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Refugees and the Rule of Law in Ireland

Thesis submitted for the degree of PhD

2015

Patricia Brazil

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Summary

This thesis is concerned with refugees and the rule of law in Ireland. Although Ireland acceded to the Convention Relating to the Status of Refugees in 1956, and the 1967 Protocol to that Convention in 1968, refugee law is a relatively new feature of the legal landscape in this jurisdiction. Until the 1990s, the numbers of people seeking asylum in Ireland were negligible, a fact reflected in the limited consideration of this topic in both academic commentaries and judicial decisions up to that time. However, this situation dramatically changed from the early 1990s onwards, when the numbers seeking recognition as refugees in the State dramatically increased, placing extreme pressure both on the administrative structures and judicial institutions engaged in this process.

In the past twenty years, the pace of development in refugee law in this jurisdiction has at times been staggering. The Refugee Act, passed in 1996, sought to provide for the first time in Irish law a comprehensive statutory framework governing all aspects of the refugee process. However, the Act was not fully commenced until 2001, by which time it had already been amended in a number of key ways by intervening legislation. Within five years of the full commencement of the Refugee Act, the government was already committing to a new legislative code in this area; a new Immigration, Residence and Protection Bill was first proposed in 2005 but a full draft was not published until 2008 and despite repeated government commitments to the prioritisation of this legislation, little progress has been made with the enactment of this fundamental reform since then.

In addition to the sometimes chaotic approach to the substantive legal framework, the courts have been inundated with applications for judicial review arising from the refugee process. Within a very short period of time, the courts have been required to become au fait with the most complex aspects of international and European law as they relate to refugees; much of this litigation has also pushed the boundaries of the remedy of judicial review as traditionally conceived.

Given the pace of these developments, both legislative and judicial, it is perhaps surprising that to date, there has been no comprehensive academic engagement with the refugee process in Ireland. This thesis seeks to address this gap by drawing together for

the first time, a complete contemporary account of the rights of refugees in Irish law with a particular emphasis on the interaction between refugee law and the rule of law.

The starting point for the analysis throughout is the regime provided by the Refugee Convention itself, whose provisions are analysed with a view to identifying good and bad practices which may impact implementation within national legal systems. The influence of the European Union on refugee law continues to gather pace and reference is also made throughout the thesis to the applicable legal instruments, with a particular focus on those most likely to affect the law and practice in Ireland. Finally, the discussion turns to the refugee in Irish law from both the substantive definition of a refugee, to the procedural framework governing the refugee status determination procedure. Drawing on both academic commentaries and the jurisprudence of international, regional and domestic courts throughout, the thesis highlights areas where the rule of law is challenged in its application to refugees, with a particular emphasis on the key concepts of clarity, certainty, independence and transparency. The judicial role in upholding the rights of refugees is a theme which underpins the research, and the conclusions seek to synthesise the findings made with a view to identifying the challenges and opportunities which lie ahead in ensuring the fullest respect for the rights of refugees and the rule of law.

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In memory of my mother, Marie Brazil

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Introduction

This thesis is concerned with refugees and the rule of law in Ireland. Although Ireland acceded to the Convention Relating to the Status of Refugees (hereafter referred to as "the Refugee Convention") in 1956, and the 1967 Protocol to that Convention in 1968, refugee law is a relatively new feature of the legal landscape in this jurisdiction. Until the 1990s, the numbers of people seeking asylum in Ireland were negligible, a fact reflected in the limited consideration of this topic in both academic commentaries and judicial decisions up to that time. However, this situation dramatically changed from the early 1990s onwards, when the numbers seeking recognition as refugees in the State dramatically increased, placing extreme pressure both on the administrative structures and judicial institutions engaged in this process.

In the past twenty years, the pace of development in refugee law in this jurisdiction has at times been staggering. The Refugee Act, passed in 1996, sought to provide for the first time in Irish law a comprehensive statutory framework governing all aspects of the refugee process. However, the Act was not fully commenced until 2001, by which time it had already been amended in a number of key ways by intervening legislation. Within five years of the full commencement of the Refugee Act, the government was already committing to a new legislative code in this area; a new Immigration, Residence and Protection Bill was first proposed in 2005 but a full draft was not published until 2008 and despite repeated government commitments to the prioritisation of this legislation, little progress

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In addition to the sometimes chaotic approach to the substantive legal framework, the courts have been inundated with applications for judicial review arising from the refugee process. Within a very short period of time, the courts have been required to become au fait with the most complex aspects of international and European law as they relate to refugees; much of this litigation has also pushed the boundaries of the remedy of judicial review as traditionally conceived.

Given the pace of these developments, both legislative and judicial, it is perhaps surprising that to date, there has been no comprehensive academic engagement with the refugee process in Ireland. This thesis seeks to address this gap by drawing together for the first time, a complete contemporary account of the rights of refugees in Irish law. In an era when industrialised nations often seek to deflect or deny responsibility for refugees, placing the burden on developing countries which lack the capacity to cope, it is important to assess the extent to which Ireland's law and practice concerning refugees is compatible with the duty of good faith implementation in Article 26 of the Vienna Convention on the Law of Treaties. As the sixtieth anniversary of Ireland's accession to the Refugee Convention approaches, it is timely to assess the extent of compliance with that Convention in our domestic law.

Why refugees?[1]

In defining the scope of this thesis as refugees, it is necessary to exclude certain related issues from consideration. In particular, it is well recognised that refugees may also seek, or be granted, alternative forms of recognition, through complementary protection regimes. [2] These topics fall outside the scope of the present discussion, not because of a failure to recognise the importance of such complementary protection measures, but because this thesis is informed by the very particular status which is accorded to refugees in international law. As McAdam points out, the unique feature of the Refugee Convention in comparison to other human rights instruments is that international law requires that the person be granted the status of a refugee.[3] McAdam explains that, whereas the grant of refugee status under the Convention entitles the person to the full range of Convention rights, "no comparable status arises from recognition of an individual's protection needs under a human rights instrument."[4] As Hathaway says:

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[1] The terms "refugees" and "asylum seekers" are often used interchangeably; this thesis generally prefers the term "refugees" insofar as it may be regarded as the more inclusive. This approach is also informed by the tendency in recent years to minimise the rights of refugees by downgrading them to "asylum seekers", often in the context of a discourse which seeks to characterise asylum seekers as fraudulently seeking the benefit of a status to which they are not entitled, thus representing a threat to the integrity of the system.

[2] See, eg, Vedsted-Hansen "Complementary or Subsidiary Protection? Offering an Appropriate Status Without Undermining Refugee Protection" UNHCR New Issues in Refugee Research, Working Paper No.52, February 2002.

[3] McAdam "The Refugee Convention as a Rights Blueprint for Persons in Need of International Protection" in McAdam (ed) *Forced Migration, Human Rights and Security* (Hart 2008) at p.267.

[4] *Ibid.*

> "refugee status is a categorical designation that reflects a unique ethical and consequential legal entitlement to make claims on the international community."[5]

The Refugee Convention

The Convention Relating to the Status of Refugees 1951, signed in the aftermath of the second World War and the gross violations of rights associated therewith, established an individualised definition of a refugee as any person who:

> "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."[6]

The Convention goes on to address the rights of refugees and those seeking asylum across a broad range of areas, including juridical status, gainful employment, welfare and administrative measures.[7] Although the Refugee Convention does not itself articulate a right to asylum,[8] Article 33 of the Convention does set out a right of non-refoulement, namely the right not to be expelled or returned to the frontiers of territories where his life or freedom would be threatened

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[5] Hathaway "Forced Migration Studies: Could We Agree Just to 'Date'?" (2007) 20 Journal of Refugee Studies 349 at 352.

[6] Article 1A(1) of the Refugee Convention.

[7] A full critique of the rights of refugees provided by the Refugee Convention is set out in Chapter 6.

[8] Article 14 of the Universal Declaration of Human Rights does recognise such a right; the nature and scope of the right to asylum is explored in chapter 1.

on account of his race, religion, nationality, membership of a particular social group or political opinion.

Unlike other international treaties which establish bodies with specific competence for oversight and enforcement of the obligations assumed by states party, there is no such body established under the Refugee Convention. [9] The office of the United Nations High Commissioner for Refugees (UNHCR), established in 1951, is charged with responsibility for "providing international protection … to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees."[10] UNHCR works with state parties in the context of implementation of the Convention,[11] but as Hathaway and Pobjoy note, the lack of an independent supervisory body renders the Refugee Convention an outlier in comparison with almost every other major international human rights treaty.[12] It is difficult to disagree with the suggestion that the failure of the Refugee Convention to "establish an interstate supervisory body to hold states accountable if and when they fail to meet their internationally defined protection obligations," allied to the lack of "a mechanism by which independent experts are authorized to provide authoritative guidance on how best to ensure a legally accurate and contextually sensitive understanding of treaty-

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[9] See generally Takahashi "Recourse to Human Rights Treaty Bodies for Monitoring of the Refugee Convention" (2002) 20 Netherlands Quarterly of Human Rights 53.

[10] Chapter 1, Article 1 of the Statute of the United Nations High Commissioner for Refugees, 14 December 1950.

[11] See generally Stavropoulou "Protection: The Office of the United Nations High Commissioner for Refugees Experience" in O'Flaherty (ed) *The Human Rights Field Operation: Law, Theory and Practice* (Ashgate 2007).

