicant, whose condition in Belgium was stable, could have expected a reduction in his circumstances, including his life expectancy, would not have been sufficient to warrant such protection.

The applicant called for “a realistic threshold of severity that was no longer confined to securing a ‘right to die with dignity’” per the *N* decision. He submitted that the respondent bore responsibility under Article 3 for proceeding with his removal without taking into consideration his “particular vulnerability” linked to his state of health, his prognosis if returned, his emotional and financial needs and family ties in Belgium. The decision to remove him, he submitted, demonstrated a lack of respect for his dignity in placing him at serious risk “of severe and rapid deterioration in his state of health leading to swift and certain death.”¹⁶³

Conceding that case-law subsequent to *N v. UK* had not provided more detailed guidance on what constituted “very exceptional circumstances”, and anxious to interpret and apply the ECHR in a

manner that rendered its rights “practical and effective”, and not “theoretical and illusory”, the ECtHR saw fit to clarify the approach it had adopted in medical refoulement cases. Accordingly, it considered that the “other exceptional circumstances” within the meaning of *N v. UK* are:

[S]ituations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, or being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy.¹⁶⁴

The ECtHR pointed out that such situations “correspond to a high threshold for the application of Article 3”, and that it is for the applicant to adduce “evidence capable of demonstrating substantial grounds”, rather than clear proof, that they would be exposed to a real risk of being subjected to treatment contrary to Article 3.

It is for the expelling state to dispel any doubts raised by such evidence based on a close assessment of risk, in the course of which it must consider “foreseeable consequences”, including the evolution of the applicant’s state of health, following his removal. The expelling state must now verify on a case-by-case basis whether the care “generally available” in the receiving state is “sufficient and appropriate in practise”, and the extent to which the applicant would actually have access to this care. Where serious doubts persist, the expelling state must obtain “individual and sufficient assurances” from the receiving state as a pre-condition for removal.¹⁶⁵

In light of the applicant’s circumstances, it was held that there would have been a violation of Article 3 had he been returned to Georgia.¹⁶⁶



¹⁵⁸ *Ibid*, para. 40

¹⁵⁹ *Ibid*, para. 46.

¹⁶⁰ *Ibid*, para. 140.

¹⁶¹ *Ibid*, paras. 133-4

¹⁶² *Ibid*, para. 136.

¹⁶³ *Ibid*, 148.

¹⁶⁴ *Ibid*, 183.

¹⁶⁵ *Ibid*, 183-8.

¹⁶⁶ *Ibid*, para. 206

Biafran Separatist Movements in Nigeria: RDC Researcher David Goggins investigates



David Goggins, Refugee Documentation Centre

Background

The nation known today as the Federal Republic of Nigeria was created in 1914 when the British colonial rulers incorporated a number of kingdoms under their control into a single entity for administrative purposes. This merging of peoples with different cultures and stages of development laid the foundation for the ethnic conflict which occurred after Nigeria became independent in 1960. In particular the Igbo people, Nigeria's third largest ethnic group, had little in common with the rest of the country. A failed coup by Igbo officers in 1966 led to pogroms in the Northern states which resulted in the killing of tens of thousands of Igbo and the displacement of several hundred thousand others. Feeling that they would never be secure in a united Nigeria the Igbo sought to create their own independent republic in the South East of Nigeria, which they called Biafra.

The Lagos-based government sought to preserve the unity of Nigeria at all costs and when diplomatic efforts failed to resolve the crisis a full scale war broke out on 2 July 1967. The Nigerian military employed a deliberate policy of starving the Biafrans into submission, and when the conflict finally ended on 15 January 1970 at least a million Igbo had lost their lives as a result of malnutrition.

Following the reincorporation of Biafra into Nigeria head of state General Yakubu Gowon announced

a policy of "no victor, no vanquished" and declared an amnesty for most of those who had fought in the war.

Post-war Hostility: A Failure of Reconciliation

Although the Nigerian government ostensibly followed a policy of reconciliation towards the former Biafrans many Igbo remained disaffected, feeling that the issues which had led to the war were unresolved and that they remained marginalised. In particular, enmity remained between the Igbo and the Nigerian army.