[12] Hathaway and Pobjoy "Introduction to Special Feature on Supervising the Refugee Convention" (2013) 26(3) International Journal of Refugee Law 323.

based norms" is unsatisfactory and may undermine the protection of refugees.[13]

Related to the lack of a Treaty body designated with ensuring compliance with the terms of the Refugee Convention is the failure of the Convention to specify any procedural framework by which applications for refugee status should be determined. This is crucial because, as Goodwin Gill and McAdam note:

> "For asylum seekers generally, the very existence of procedures for the determination of status can guarantee both non-refoulement and treatment in accordance with the relevant international instruments."[14]

Over thirty years ago, the UNHCR Executive Committee noted "the importance of procedures for determining refugee status" and expressed the hope that all parties to the Convention and Protocol which had not yet done so "would take steps to establish such procedures in the near future and give favourable consideration to UNHCR participation in such procedures in appropriate form."[15] UNHCR has repeatedly called for the establishment of "fair and expeditious procedures for the determination of refugee status, preferably guaranteeing 'full access' by those in search of asylum, and with the opportunity for independent review of negative

---

[13] See, eg, Kalin *Supervising the 1951 Convention on the Status of Refugees: Article 35 and Beyond* Paper presented to the 2nd Expert Roundtable in Cambridge (9 – 10 July 2001) as part of the Global Consultations on International Protection in the context of the 50th anniversary of the 1951 Convention relating to the Status of Refugees.

[14] Goodwin Gill and McAdam *The Refugee in International Law* (3rd ed Oxford University Press 2007) at p.325.

[15] UNHCR Executive Committee "Determination of Refugee Status" No.8 (XXVIII) 12 October 1977. Among the basic requirements identified by UNHCR Excom were

decisions."[16] However, the impact of UNHCR's statements in this context have been weakened by strong criticism of UNHCR's own procedures in countries where it has assumed responsibility for refugee status determination.[17]

Goodwin-Gill and McAdam note that although neither the Convention nor the Protocol formally requires procedures as a necessary condition for full implementation:

> "their object and purpose of protection and assurance of fundamental rights and freedoms for refugees without discrimination, argue strongly for the adoption of such effective internal measures."[18]

While "procedural rights … remain within the area of 'choice of means' among States party to the Convention and Protocol", and it is generally agreed that "national procedures vary considerably, drawing mostly on local legal culture and due process traditions"[19], states party to the Convention are nevertheless subject to "the principle of effectiveness of obligations, and the measures it adopts

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[16] Goodwin-Gill and McAdam *op cit* at p.530. See further UN General Assembly "Note on International Protection (submitted by the High Commissioner)" 3 August 1987, UN General Assembly "Note on International Protection (submitted by the High Commissioner)" 15 August 1988, UNHCR "International Protection (submitted by the High Commissioner)" 27 August 1990, UN General Assembly, Note on International Protection, 4 July 2005, UNHCR "Note on International Protection" 12 July 2006, UN General Assembly "Note on International Protection. Report by the High Commissioner" 29 June 2007, UNHCR "Note on International Protection" 30 June 2008, UN General Assembly "Note on International Protection" 26 June 2009.

[17] See, eg, Kagan "The Beleaguered Gatekeeper: Protection Challenges Posed by UNHCR Refugee Status Determination" (2006) 18(1) International Journal of Refugee Law 1 and Kagan "Frontier Justice: Legal Aid and UNHCR Refugee Status Determination in Egypt" (2006) 19 (1) Journal of Refugee Studies 45.

[18] *Op cit* at p.530.

[19] Goodwin Gill and McAdam *op cit* at p.

will be judged by the international standard of reasonable efficacy and efficient implementation".[20]

As Legomsky notes:

> "an unfair procedure necessarily produces an unjustifiably high risk of violating the individual's substantive rights. Thus, a fair refugee status determination is one essential complement of the … prohibition on refoulement…"[21]

This thesis thus has two concerns; first, to identify the rights of refugees in Irish law, and secondly to consider the extent to which those rights are respected in practice. The focus is therefore both on substantive concepts and procedural frameworks which ultimately ensure respect for the rights of refugees.[22]

Refugees, Asylum Seekers and the Rule of Law

In this thesis, the extent of respect for the rights of refugees will be analysed through the lens of the rule of law. This approach is inspired by Kneebone, whose book *Refugees, Asylum-Seekers and the Rule of Law* was published five years ago, analysing the law and practice in five different states party to the Refugee Convention in order to assess the respect both for the rights of refugees and the rule of law in those states.[23] Kneebone articulated her core concern in terms which invited application to the Irish context:

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[20] *Ibid* at p.528.

[21] Legomsky "Second Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection" (2003) 14 International Journal of Refugee Law 567.

[22] See generally Dauvergne "The Dilemma of Rights Discourse for Refugees" (2000) 23 University of New South Wales Law Journal 56.

[23] Kneebone (ed) *Refugees, Asylum Seekers and the Rule of Law* (Cambridge University Press 2009). The five jurisdictions considered were the United States, United Kingdom, Canada, Australia and New Zealand.

> "the rule of law, which is the cornerstone of the concept of democracy and of modern legal systems, is challenged by its application to refugees and asylum seekers. … The rights of refugees are defined in international law, but are subject to state discretion as to their implementation in national systems. … implementation is being done in such a way as to deny refugees the rights which are due to them under the international regime of refugee protection. Thus the international rule of law is also being eroded by implementation at the national level."[24]

Among the measures cited by Kneebone as examples of this erosion of implementation of the rights of refugees in domestic law were "non-entrée measures, interceptions, interdictions, offshore processing, restrictive application of the refugee definition and application of 'safe third country' concepts which are based upon the false understanding that there is no responsibility to process an asylum seeker if protection can be sought in a safe alternative country."[25]

Mertus has noted that the "new refugee regime" arising from the changed geopolitical role of states after the end of the Cold War "reflects the trend away from the State and strict notions of sovereignty but also the staying power of the statist paradigm."[26] As Kneebone explains:

---

[24] Kneebone "Preface" in Kneebone *ibid* at p.2.

[25] See Kneebone "The Legal and Ethical Implications of Extraterritorial Processing of Asylum Seekers: The 'Safe Third Country' Concept" in McAdam (ed) *Forced Migration and Human Rights* (Hart 2008).

[26] Mertus "The State and the Post-Cold War Refugee Regime: New Models, New Questions" (1998) 10 International Journal of Refugee Law 321.

> "concern with territorial sovereignty prevailed in the context of decentralised and weak states. Further, the root causes of displacement were perceived to be qualitatively different. ... 'Receiving states talk less about the human rights of the uprooted and more about their own rights'"[27]

A further striking trend in recent years has involved shifting the responsibility for refugee populations away from developed Western states onto developing states who are particularly ill-equipped to respond.[28] For example, the total number of refugees identified by UNHCR in 2012 was 10.5 million, of whom 8.5 million (or 81% of the global refugee population) were hosted by developing countries.[29] UNHCR also noted that the 49 least developed countries provided asylum to 2.5 million refugees, or 24% of the total.[30] Commenting on this trend, Kneebone noted:

> "If the international regime of refugee protection is to be sustained, the burden is on Northern states to act responsibly. This includes using their legal systems to support rather than to deny protection to asylum seekers where appropriate. But rather than beginning with that premise, states have typically insisted on their sovereign rights to determine who will enter their territory. Although the human rights context of refugee law is widely acknowledged, it is applied inconsistently. Current indications are that refugee law is inconsistent between states at the national level. It seems that states are

---

[27] *Op cit* at pp.28-29.

[28] See generally Gibney "Forced Migration, Engineered Regionalism and Justice Between States" in Kneebone and Rawlings-Sanaei (eds) *New Regionalism and Asylum Seekers: Challenges Ahead* (Berghahn 2007), Chapter 3.

[29] UNHCR *Statistical Yearbook 2012* (December 2013) at p.6.

[30] *Ibid* at p.8.

using refugee law at the national level to achieve their own aims."[31]

Erika Feller, the Assistant High Commissioner for Protection at UNHCR has previously referred to the "asylum lottery" and remarked that:

> "finding asylum can become a matter of chance in some regions, due to inconsistency by States in applying Convention standards."[32]

One indication of the "asylum lottery" is the wide divergence between recognition rates for refugees among different countries and tribunals. For example, in 2002 the recognition rate in Canada was 55% in contrast to Greece, whose recognition rate was less than 2%. In the US and UK, recognition rates were around 30% whereas in Australia, Belgium and Sweden, the rate was 20-25%.[33] In Ireland, the recognition rate in 2002 was approximately 15%. [34] More recently, it has been noted that the overall recognition rate in Ireland in 2011 was 5%, in contrast with the EU average of approximately 25%.[35] It has been suggested that such statistical divergences:

> "suggest that national legal responses are significant in translating the international regime of refugee protection into

---

[31] *Op cit* at p.29.

[32] UNHCR Statement, 58th Session of the UNHCR Excom programme, agenda item 5(a) in introducing the 2007 Note on International Protection, 3 October 2007.

[33] Kneebone *op cit* at p.29.

[34] According to the Annual *Report of the Refugee Applications Commissioner 2002* (ORAC 2003), the recognition rate at first instance for 2002 was 5.9%, while the *Annual Report of the Refugee Appeals Tribunal 2002* (Refugee Appeals Tribunal 2003) notes that the recognition rate at appeal stage was 24%, yielding a composite recognition rate of 15%.

[35] Irish Refugee Council *Difficult to Believe: The Assessment of Asylum Claims in Ireland* (2012) at p.1.

practice. They demonstrate the interconnectedness of the international and the national rule of law. They suggest the important role of national legal systems in implementing the international law rights of refugees and asylum seekers and the opportunities that exist for interpreting and implementing those rights according to domestic or national understandings, given the 'imperfectness' of the regime..."[36]

As Kneebone has noted, "the rights and status of the asylum seeker in the legal system raises fundamental questions about how to maintain the 'integrity' of the rule of law when it is under challenge, and the role of the state in protecting individuals who are not 'nationals.'"[37] Furthermore, it is necessary to consider the extent to which national legal responses may be regarded as posing a challenge to the international regime of refugee protection:

> "The Refugee Convention imposes a basic obligation of non-refoulement on states, but as a result of general policies aimed at deterring spontaneous asylum seekers, many categories of individuals are excluded from the right to an individual determination of their status which the Refugee Convention envisages. States are avoiding engagement with that obligation by denying the right to seek asylum, or by granting other forms of complementary protection. If states are bypassing the international system of refugee protection, that has implications for the development of policy responses at the international level."[38]

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[36] Kneebone *op cit* at p.30.

[37] *Ibid.*

[38] *Ibid* at p.31.

The Rule of Law

It is beyond the scope of this thesis to undertake an exhaustive examination of the concept of "the rule of law," but it is necessary briefly to consider its origin and scope, in order to define what is meant by the rule of law for the purposes of my discussion.

The origin of the phrase "the rule of law" is often identified as Dicey's 1885 text *An Introduction to the Study of the Law of the Constitution*,[39] although Tamanaha notes that the concept has a much older pedigree.[40] Dicey gave three meanings to the rule of law; first:

> "We mean, in the first place, that no man is punishable or can lawfully be made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the law…
>
> We mean in the second place, when we speak of 'the rule of law' as a characteristic of our country, not only that with us

---

[39] Dicey *An Introduction to the Study of the Law of the Constitution* (Macmillan 1885).

[40] Tamanaha has traced the idea back to Aristotle's *Politics* Book III, 1286 at p.78, where he stated "Now, absolute monarchy, or the arbitrary rule of a sovereign over all the citizens, in a city which consists of equals, is thought by some to be quite contrary to nature; … Wherefore it is thought to be just that among equals every one be ruled as well as rule, and therefore that an should have their turn. We thus arrive at law; for an order of succession implies law. And the rule of the law, it is argued, is preferable to that of any individual. On the same principle, even if it be better for certain individuals to govern, they should be made only guardians and ministers of the law… Therefore he who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men. The law is reason unaffected by desire". Tamanaha further develops the evolution of the concept through Greek and Roman times, into the Middle Ages and the Enlightenment, before critiquing modern theories of both the formal and substantive concept of the rule of law: Tamanaha *On the Rule of Law* (Cambridge University Press 2004) at pp.8-9.

> no man is above the law but (which is a different thing) that here, every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals…
>
> There remains yet a third and a different sense in which the 'rule of law' or the predominance of the legal spirit may be described as a special attribute of English institutions. We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts; whereas under many foreign constitutions the security (such as it is) given to the rights of individual results, or appears to result, from the general principles of the constitution."[41]

Craig suggests that Dicey's conception of the rule of law is formalist, insofar as it is concerned with the formal status of law and not with its substantive content.[42] Another influential scholar who subscribed to the formalist conception of the rule of law is Raz, who justified this approach as follows:

> "If the rule of law is the rule of the good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function. We have no need to be converted to the rule of law just in order to discover that to believe in it is to believe that good should triumph. The rule

[41] *Op cit* at p.195. For a masterful discussion of legal formalism, see Redmond *People, States and Hope: Cosmopolitanism and the Future of International Law* (Wolf 2012) at pp.71-80.

[42] See Craig "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" [1997] Public Law 467.

> of law is a political ideal which a legal system may lack or possess to a greater or lesser degree. That much is common ground. It is also to be insisted that the rule of law is just one of the virtues by which a legal system may be judged and by which it is to be judged. It is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man."[43]

The primary objection to the formalist conception of the law is that it is capable of allowing the law to be used as an instrument of oppression and the mass violation of human rights; as the formalist approach is concerned only with the legal process by which laws are created, it is unconcerned with the substantive content of laws properly enacted. As Raz noted:

> "A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies ... it will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law ... The law may ... institute slavery without violating the rule of law."[44]

This is sometimes referred to as a "thin" definition of the rule of law.[45] For Raz, protection against the potential for abuses under such a thin rule of law came not from importing substantive contents into

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[43] Raz "The Rule of Law and its Virtue" (1977) 93 LQR 195 at 196.

[44] Raz "The Rule of Law and its Virtue" in Raz *The Authority of Law: Essays on Law and Morality* (OUP 1979) at pp.211, 221.

[45] See Craig "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" [1997] Public Law 467.

the rule of law, but from the requirement that validly enacted laws should be capable of guiding conduct in order to allow people plan their lives accordingly. From this proposition flowed other requirements, such as the requirement "that laws should be prospective, not retrospective; that they should be relatively stable; that particular laws should be guided by open, general and clear rules; that there should be an independent judiciary; that there should be access to the courts; and that the discretion which law enforcement agencies possess should not be allowed to undermine the purposes of the relevant legal rules."[46]

Although recognising the logical force of Raz's contention, Bingham "roundly rejects it in favour of a 'thick' definition, embracing the protection of human rights within its scope."[47] This is the substantive conception of the rule of law. Dworkin is one of the most influential proponents of this approach; for Dworkin, the legal system "constitutes a coherent and integrated scheme of rules and principles that reflect the moral life and vision of the community."[48] Dworkin's theory of 'law as integrity' asked judges to assume, 'so far as possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process.'[49]

One of the primary criticisms which can be made of the substantive conception of the rule of law is the assumption that there is any such identifiable version of the community's moral life and vision; "in a deeply pluralistic society, Dworkin's account has questionable purchase, for there are competing sets of moral principles."[50]

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[46] *Ibid* at p.469.

[47] Bingham *On the Rule of Law* (Penguin 2010) at p.67.

[48] Tamanaha *op cit* at p.80.

[49] *Ibid* at p.243.

[50] *Ibid* at p.81.

Craig summarises the difference between the formal and substantive conceptions of the rule of law as follows:

> "Formal conceptions of the rule of law address the manner in which the law was promulgated (was it by a properly authorised person…); the clarity of the ensuing norm (was it sufficiently clear to guide an individual's conduct so as to enable a person to plan his or her life etc); and the temporal dimension of the enacted norm (was it prospective…). Formal conceptions of the rule of law do not however seek to pass judgment on the actual content of the law itself. They are not concerned with whether the law was in that sense a good law or a bad law, provided that the formal precepts of the rule of law were themselves met. Those who espouse substantive conceptions of the rule of law seek to go beyond this. They accept that the rule of law has the formal attributes listed above, but they wish to take the doctrine further. Certain substantive rights are said to be based on, or derived from, the rule of law. The concept is used as the foundation for these rights, which are then used to distinguish between 'good' laws, which comply with such rights, and 'bad' laws, which do not."[51]

As Tamanaha notes, the history, politics and theories surrounding the notion of the rule of law are "a tale of continuity, shared understandings and sharp disputes":

> "Moreover, each theory of the rule of law, whether formal or substantive, raises serious objections or concerns. This is to be expected from any idea that has survived over two millennia, playing a pivotal role in so many contexts…"[52]

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[51] *Op cit* at p.467.

[52] *Op cit* at p.114.

Whichever conception is preferred, certain core themes can be identified; for Tamanaha, these are the notion of "government limited by law", "formal legality" and "rule of law, not rule of men."[53] It is submitted that within each of these three themes so identified, the role of an independent judiciary and a fair hearing are key.

Thus, on the concept of government limited by law, Tamanaha notes that this incorporates the sense that "officials must abide by the currently valid positive law" as well as restraints on the law-making power.[54] In this context, the notion of restraint on judicial power also incorporates the role of an independent judiciary which holds the other parts of the government apparatus accountable on legal grounds.[55] From the formalist perspective, as noted above, Raz suggested that in order to comply with the rule of law, a number of mechanisms were required, including an independent judiciary, open and fair hearings without bias and review of legislative and administrative officials.[56] From the substantive perspective, one of the core tenets Bingham articulates in his conception of the rule of law is that "adjudicative procedures provided by the State should be fair" in which he emphasises the importance of judicial independence.[57]

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[53] *Ibid,* chapter 9.

[54] *Ibid* at pp.114-119. On the nature of restraints on government power, he notes "These restraints have been understood in terms of the dictates of natural or divine law, or a timeless customary law, which were the dominant views in the Middle Ages, or in terms of human or civil rights, which is the common phraseology today" (at p.115).

[55] *Ibid.*

[56] See Craig *op cit* at p.469.

[57] *Op cit* at pp.92-93.

The second common theme to both conceptions of the rule of law is "formal legality", which entails public, prospective laws, and also the qualities of generality, equality of application and certainty:

> "Formal legality emphasises a rule-bound order established and maintained by government."[58]

Again, within this theme, the judicial role is vital; "the fullest procedural sense of formal legality also includes the availability of a fair hearing within the judicial process." [59] From the formalist perspective, Hayek suggested that all rule of law systems possess three attributes of generality, equality and certainty, and regarded the separation of powers as mandated by the attribute of generality:

> "for only in this manner can the law be set out in abstract terms in advance of its application to any particular individual: legislative and judicial separation thus is by implication also an 'integral part' of the rule of law."[60]

From the substantive perspective, Dworkin's rights conception also envisaged a clear role for the judiciary:

> "It assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole. It insists that these moral and political rights be recognized in positive law, so that they may be enforced upon the demand of individual citizens through courts or other judicial institutions of the familiar type, so far as this is practicable."[61]

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[58] Tamanaha *op cit* at p.119.