During his presentation to an EASO practical cooperation meeting held in Rome in June 2017, Stephane Jaquemet, UNHCR's Regional Representative for Southern Europe, commented on the discontent in the region, stating:

"The Nigerian Civil War, or the Biafran War, was incredibly devastating for the region. One to two million are estimated dead, largely because of famine. At the end of the Civil War, the Federal Government had this policy of 'no victor, no vanquished' and declared that it was going to follow a strategy of reconciliation and rehabilitation and reconstruction in the region. However, those words were not necessarily put into action, and this is a message that continues to be articulated in south eastern Nigeria: that the region has suffered, that is has been punished by the Nigerian Federal Government ever since the end of the war, and that it is very much marginalised compared to other regions of Nigeria."¹⁶⁷

Further reference to the ongoing hostility between the army and those Igbo who remain committed to the idea of an independent Biafra may be found in a 2016 Amnesty International report which states:

"Despite the official end of the Nigerian civil war in 1970, the relationship between the Nigerian security forces and pro-Biafrans, has been, at best, unfriendly. The historical mistrust between pro-Biafra supporters in the country's southeast Igbo-dominated states and the Nigerian army has been further exacerbated by recent socio-political and economic developments in the country."¹⁶⁸

¹⁶⁷ European Asylum Support Office (August 2017) EASO COI Meeting Report: Nigeria, p.28

¹⁶⁸ Amnesty International (25 November 2016) Nigeria: 'Bullets were Raining Everywhere': Deadly Repression of Pro-Biafra Activists, p.11

Referring to the current situation in the region a report from the International Crisis Group states:

“The south east, like much of the country, suffers from deficient and dilapidated infrastructure and widespread youth unemployment. The resulting economic frustration feeds into longstanding complaints that the federal government never fully rehabilitated the region after the civil war.”¹⁶⁹

Where is Biafra?

The Nigerian state never recognised the existence of Biafra as an independent entity, or even as a region within Nigeria. This hard-line attitude remains the official position of the Nigerian government and has resulted in confusion among would-be separatists as to which areas in South East Nigeria should be included in their new Biafra. Referring to this lack of clarity concerning the physical boundaries of the proposed state a report from the International Crisis Group states:

“Separatists are not clear about how they see the territory of the ‘new Biafra’. Some claim it would include all areas inhabited by people of Ibo descent, including parts of the oil-rich Niger Delta to the south and Benue state to the north, but the other peoples of these regions vehemently oppose inclusion in any new Biafra. Other separatists say a restored Biafra would be limited to the five core Ibo states – Abia, Anambra, Ebonyi, Enugu and Imo – referred to administratively as Nigeria’s ‘South East Zone’.”¹⁷⁰

Regarding support for the recreation of an Igbo state anthropologist Olly Owen of the Oxford Department of International Development states:

“Significantly, the Biafra project is primarily a youth issue, popular with the under-40 cohorts. Very few of those who actually lived through the civil war in the region show enthusiasm for renewed separatism.”¹⁷¹

¹⁶⁹ International Crisis Group (4 December 2015) Nigeria’s Biafran Separatist Upsurge

¹⁷⁰ *ibid*

¹⁷¹ Olly Owen, Oxford Department of International Development (8 March 2016) The new Biafrans: Historical imagination and structural conflict in Nigeria’s separatist revival

The Emergence of Separatist Groups

Following Nigeria’s return to democracy in 1999 a number of ethno-nationalist groups appeared. Prominent among these groups agitating for the resurrection of a separate state for the Igbo people was the Movement for Actualization of the Sovereign State of Biafra (MASSOB) The founder of this group was a lawyer named Ralph Uwazurike, whose activities have resulted in him being arrested on several occasions. Referring to the appeal of MASSOB an IRIN report states:

“Uwazurike's claims that successive governments have oppressed and discriminated against Nigeria's estimated 30 million Igbos have struck a chord among thousands of Igbo youths, many of them jobless, who have joined MASSOB's ranks.”¹⁷²

A group which professes similar goals to MASSOB is the Indigenous People of Biafra (IPOB), which was founded in 2012. The leader of IPOB is Nnamdi Kanu, who is also the Director of the London-based station Radio Biafra, which he originally operated on behalf of MASSOB before falling out with Uwazurike. Since 2012 Radio Biafra has broadcast pro-separatist and anti-Nigerian propaganda and has been accused by the Nigerian government of broadcasting hate speech.