[59] *Ibid.*

[60] Hayek *The Constitution of Liberty* (University of Chicago Press 1960) at pp.210-212.

[61] Dworkin *A Matter of Principle* (1985) at pp.11-12.

Finally, Tamanaha's third common theme, "rule of law, not man" is concerned also with values of predictability, certainty and consistency, but again the judicial role is at once implicit yet also crucial:

> "Laws are not self-interpreting or applying; the operation of law cannot be sequestered from human participation."[62]

In order to guard against untrammelled judicial power, it is necessary that the judiciary is comprised of suitably qualified legal experts who will act as "special guardians of the law":

> "as the judge becomes indoctrinated in the ways of the law and the judicial role, the judge [thus] *becomes* the law personified. In the ideal, the judge is to be unbiased, free of passion, prejudice, and arbitrariness, loyal to the law alone."[63]

Tamanaha suggests that this chain of reasoning is supported by two additional social developments: first, the extraordinary growth of the legal tradition and its extensive social penetration, and the second as the separation of powers which established the independence of judges:

> "The common formula for achieving this involved the selection of judges based upon legal qualifications (legal training and experience), long term appointments for judges, procedural and substantive protections against removal of judges, reasonable compensation for judges, and sufficient resources to maintain a functioning court system."[64]

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[62] *Op cit* at p.123.

[63] *Ibid.*

[64] *Op cit* at p.124.

Whilst this discussion has sought to highlight areas of commonality between the formalist and substantive conceptions of the rule of law, such as certainty and predictability of the law and the importance of an independent judiciary, as Craig ultimately notes:

> "The phrase the "rule of law" has a power or force of its own. To criticise governmental action as contrary to the rule of law immediately casts it in a bad light. Such criticism may well be warranted depending upon the circumstances. Yet if the nub of the critique is posited upon the substantive conception of the rule of law then intellectual honesty requires that this is made clear..."[65]

Insofar as this thesis is concerned with the protection of the rights of refugees, preference is given to the substantive conception of the rule of law. This is necessary insofar as the limitations of the formalist conception give rise to potential for breaches of the rights of refugees; the Refugee Convention is the ultimate source for the rights of refugees, complemented in some instances by other international human rights instruments. Further, it is submitted that having regard to the normative framework underpinning the Irish Constitution, the substantive conception of the rule of law is already a familiar part of the Irish jurisprudential framework.[66]

It is necessary in this context to address briefly the role of the judiciary under the substantive conception of the rule of law, with a

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[65] *Op cit* at p.486.

[66] See, eg, *In re Article 26 and the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 IR 360 where the Supreme Court held that the State was founded on the rule of law. In *Maguire v Ardagh* [2002] 1 IR 385 Denham J referred to the rule of law as a cornerstone of the Irish legal system and a principle fundamental to constitutional justice that requires that the law be public and precise. See generally de Blacam *Judicial Review* (2nd ed Tottel 2009).

particular focus on the remedy of judicial review.[67] It is generally acknowledged that judicial review is an essential element within the substantive concept of law, for it is in this way that the rights of individuals may ultimately be vindicated in the face of administrative or legislative illegality.[68] The danger that "the rule of law might become rule by judges" in this context is one of the most frequently cited criticisms of the substantive conception of the rule of law and the role of the courts on judicial review. [69] In this way, the substantive conception of the rule of law has been said to represent a threat to democracy.[70] However, it may be said that a key feature of the nuanced, ever evolving understanding of the separation of powers in this jurisdiction is the ability of judges to subject executive and legislative action to judicial review save in certain limited circumstances.[71] As will be demonstrated throughout the critique of Irish law and practice, the role of the judiciary in subjecting refugee decisions to judicial review has been a key bulwark in the defence of the rights of refugees in this jurisdiction.

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[67] Decisions in the refugee process in Ireland at both first instance and appeal are made in the context of administrative structures and are subject only to judicial review; there is no right of appeal from an administrative decision in the refugee process to a court of law in Ireland.

[68] See generally Tamanaha *op cit* at pp.50-57.

[69] Bingham *op cit* at p.4.

[70] See however the dictum of Barak CJ in *United Mizrahi Bank Ltd v Migdol Village* (1995) 49(4) PD 221, quoted with approval by Denham J in her dissenting judgment in *TD v Minister for Education* [2001] 4 IR 259 at pp.313-314; Barak CJ stated that judicial review of constitutionality is the very essence of democracy, for democracy does not only connote the rule of the majority. Democracy also means the rule of basic values and human rights ... Democracy is a delicate balance between majority rule and the basic values of society ... To maintain that judicial review is undemocrati is to maintain that safeguarding human rights is undemocratic."

[71] See de Blacam *op cit* at paras.2.25-2.39. See also Carolan *The New Separation of Powers: A Theory for the Modern State* (Oxford University Press 2009).

Methodology

The thesis employs a number of different research methodologies. Its primary method is that of doctrinal legal analysis. The provisions of the various international, regional and domestic legal instruments relating to refugees are analysed and the reasoning in judgments concerned with refugees are analysed and critiqued. The thesis also locates refugee law in its legal and social context, using historical research to do so. Primary sources such as parliamentary debates, original policy documents and contemporary newspaper reports were researched in addition to secondary materials.

Proposed outline

Chapter one introduces the refugee in international law, from both a philosophical point of view and a legal point of view. The evolution of the international refugee regime is considered, with a particular emphasis on the different responses to emerging refugee crises throughout the twentieth century, from the early juridical approach adopted by the League of Nations, through the social or group perspective adopted during the 1930s. This exercise is necessary not just for an historical understanding of refugee law, but also to allow a critique of the extent to which the individualised conception of a refugee under the 1951 Convention should be understood with reference to the events of World War II which inspired it. This chapter also considers the nature and extent of the right to asylum which exists in international law, considering both the provisions of Article 14 of the Universal Declaration of Human Rights and more recently Article 18 of the Charter of Fundamental Rights. The core refugee protection norm of the principle of non-refoulement as articulated in Article 33 of the Refugee Convention is introduced here, given its centrality in the protection of refugees generally. The chapter concludes with a brief exposition of the international expansion of the refugee concept through the role of the UNHCR as well as regional protection regimes, including the Convention Governing the Specific Aspects of Refugee Problems adopted by the

Organisation of African Unity (OAU) in 1969 and the Latin American Cartagena Declaration on Refugees of 22 November 1984. The focus of discussion here is to elucidate potential gaps in the scope of protection under the Refugee Convention with reference to more generous regimes adopted under these regional arrangements. Finally, the measures adopted in Europe under the auspices of both the Council of Europe and the European Union are addressed, with a particular emphasis on legal measures adopted pursuant to the Common European Asylum System in the light of the impact of the EU asylum acquis on Irish law.

Building on this discussion, chapter two sets out a detailed critique of the core element in the definition of a refugee, encompassing the notions of alienage, a well founded fear, the concept of persecution and the five Convention grounds of race, religion, nationality, political opinion and membership of a particular social group. The discussion in this chapter is drawn not just from an analysis of the provisions of the Refugee Convention itself, but also the provisions of the Qualification Directive adopted under EU law, and the extent to which the European regime is consistent with the Convention. This is important from the perspective of the rule of law insofar as concerns have been expressed that in some instances, the standards adopted under the Qualification Directive are lower than the Convention, thus potentially threatening the integrity of the international framework and also allowing for violation of the rights of refugees in the gaps which may exist between these two frameworks.

Having set out the guiding principles under the international and European frameworks for refugee protection in the first two chapters, chapter three then moves to introducing the refugee in Irish law. The chapter begins with a brief history of refugees in Ireland, from a socio-historical perspective, noting the move from small groups of refugees arriving on a pre-arranged, "programme" basis to the

dramatic shift in the 1990s to a large influx of asylum seekers whose arrival was not anticipated, and the implications of this shift on both the institutional and administrative frameworks concerning refugees in Irish law. The early, non-statutory arrangements for processing of refugee applications are considered (namely the von Arnim procedure and the Hope Hanlan procedure) before the discussion turns to the Refugee Act 1996, the first (and, to date, the only) statutory regime governing the refugee process in Ireland. This chapter then proceeds to analyse the constituent elements in the substantive definition of a refugee in Irish law, both under the Refugee Act 1996 and more recently the statutory instruments implementing the EU Qualification Directive. The principle of non-refoulement in Irish law is also addressed, with an emphasis on the evolving jurisprudence of the Irish courts on the nature and scope of this right, and the duties of both primary decision-makers and courts on review to ensure respect for this fundamental norm. From the perspective of the rule of law, much of the focus in this chapter is on the principle of certainty, and the extent to which the provisions of Irish law concerning the definition of a refugee comply with this requirement. The role of the judiciary in the interpretation of core norms is also assessed, with an emphasis on the extent to which the rights of refugees (and in particular, the ultimate right to non-refoulement) is respected.

Drawing on concerns at the potential for violation of substantive refugee rights in the procedural context, in the absence of a mandated procedure under the Refugee Convention itself allied to the fact that there is no Treaty body established for the purpose of enforcement of the Refugee Convention, chapter 4 considers the procedural framework for the determination of refugee applications in Ireland. The path of an asylum application is traced from the initial application through to first instance decisions at the Refugee Applications Commissioner and rights of appeal to the Refugee Appeals Tribunal. This incorporates a discussion of the concepts of

safe first countries, safe third countries and the manifestly unfounded procedure, not just from the statutory perspective but also as addressed by decisions of both the Irish superior courts and the Court of Justice of the European Union. Drawing on the common themes to the rule of law of certainty, consistency, independence and transparency, this chapter highlights a number of grounds for significant concern in the Irish procedural framework governing refugee applications. Given the emphasis on credibility findings within the process, a number of decisions of the High Court are critiqued, not just to enable a consideration of the role of the judiciary in the protection of refugee rights but also to demonstrate that the nature and extent of the reliance on credibility findings by some refugee decision-makers in this jurisdiction poses a real threat to the rule of law.

Chapter five considers the rights of refugees, both as provided under the Refugee Convention and as implemented in Irish law. Commencing with a discussion of the basis of entitlement under the Refugee Convention, it is demonstrated that the Convention does not provide a single, unified standard for enjoyment of rights by refugees, but rather distinguishes between three broad categories, namely rights enjoyed by refugees by the fact of their "simple presence"; rights limited to those refugees "lawfully present"; and rights limited to those refugees who are "lawfully resident." The nature of the rights of refugees under each category are considered, including the right to freedom of religion, freedom of association, access to the courts, the right to work, public relief and social welfare, rights of residence and travel, citizenship and the right to family reunification. The analysis is again informed by the rule of law perspective, highlighting instances where lack of clarity, independence and transparency give rise to concern.

The final chapter considers loss and denial of refugee status, again deriving from the provisions of both the Refugee Convention and the

Qualification Directive. The rules regarding cessation of refugee status are considered, with a focus on certain aspects of the European and Irish frameworks which fall short of the standards required by the Convention. Grounds for exclusion from refugee status are also assessed from a similar perspective, and in respect of both cessation and exclusion a number of recent decisions of the Irish courts and the Court of Justice of the European Union are analysed with a view to identifying the areas of divergence and the consequences for the rule of law and the rights of refugees.

The thesis concludes with a review of the core requirements of the rule of law and the rights of refugees. The limitations in the Refugee Convention itself are assessed, including the absence of a procedural framework and the lack of an enforcement mechanism. The provisions of both the substantive and procedural frameworks governing the refugee process in Ireland are recalled, in order to demonstrate the serious grounds for concern which exist across a number of indicators so far as the rule of law is concerned, including independence, transparency and consistency. The consequences of these deficiencies, including high rates of judicial review, are addressed, as is the role of the courts in enforcing the rights of refugees and ultimately upholding the rule of law.

Chapter 1 The Refugee in International Law

Introduction

This chapter introduces the refugee in international law, both from a philosophical and legal perspective. The evolution of the international refugee regime is considered, with a particular emphasis on the different responses to emerging refugee crises throughout the twentieth century, from the early juridical approach adopted by the League of Nations, through the social or group perspective adopted during the 1930s. This exercise is necessary not just for an historical understanding of refugee law, but also to allow a critique of the extent to which the individualised conception of a refugee under the 1951 Convention should be understood with reference to the events of World War II which inspired it. This chapter also considers the nature and extent of the right to asylum which exists in international law, considering both the provisions of Article 14 of the Universal Declaration of Human Rights and more recently Article 18 of the Charter of Fundamental Rights. The core refugee norm of the right not to refouled as guaranteed by Article 33 of the Refugee Convention is also addressed. The chapter concludes with a brief exposition of the international expansion of the refugee concept through the role of the UNHCR as well as regional protection regimes, including the Convention Governing the Specific Aspects of Refugee Problems adopted by the Organisation of African Unity (OAU) in 1969 and the Latin American Cartagena Declaration on Refugees of 22 November 1984. The focus of discussion here is to elucidate potential gaps in the scope of protection under the Refugee Convention with reference to more generous regimes adopted under these regional arrangements. Finally, the measures adopted in Europe under the auspices of both the Council of Europe and the European Union are addressed, with a particular emphasis on legal measures adopted pursuant to the Common European Asylum System in the light of the

impact of the EU asylum acquis on Irish law. A proper understanding of the international and regional conceptions of refugees and their rights is clearly necessary before any attempt can be made to assess the adequacy and effectiveness of the manner and levels of protection afforded in Ireland.

The concept of asylum in early international law

The concept of "asylum" is an ancient one, appearing in manuscripts from ancient Greece and Rome. The word 'asylum' comes from the Greek 'asylos', meaning "that which cannot be robbed: 'a' (without) + 'syle' (the right of seizure)."[1]

Some suggest that the right of asylum can be traced back to ancient Egypt, and the legend of King Assyrophernes, who erected statues in honour of his dead son where people could seek sanctuary.[2] Others point to Persia as the origin of the concept; this derives from an inquiry commissioned by the Emperor Tiberius in the first century AD on the Greek system of "temple asylum", which effectively granted immunity to fugitives from sanctuary within the walls of a sacred place.[3] This concept of sanctuary features in the work of Shakespeare,[4] and was widely known in England from the fourth to seventeenth centuries.[5]

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[1] See Dzubow "The Ancient Origins of Asylum: Part 1" (2014) The Asylumist 1.

[2] Others suggest that this is a myth born in the 18th century, pointing out that there is no reference to such a ruler in the Egyptian King Lists: *Ibid.* There are echoes of this story in the legend of the Assyrian king Ninus who built a commemorative statue in honour of his father which served as a place of safety for people fleeing harm; however, similar questions have been raised as to the accuracy of this historical record.

[3] See Stevenson *Power and Place: Temple and Identity in the Book of Revelation* (De Gruyter 2001) at pp.76, 112.

[4] Richard III, Act III, scene (i), where Elizabeth and the young Duke of York take sanctuary in a church from the villainous king.

[5] See Baker "The English Law of Sanctuary" (1990) 2(6) Ecclesiastical Law Journal 8.

Episodes of religious persecution in Europe in the fifteenth and seventeenth century[6] coincided with the work of some of the leading theoretical founders of international law who were writing at this time, such as de Vitoria, Suarez, Grotius, Pufendorf, Wolff and de Vattel.[7] Thus, Grotius (who himself enjoyed political asylum in France following imprisonment over a theological dispute),[8] spoke of "the inviolable nature of asylums", to which "victims of unmerited persecution" were entitled, although he was careful to exclude from the scope of protection "those who have committed crimes injurious to mankind, and destructive to society."[9] Grotius' conception was clearly premised on a right to asylum, in contrast to Pufendorf, who saw it as a "commendable act of humanity" but not something which states could be compelled to do:

> "It belongs, indeed, to humanity to receive a few strangers, who have not been driven from their homes for some crime, especially if they are industrious and wealthy, and will not disturb neither our religious faith nor our institutions ... every state may decide after its own custom what privilege should be granted in such a situation ... But when these people are worthy of our sympathy, and no other reason stand in the way, it would certainly be an act of humanity on our part to confer a kindness on them, that will not be too onerous on us, or the cause of later regret ... Furthermore, since whatever is conferred upon such people we can impute to them as a kindness, it follows that they cannot seize for themselves anything they may want to occupy, as if they

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[6] For example, the Alhambra Decree ordering the expulsion of Jews from Spain in 1492 and the persecution of the Huguenots in France in 1685 following the Edict of Fontainebleu.

[7] See further Einarsen "Drafting History of the 1951 Convention and its 1967 Protocol" in Zimmermann ed *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (Oxford University Press 2011) at p.41

[8] See generally de Burigny *The Life of the Truly Eminent and Learned Hugo Grotius* (Millar 1754).

[9] Grotius *The Rights of War and Peace, Including the Law of Nature and of Nations* (1623) (Cosimo 2007) at p.260.

> had a perfect right to it, or any section of our land that may be unused, but they must be content with what we have assigned to them."[10]

Thus, Pufendorf characterised asylum as a beneficent act of a magnanimous (albeit self-interested) state, placing his conception very much at odds with the rights conception advanced by Grotius. A century later, Wolff identified the concept of "civitas maxima", "'the world community' which obliged states to grant asylum, albeit holding that "individuals seeking asylum cannot as such challenge the sovereignty of each State."[11] Wolff also contemplated the possibility of binding treaties whereby States would agree to accept responsibility for refugees.[12] Also writing in the eighteenth century, de Vattel proposed a compromise on the nature and extent of a right to asylum:

> "as property could not be introduced to the prejudice of the right acquired by every human creature, of not being absolutely deprived of such things as are necessary,—no nation can, without good reasons, refuse even a perpetual residence to a man driven from his country. But if particular and substantial reasons prevent her from affording him an asylum, this man has no longer any right to demand it…"[13]

De Vattel's conception involved "neither an absolute right for the individual nor complete discretion for the receiving State"; for him, the right to seek asylum was conditional, for "only if a State had just reasons, it could reject the claim for asylum from a man driven from his own country."[14] Clear parallels can be drawn between these differing

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[10] Pufendorf *Of the Law of Nature and Nations* (1672) (Scott (ed), Oldfather (tr) 1934) at pp.366-367.

[11] Einarsen *op cit* at p.42.

[12] *Ibid.*

[13] De Vattel *The Law of Nations* (1758) (Haakonssen ed, 2008) at p.227.