During her presentation at the EASO practical cooperation meeting Megan Turnbull, Visiting Assistant Professor, PhD, Department of Political Science, Skidmore College, explained the difference between these two groups as follows:

“They are two different groups, with two different leaders. One emerged right after the transitional elections and has much clearer commitments to non-violence, rhetorically at least. In the Indigenous People of Biafra there is a much more violent rhetoric, but the actions have been largely peaceful. However, they pursue more or less the same goals. They both want an independent republic in south eastern Nigeria.”¹⁷³

MASSOB leader Ralph Uwazurike has expressed a negative view of the rival group in an article published by the Lagos-based newspaper Vanguard where he is quoted as saying:

¹⁷² IRIN (10 May 2005) Nigeria: More than 100 people arrested at separatist Biafra rally

¹⁷³ European Asylum Support Office (August 2017) EASO COI Meeting Report: Nigeria

“Uwazurike accused the Federal Government of popularising Kanu, adding that ‘if the government had ignored Kanu, the situation would not have escalated.’ He attributed Kanu’s popularity to the relevance given to him by the Federal Government and called on all Igbo leaders to condemn the activities of IPOB as it had no agenda. ‘The IPOB has no agenda and I advise Igbo leaders to condemn its activities.’¹⁷⁴

Extra-Judicial Killing of Separatists

Demonstrations organised by pro-Biafran groups have frequently resulted in the deaths of protesters. These deaths are cited by separatists as evidence of a deliberate policy of extra-judicial execution by the Nigerian government. In an investigation into the repression of IPOB supporters Amnesty International states:

“Since August 2015, the security forces have killed at least 150 members and supporters of the pro-Biafran organization IPOB (Indigenous People of Biafra) and injured hundreds during non-violent meetings, marches and other gatherings. Hundreds were also arbitrarily arrested.”¹⁷⁵

Amnesty International offers evidence for these allegations in a report which states:

“Analysis of 87 videos, 122 photographs and 146 eye witness testimonies relating to demonstrations and other gatherings between August 2015 and August 2016 consistently shows that the military fired live ammunition with little or no warning to disperse crowds. It also finds evidence of mass extrajudicial executions by security forces, including at least 60 people shot dead in the space of two days in connection with events to mark Biafra Remembrance Day.”¹⁷⁶

The charge that state forces have killed civilian protesters is reiterated in the Human Rights Watch annual report on events in Nigeria during 2016 which states:

¹⁷⁴ Vanguard (14 September 2017) IPOB: MASSOB leader Uwazurike condemns Kanu, says not a leader

¹⁷⁵ Amnesty International (25 November 2016) Nigeria: ‘Bullets were Raining Everywhere’: Deadly Repression of Pro-Biafra Activists

¹⁷⁶ Amnesty International (24 November 2016) Nigeria: At least 150 peaceful pro-Biafra activists killed in chilling crackdown

“In February and May, security forces were accused of killing at least 40 members of the Indigenous People of Biafra (IPOB), and Movement for the Actualization of the Sovereign State of Biafra (MASSOB).”¹⁷⁷

Muhammadu Buhari: A New Hard-line President

The election of former general Muhammadu Buhari as president in March 2015 caused concern among separatist activists who feared a more hard-line approach towards them. In particular there were claims that Buhari, a Fulani from Katsina State in the North-West of Nigeria, was unsympathetic to the Igbo and was likely to discriminate against them. These fears are expressed in an African Arguments article which states:

“Under Buhari, political grievances have deepened. With no Igbo heading any of the military and security services, many argue the region has no voice in key organs such as the National Defence Council (NDC). ‘We are like second class citizens, of the same status as a colonised people, except that this is internal colonialism, caliphate colonialism’, asserted a retired Igbo military officer. The situation has also been aggravated by Buhari’s statement shortly after coming to power that ‘constituencies that gave me 97% cannot in all honesty be treated, on some issues, with constituencies that gave me 5%’. To many in the south east, who mostly voted for former president Goodluck Jonathan, that statement raised fears that the president would not accord them equal treatment with the north.”¹⁷⁸

In a further comment on the government’s actions this article states:

“Following from this hardline stance, security agencies shut down the unlicensed radio station, Radio Biafra, operated by the separatist group Indigenous People of Biafra (IPOB). They have banned pro-Biafran newspapers, arresting and brutalising non-compliant vendors. These measures have driven many publications off the streets, but have not curbed the even more vigorous social media.”¹⁷⁹

¹⁷⁷ Human Rights Watch (12 January 2017) World Report 2017 - Nigeria

¹⁷⁸ African Arguments (29 May 2017) Nigeria: How to solve a problem like Biafra

¹⁷⁹ ibid

Increasing Tensions in 2017

The efforts of the Nigerian government to suppress all separatist demands has resulted in an escalation of tension in the region. Reporting on events in September 2017 a Voice of America news report states:

“On Monday, 60 supporters of the Biafra separatist movement were imprisoned by court order in the southeastern Nigerian state of Abia. The order is part of a growing government crackdown against the Indigenous People of Biafra (IPOB), a group calling for southeastern Nigeria to break away and form an independent country. In recent weeks, protests by IPOB activists have become increasingly tense. A rally in Abia earlier this month left a police officer dead and a police station nearly burned down. The now jailed sixty people who took part in that rally were charged with conspiracy, terrorism, attempted murder, and membership in an unlawful society.”¹⁸⁰

In October 2017 the Armed Conflict Location & Event Data Project reported that:

“A notable development in the country’s south have been police and military clashes with the Indigenous Peoples of Biafra (IPOB), an Igbo separatist group functioning in Abia and Rivers States. IPOB’s movements are believed to be a reaction to an early September military raid on the home of Nnamdi Kanu, the leader of the organization. The spate of violence caused the government to officially name the organization a “terrorist group” late in the month.”¹⁸¹

In September 2017 the Nigerian military launched an operation called “Python Dance II” with the intention of crushing separatist aspirations once and for all. As an attempt to pacify the region this operation appears to have been counter-productive. An article from Chatham House states:

“Python Dance II escalated into a violent confrontation in which supporters of secessionist group the Indigenous People of Biafra (IPOB) claim some of their members were killed, and the home of the group’s leader, Nnamdi Kanu, was

raided. Kanu has not been seen in public since the raid on his house.”¹⁸²

This article also refers to the controversial decision by the Nigerian government to declare IPOB a terrorist organisation, saying that:

“Shortly after the raid on Kanu’s home the military declared IPOB a terrorist organization – a move which was endorsed by the Nigerian government but rejected by many Nigerians and international observers. Critics of the conduct of Nigeria’s military make the point that IPOB supporters are not known to be violent and that the protests have been largely peaceful. During the demonstrations some protestors threw sticks and stones but there were no reports of armed confrontation. The EU and the US rejected the decision but Nigeria maintains it is irreversible and has warned foreign governments and organizations not to interfere.”¹⁸³

Commenting on the designation of IPOB as a terrorist group an article from the Nigerian newspaper This Day states:

“Another dimension to the terrorism debate is that the decision of the federal government to proscribe the Indigenous People of Biafra (IPOB) and labelled the group as a terrorist organisation has again increased the number of terrorist organisations within the country in the eyes of the international community. This is more so because it is not clear that the demand for Biafra is anything that will die soon as result of the proscription.”¹⁸⁴

An article from The Economist describes the alleged raid on the home of Nnamdi Kanu as follows:

“Doors hang off their hinges. Cupboards have been emptied onto floors, walls and windows are pitted with what appear to be bullet holes. A statue of Nnamdi Kanu, the leader of the Indigenous People of Biafra (IPOB), a Nigerian separatist group, is missing a hand and an arm. Mr Kanu’s family compound in Umuahia, the sleepy capital of Abia state in south-eastern Nigeria, was raided by soldiers on September 14th. His brother, Emmanuel, claims 28 people were killed and says he has not heard from Mr

¹⁸⁰ Voice of America News (26 September 2017) Nigeria Jails 60 Biafran Separatists

¹⁸¹ Armed Conflict Location & Event Data Project (October 2017) Conflict Trends Report No. 62; Real-Time Analysis of African Political Violence, October 2017

¹⁸² Chatham House (9 November 2017) Calls for Biafran Independence Return to South East Nigeria

¹⁸³ *ibid*

¹⁸⁴ This Day (21 November 2017) Still a Terrorised Nation

Kanu since. The army denies the raid even happened.”¹⁸⁵

Regarding the ultimate result of the crackdown by the Nigerian army the Economist article concludes that:

“The army may have cut off the head of the Biafran separatist snake for now. But until Nigeria cleans up its public finances so that its various ethnic groups can see how much money it raises, and where it is spent, resentments will simmer and the appeal of Biafra will remain.”¹⁸⁶

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



As the season is almost upon us we would like to wish all our readers a merry Christmas and a happy and peaceful New Year!



¹⁸⁵ The Economist (26 October 2017) Biafran separatists are gaining support, 50 years after the civil war
¹⁸⁶ ibid