[14] Einarsen *op cit* at p.42.

conceptions on the right to asylum with the continuing debate on the issue in recent times. It is submitted that the rights-based conception of asylum is preferable to the humanitarian approach, as this model provides certainty and predictability that refugees can access and enjoy the fundamental right to asylum.[15]

The evolution of the international refugee regime

Notwithstanding such philosophical recognition of the nature and extent of asylum, refugee law as we know it is a twentieth century invention; prior to this, laissez-faire immigration policies generally meant that those fearing persecution could simply relocate to another country without obstacle.[16] As Hathaway describes:

> "During a period of more than four centuries prior to 1920, there was little concern to delimit the scope of the refugee definition. Groups of refugees tended to be relatively small and many of them chose to migrate to the Americas and other newly-discovered lands. Moreover, the reign of liberalism with its individualistic orientation and respect for self-determination led most European powers to permit essentially uncontrolled and unrestricted immigration."[17]

However, as countries gradually began to restrict inward migration, those seeking refuge found themselves unable to move;[18] as Skran

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[15] See further below.

[16] As Einarsen notes, "the tradition of providing 'asylum' for victims of persecution has ancient roots and appears in old books and other written materials from the Middle East, Greece and several other countries": Einarsen, *ibid.*. However, this tradition did not require the adoption of a formalised framework in the absence of legal obstacles to migration at that time.

[17] Hathaway "The Evolution of Refugee Status in International Law: 1920-1950" (1984) 33 International and Comparative Law Quarterly 348 at p.348.

[18] See generally Dauvergne "Challenges to Sovereignty: Migration Laws for the 21st century" Working Paper No.92, New Issues in Refugee Research Series, 31 July 2003.

observes, "more than anything else, the development of refugee law represents an attempt to provide legal status and personal security to those forced to flee their home countries but unable to establish new lives elsewhere."[19]

The first formal refugee regime commenced with the decision by the League of Nations to appoint Fridtjof Nansen as High Commissioner for Russian Refugees, in order to address the situation of over one million Russian refugees who were present in neighbouring countries without documents, and indeed nationality. [20] Nansen convened an intergovernmental conference in Geneva in July 1922 attended by the 16 countries playing host to the Russian refugees, where it was agreed that a document (known as the "Nansen passport") would be issued to persons of Russian origin who had not acquired another nationality.[21]

The scope of application of the Nansen passport scheme was extended to Armenian refugees in 1924, but it is noteworthy that neither the 1922 arrangement for Russian refugees, nor the 1924 plan for Armenian refugees, contained a definition of a refugee. The first explicit definition

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[19] Skran "Historical development of international refugee law" in Zimmermann (ed) *The 1951 Convention Relating to Refugee Status and its 1967 Protocol* (OUP 2011) at p.6.

[20] These refugees were fleeing the aftermath of the Bolshevik revolution, some for political reasons and others who simply sought to escape the dire conditions that followed the revolution, including material devastation and famine. As Hathaway notes, "the refugees' circumstances in the countries of first reception were desperate: the value of the roubles they brought with them deteriorated quickly and dramatically, most were without employment and illness was rampant. The vast majority of the Russians had no valid travel documents as a result of which they lacked the mobility to search out better living conditions elsewhere in Europe or overseas. The prospects for repatriation with a guarantee of freedom from retaliation by the Soviet authorities were bleak": *op cit* at p.351.

[21] The purpose of the Nansen passport was to provide refugees with a more secure legal status, and enable them to travel; but it also served to allow governments gather accurate information on the number of refugees living within their territory.

was set out in the 1926 revised arrangement relating to Russian and Armenian refugees, article 2 of which defined a refugee as:

> "Russian: Any person of Russian origin who does not enjoy or who no longer enjoys the protection of the Government of the Union of Socialist Soviet Republics and who has not acquired another nationality.
> Armenian: Any person of Armenian origin formerly a subject of the Ottoman Empire who does not enjoy or who no longer enjoys the protection of the Government of the Turkish Republic and who has not acquired nationality."[22]

Hathaway refers to this phase in the evolution of the international refugee definition as the juridical phase, which:

> "treats as refugees groups of persons outside their State of origin who have been effectively deprived of the formal protection of their government. The purpose of refugee status conceived in juridical terms is to facilitate the international movement of persons who find themselves abroad and unable to migrate because no nation is prepared to accept responsibility for them."[23]

The juridical approach was thus unconcerned with the *reasons* for the denial or withdrawal of protection; to qualify as a refugee, it was sufficient merely to demonstrate de jure protection was no longer available to the individual. The limited nature of this approach is demonstrated in the fact that the rights of refugees were not provided for

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[22] Arrangement Relating to the Issue of Identity Certificates to Russian and Armenian Refugees, Supplementing and Amending the Previous Arrangements Dated July 5th 1922 and May 31st 1924.

[23] Hathaway *op cit* at p.349.

other than the issue of the identity certificate.[24] Indeed, Hathaway suggests that the primary concern of this approach was not vindication of the rights of refugees, but rather to deal with the "international legal dilemma caused by denial of state protection", commenting:

> "The withdrawal of de jure protection by a state, whether by way of denaturalisation or the withholding of diplomatic facilities such as travel documents and consular representation, results in a malfunction in the international legal system. Because the then existing international law did not recognise individuals as subjects of international rights and obligations, the determination of responsibilities on the international plane fell to the sovereign state whose protection one enjoyed. When the bond of protection between citizen and state was severed, no international entity could be held accountable for the individual's actions. The result was that states were reluctant to admit to their territory individuals who were not the legal responsibility of another country. The refugee definitions adopted between 1920 and 1935 were designed to correct this breakdown in the international order, and accordingly embraced persons who wished to have freedom of international movement but found themselves in the anomalous situation of not enjoying the legal protection of any state."[25]

A further deficiency in the juridical approach can be identified in the fact that neither the 1922 arrangement concerning Russian refugees, the 1924 plan concerning Armenian refugees nor the revised arrangements adopted in 1926 addressed the question of *how* refugee status would be determined.[26]

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[24] For example, as Skran notes, "having a certificate did not guarantee a refugee the right to return to the host country issuing it": *op cit* at p.8.

[25] Hathaway *The Law of Refugee Status* (Butterworths 1991) at p.3.

[26] *Ibid* at p.10. The importance of procedural as well as substantive provisions in this context are addressed in chapter 4, infra.

While the Nansen passport system was welcomed insofar as it provided refugees with "a modicum of legal status",[27] Skran points out that by the late 1920s its "ad hoc and piecemeal nature" had become increasingly unacceptable, with a growing recognition in particular that "refugee problems would not disappear quickly as radical solutions could not be implemented."[28] As a result, the Twelfth Assembly of the League of Nations proposed the adoption of the first refugee convention, which ultimately led to the Convention Relating to the International Status of Refugees 1933. This marked a watershed moment in the development of refugee law, representing, as Beck describes:

> "the first binding multilateral instrument to afford refugees legal protection; it was, as well, the first international agreement to articulate the principle that refugees should not be returned involuntarily to their country of origin."[29]

The Preamble to the 1933 Convention represents the first direct articulation of the rights of refugees, stating that they:

> "shall be ensured the enjoyment of civil rights, free and ready access to the courts, security and stability as regards establishment and work, facilities in the exercise of the professions, of industry and of commerce, and in regard to the movement of persons, admission to schools and universities."[30]

More important still, the 1933 Convention included the first statement of the right of refugees not to be returned to their country of origin, thus "formalizing a clear understanding of the principle of non-

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[27] *Ibid* at p.13.

[28] *Ibid* at p.14.

[29] Beck "Britain and the 1933 Refugee Convention: National or State Sovereignty?" (1999) 11(4) International Journal of Refugee Law 597 at p.603.

[30] Convention Relating to the International Status of Refugees (adopted 28 October 1933, entered into force 13 June 1935) 159 LNTS 3663.

refoulement."[31] In Article 3 of the 1933 Convention, the Contracting Parties undertook:

> "not to remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (refoulement), refugees who have been authorised to reside there regularly, unless the said measures are dictated by reasons of national security or public order."[32]

While the 1933 Convention had a number of limitations, such as the fact that it was ratified by only eight countries, and the fact that its scope remained confined to those already under League of Nations protection, [33] it was nonetheless an important development in the evolution of international refugee law, insofar as it "set standards for refugee treatment in several key areas and came to exert a significant influence on adherent state behaviour."[34]

However, these limitations in the 1933 Convention meant that it was of little assistance in addressing the emerging refugee crisis arising from the ascendancy of the Nazis in Germany during the 1930s. In order to address this crisis, the League of Nations adopted a "Provisional Arrangement Concerning the Status of Refugees Coming from

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[31] Orchard "Displacement, Institutional Development and the Normative Environment: The Case of the League of Nations and the United Nations" Paper presented at International Conference on Refugees and International Law: The Challenge of Protection, Oxford, United Kingdom, 15-16 December, 2006.

[32] Article 3 of the Convention Relating to the International Status of Refugees 1933. Interestingly, Skran observes that Article 3 of the 1933 Convention was not without controversy; of the eight states which ratified the Convention, three made reservations to the article - the United Kingdom "expressly objected to the principle of non-rejection at the frontier": *op cit* at p.19.

[33] The 1933 Convention did not adopt a new definition of a refugee, but rather adopted the definition set out in the earlier arrangements in respect of Russian, Armenian and other refugees: see further Skran *op cit* at p.18.

[34] Beck *op cit* at p.603.

Germany" on 4 July 1936.[35] Article 1 of this arrangement stated that the term "refugee coming from Germany":

> "... shall be deemed to apply to any person who was settled in that country, who does not possess any nationality other than Germany nationality, and in respect of whom it is established in law or in fact he or she does not enjoy the protection of the Government of the Reich."

Notwithstanding the apparent similarities in this definition to the earlier arrangements, Hathaway suggests that the approach from 1935 onwards marked a break from the juridical perspective towards the adoption of a "social perspective", which he explains as follows:

> "Refugees defined from the social perspective are the helpless casualties of broadly based social or political occurrences which separate them from their home society. Assistance in migration is afforded refugees not, as from the juridical perspective, with a view to correcting an anomaly in the international legal system, but rather in order to ensure the refugees' safety or well being. The categories of persons eligible for international assistance included groups adversely affected by a particular social group or political event, not just those united by a common status in relation to the international legal system."[36]

This perspective arises not so much from the definition of refugees, but the provisions of the 1936 arrangement concerning travel and identity certificates,[37] expulsion and non-refoulement[38] and the legal status of

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[35] Provisional Arrangement Concerning the Status of Refugees Coming from Germany, 4 July 1936 (3952 LNTS 77).

[36] Hathaway *op cit* at p.4.

[37] Articles 2 and 3 of the 1936 Provisional Arrangement provided for a Nansen passport system for refugees coming from Germany, which set out in some detail the procedure for the issuing of such documents, the duration of the documents, the cost of issuing

refugees.[39] Similar provisions were contained in subsequent measures adopted, including the 1938 Convention Concerning the Status of Refugees coming from Germany[40] and the Protocol to the Provisional Arrangement and to the Convention Concerning the Status of Refugees Coming from Germany adopted in 1939.[41] In terms of the impact of the measures adopted in the 1930s which were informed by this social perspective, Skran suggests that the failure to guarantee refugees a place of asylum was the single greatest deficiency:

> "the signature problem for the Jewish refugees fleeing Nazi Germany was their inability to find a country of asylum. Without this, the impact of the guarantees of personal status in the 1938 Convention were greatly reduced."[42]

It is submitted that this is an enduring theme in refugee law; the existence of formal measures guaranteeing recognition as a refugee are

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such documents and the entitlement of a holder of the document to free movement within the territory of the country which issued it.

[38] Article 4 of the 1936 Provisional Arrangement was a somewhat weaker articulation of the non-refoulement provision in the 1933 Convention but nonetheless did place some limits on the ability of states to expel refugees, providing that in cases where a refugee was to be required to leave, the state must allow the refugee a suitable period within which to make alternative arrangements; the standard for expulsion was also set relatively high, being limited to grounds of national security or public order, and even in cases where that threshold was met, refugees could not be "sent back across the frontier of the Reich unless they have been warned and have refused to make the arrangements necessary to proceed to another country": Article 4(3).

[39] Article 5 of the 1936 Provisional Arrangement addressed the personal status of refugees, Article 6 addressed rights under national law and Article 7 concerned access to the courts, on terms similar to the equivalent provisions in the 1933 Convention: see Skran *op cit* at p.28.

[40] Convention Concerning the Status of Refugees coming from Germany, February 10, 1938 (4461 LNTS 61).

[41] Provisional Arrangement and to the Convention Concerning the Status of Refugees Coming from Germany adopted in 1939, September 14, 1939 (4634 LNTS 142).

[42] *Op cit* at p.34.

of little assistance if such rights cannot be enjoyed as a matter of practice. This once again demonstrates the extent to which the substantive rights of refugees can be undermined by gaps in the procedural framework.

While many criticisms have been made of the various measures adopted in the interwar period in respect of refugees, in terms of definition,[43] scope[44] and strength,[45] it is undoubtedly the case that:

> "the numerous arrangements and conventions, coupled with the activities of various refugee agencies, helped to establish that refugee assistance and protection constituted a legitimate function of international organisation and law ... these efforts to develop refugee law in the interwar years also helped to establish refugees as a special category of migrant. Both the 1933 and 1938 Conventions set standards for the treatment of refugees and, in some cases, influenced the shape of domestic laws and policies. While their provisions may not have gone far enough, their overall impact was to establish refugees as a special category of migrant deserving attention and help. ... Ultimately, the most important legal legacy of the League of Nations era was providing a foundation for the framers of the 1951 Convention to build on."[46]

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[43] For example, Grahl-Madsen was strongly critical of the focus on the absence of diplomatic criterion as the "essential criterion of refugeehood" by failing to consider the extent to which this was "caused by a deep-rooted political controversy between the authorities and the individual": *The Status of Refugees in International Law (Vol.1)* (AW Sijthoff 1966) at p.98.

[44] Holborn writing in 1938 called for "a generally accepted legal status for all political refugees": "The Legal Status of Political Refugees 1920-1933" (1938) American Journal of International Law 681 at 702.

[45] As Goodwin-Gill and McAdam note of this period, "limited ratifications of instruments containing equivocal and much qualified provisions effectively prevented the consolidation of a formal principle of non-refoulement": *op cit* at p.203.

[46] Skran *op cit* at p.36.

Hathaway suggests that the framework in respect of refugees from 1938 to 1950 was governed by an "individualist perspective" which was "revolutionary in its rejection of group determination of refugee status":

> "A refugee by individualist standards is a person in search of an escape from perceived injustice or fundamental incompatibility with her home state. She distrusts the authorities who have rendered continued residence in her country of origin either impossible or intolerable, and desires the opportunity to build a new life abroad. Refugee status viewed from this perspective is a means of facilitating international movement for those in search of personal freedom."[47]

One of the earliest examples of this shift can be seen in the expanded terms of remit of the Intergovernmental Committee on Refugees established in 1938 to address the exodus from Nazi Germany. Initially expressed as being intended to facilitate "involuntary migration from Germany (including Austria)",[48] a review in April 1943 expanded the mandate to include "all persons, wherever they may be, who, as a result of events in Europe, have had to leave, or may have to leave, their country of residence because of the danger to their lives or liberties on account of their race, religion or political beliefs."[49] A similar approach is evident in the expansion of the mandate of the United Nations Relief and Rehabilitation Administration from repatriation to refugee protection in 1945:

> "This reorientation was born of necessity. It had become clear that many individuals did not wish to return to their states of origin because of a continuing fear that they would be subject to persecution. This extension of the organisation's competence to

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[47] *Op cit* at p.5.

[48] Goodwin-Gill and McAdam *op cit* at p.18.

[49] *Ibid.*

> embrace refugee protection was attacked by the Eastern bloc countries which objected to individuals not returning to aid in the reconstruction efforts following the war. Crucially, following this criticism, the competence of the organisation in this field was narrowed to include only those individuals who could show concrete evidence that they would suffer persecution upon return to their state of origin. This marked a subtle shift towards the modern legal definition of a refugee by requiring that the individual demonstrate a specific likelihood of persecution by her state of origin and not simply that she possessed its nationality and lacked its protection."[50]

This individualist perspective had a significant impact on refugee status determination procedures; it was no longer possible to assign refugee status on the basis of belonging to a particular category, instead each case required an examination of the individual merits of each case. Hathaway has made the insightful observation that the "move to a more personal conception of refugeehood [also] altered substantive notions", whereby "the essence of refugee status came to be discord between the individual refugee applicant's personal characteristics and convictions and the tenets of the political system in her country of origin."[51]

This crucial shift in the basis for recognition served to heighten the potential discord between the substantive rights of refugees and the procedural frameworks necessary to give effect to those rights. The individualist conception of a refugee required an individual decision on the facts of each particular case, and the failure to put in place appropriate procedural guarantees might be said to have sown the seeds for subsequent failings in the international refugee regime.

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[50] Harvey *Seeking Asylum in the United Kingdom: Problems and Prospects* (Cambridge University Press 2000) at p.19.

[51] *Op cit* at p.5.

The International Refugee Organisation (IRO) was established in 1946 to deal with the refugee crisis in the aftermath of the Second World War.[52] The Constitution of the IRO recognised six categories of refugees as follows:

> "1. (a) Victims of nazi or fascist regimes or of regimes which took part on their side in the second world war, or of the quisling or similar regimens which assisted them against the United Nations, whether enjoying international refugee status or not;
> (b) Spanish Republicans and other victims of the Falangist regime in Spain…;
> (c) Persons who were considered refugees before the outbreak of the second world war, for reasons of race, religion, nationality or political opinion.
> 2. Subject to the … exclusion of … war criminals, quislings and traitors… a person … who is outside of his country of nationality or former habitual residence, and who, as a result of events subsequent to the outbreak of the second world war, is unable or unwilling to avail himself of the protection of the government of his country of nationality or former nationality.
> 3. … persons who, having resided in Germany or Austria, and being of Jewish origin or foreigners or stateless persons, were victims of nazi persecution and were detained in, or were obliged to flee from, and were subsequently returned to, one of those counties as a result of enemy action, or of war circumstances, and have not yet been firmly resettled therein.
> 4. … unaccompanied children who are war orphans or whose parents have disappeared, and who are outside their countries of origin…"[53]

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[52] See generally Einarsen *op cit* at pp.45-46.

[53] Annex I, Part I, Section 1 of the Constitution of the International Refugee Organisation.

The individualised conception of the refugee was not universally accepted; as Hathaway recounts:

> "During debate in the United Nations in 1946, for example, the socialist states asserted the impropriety of including political dissidents among the ranks of refugees protected by international law. ... The voting strength and influence of the Western alliance, however, led to a movement away from a focus on group de jure or de facto disenfranchisement, towards a personal evaluation of incompatibility between state of origin and refugee claimant in search of personal freedom and liberty. This initiative to define the refugee concept in a manner consistent with the ideology of the more powerful states set the stage for the development of contemporary international refugee law."[54]

Einarsen notes that paragraph 2 of the IRO definition of a refugee "could be applied to the Eastern Europeans who in practice did not want to go home for fear of persecution and other valid reasons linked to lack of protection from their own governments", whose resettlement in the West was not in the interests of the Soviet leadership, which refused membership of the IRO as a result.[55] In 1949, the United Nations decided that the IRO should be replaced with a new institution with a global focus on the refugee problem, the UNHCR.[56] Work on a new universal refugee regime was already underway, and in 1948 the Universal Declaration had recognised for the first time a human right to asylum.

Article 14(1) of the Universal Declaration of Human Rights states:

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[54] *Op cit* at pp.5-6.

[55] *Op cit* at pp.46-47.

[56] UN General Assembly Resolution on refugees and stateless persons, 3 December 1949, A/RES/319.

> "(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.
>
> (2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations."

The interpretation of Article 14 UDHR has, as Einarsen points out, often been disputed, as has its legal status in contemporary international law.[57] Probably the most fundamental difficulty with this provision is the fact that it does not govern the right of entry to another state in order to seek asylum;[58] furthermore, even if the refugee is able to access the territory of a contracting state and claim asylum, Article 14 "does not contain a guarantee of formalised asylum or permanent residence in the receiving state."[59] It is possible, however, to identify certain minimum obligations flowing from the provision; it is generally accepted that Article 14 prohibits expulsion or return of refugees to countries where they face persecution. [60] Einarsen suggests that it is clear from the travaux preparatoires to the Universal Declaration that while at least some States wanted to restrict the right to asylum as much as possible, there was "no convincing evidence that Article 14 UDHR was to be without substance."[61] This is in stark contrast to the strong criticism expressed by Lauterpacht in respect of the final wording of Article 14, who described it as "artificial to the point of flippancy" owing to the absence of any obligation on states to give effect to the right to asylum.[62] The level of sophistry engaged in by some states party would support this view; for example, the United Kingdom proposed deleting an earlier formulation concerning the right "to seek *and be granted* asylum" with the "vaguer

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[57] *Op cit* at p.47.

[58] Some egs.

[59] Einarsen *op cit* at p.47.

[60] The inter-relationship between non-refoulement and the right to asylum will be further addressed in Chapter 5 below.

[61] *Op cit* at p.48.

[62] Lauterpacht *International Law and Human Rights* (Praeger 1950) at p.422.

and far more innocuous 'and to enjoy it'", arising from a concern "to avoid language that might be interpreted as imposing obligations."[63] Einarsen suggests that the

> "better inference from the available legal sources is probably that the right 'to enjoy' asylum, read in conjunction with the UDHR as a whole, is basically an expression of the same principle that three years later was detailed, extended and made legally binding by the 1951 Convention."[64]

This conclusion is somewhat curious given that there is no statement of the right to asylum to be found in the 1951 Convention.[65] What is clear from the formulation of the right to asylum in Article 14 of the Universal Declaration of Human Rights is the by now common refrain; while international instruments have evolved towards the recognition of a substantive definition of asylum and refugee status, the failure to underpin these concepts with clear procedural frameworks risks undermining the very substance of the rights concerned.

By the time of the promulgation of the Universal Declaration on Human Rights in 1948, work was already underway on the drafting of a Refugee Convention. It began with a resolution of the UN General Assembly in February 1946, and was concluded when the UN Conference of Plenipotentiaries adopted the Convention Relating to the Status of Refugees on 28 July 1951.[66] It is notable that "the particular drafting history of the 1951 Convention is, however, not much concerned with Article 14 UDHR, although occasional references to Article 14 were made."[67]

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[63] Goodwin-Gill and McAdam *op cit* at p.359.

[64] *Op cit* at p.48.

[65] See further below at chapter 2.

[66] See generally Jackson "The 1951 Convention Relating to the Status of Refugees: A Universal Basis for Protection" (1991) 3 International Journal of Refugee Law 403.

[67] Einarsen *op cit* at p.48.

Article 1(A)(2) of the Convention sets out the definition of a refugee as follows:

> "As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

Hathaway identifies two main characteristics of the Convention as its strategic conceptualisation and its Eurocentric focus:

> "The strategic dimension of the definition comes from successful efforts of Western states to give priority in protection matters to persons whose flight was motivated by pro-Western political values. As anxious as the Soviets had been to exclude political emigrés from the scope of the Convention for fear of exposing their weak flank, so the more numerous and more powerful Western states were preoccupied to maximise the international visibility of that migration."[68]

The emphasis on civil and political status in the Convention nexus, although "apparently neutral", in fact focused on "matters in regard to which Eastern bloc practice [was] historically problematic." [69] Simultaneously, the exclusion of socio-economic factors from the scope of protection under the Convention allowed Western states avoid focus on areas where they were traditionally more vulnerable:

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[68] Hathaway *The Law of Refugee Status* (Butterworths 1991) at pp.6-7.

[69] *Ibid* at p.8.

> "By mandating protection for those whose (Western inspired) civil and political rights are jeopardised, without at the same time protecting persons whose (socialist inspired) socio-economic rights are at risk, the Convention adopted an incomplete and politically partisan human rights rationale."[70]

The "Eurocentric focus" is evident from the terms of Article 1(B)(1) which stated:

> "For the purposes of this Convention, the words 'events occurring before 1 January 1951' in article 1, section A, shall be understood to mean either:
> (a) 'events occurring in Europe before 1 January 1951'; or
> (b) 'events occurring in Europe or elsewhere before 1 January 1951',
> and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention."

The focus on events in Europe is generally understood to have been motivated by a desire to put in place a burden-sharing mechanism given the mass displacement which had arisen in Europe as a result of the Second World War.[71] Many of the statements by national delegates

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[70] *Ibid.* Although this "Cold War" perspective gained traction since the 1970s and 1980s, Einarsen argues that a comprehensive review of the travaux preparatoires to the Convention does not support this approach, suggesting that "much more could be said about the different theories and their relationship to different results of legal interpretation of the refugee definition, but since they have not usually been based on an analysis of the drafting process, many such theories are less interesting than the drafting history itself": *op cit* at p.53.

[71] See, eg, Feller "The Evolution of the International Refugee Protection Regime" (2001) Washington University Journal of Law and Policy 129 and Gallagher "The Evolution of the International Refugee System" (1989) 23(3) International Migration Review 579.

during the drafting process expressed concern at the prospects of a universal definition of a refugee, not subject to any temporal limitation, which would be akin to "a blank cheque."[72]

It was not until the Protocol to the Convention Relating to the Status of Refugees was signed on 31 January 1967 that the temporal and geographical limitations in the 1951 Convention were removed, and the refugee regime originating from the 1951 Convention became truly universal, at least in terms of geography if not scope.[73] As has been said, the 1967 Protocol "achieved the formal, but not the substantive, universalisation of the Convention definition of refugee status... Even after the elimination of temporal and geographical limitations, only persons whose migration is prompted by a fear of persecution on the ground of civil or political status come within the scope of the Convention-based protection system."[74]

The Right to Non-Refoulement

The rights and entitlements of refugees are fully explored in chapter 5 below. However, given the centrality of the right to non-refoulement in much of the analysis which follows, it is appropriate to address the scope of the right here. Article 33 of the Refugee Convention has been variously described as "the cardinal principle of protection of the Convention",[75] the "cornerstone of the protection of refugees and asylum seekers"[76] and "an essential corollary to the right to seek asylum as enshrined in Article 14, para.1 of the Universal Declaration on Human Rights."[77] Article 33 provides:

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[72] See Einarsen *op cit* at pp.54-61.

[73] See Jackson *op cit* at pp.407-408.

[74] *Op cit* at p.10.

[75] UNHCR ExCom *General Conclusion on International Protection* (Conclusion No.65 1991).

[76] UNHCR ExCom *Note on International Protection* (2001).

[77] *Ibid.*

> "1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

The primary importance of this right is reflected in the fact that it is one of the few non-derogable rights in the Refugee Convention.[78] On the nature and scope of this principle, it has been noted:

> "In the absence in international law of an individual right to be granted asylum, the principle guarantees that refugees remain beyond the reach of a persecution state as long as their fear of persecution remains well-founded. While the principle does not oblige states to grant refugees asylum, it ensures that such persons must be allowed to stay, even if denied asylum, unless they can be sent to a third country where they are safe from persecution and from being returned to the country of origin. While a right to asylum would create a positive obligation, the prohibition of refoulement imposes a negative duty to refrain from certain actions."[79]

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[78] Article 42(1) of the Refugee Convention prohibits reservations in respect of Article 33.

[79] Kalin, Caroni and Heim "Article 33, para.1" in Zimmermann (ed) *op cit* at p.1335.

It is clear from the provisions of Article 33(2) that the prohibition is not absolute,[80] and a person may be refouled if he or she constitutes a danger to the security of the country of refuge or a threat to the community having been convicted of a particularly serious crime. There is broad consensus that the exceptions contained in Article 33(2) should be construed narrowly and restrictively.[81]

One of the key strengths of the prohibition on refoulement is that it applies regardless of the formal recognition or otherwise of a refugee; as UNHCR has commented:

> "Every refugee is, initially, also an asylum seeker; therefore, to protect refugees, asylum seekers must be treated on the assumption that they may be refugees until their status has been determined. Otherwise, the principle of non-refoulement would

[80] There is much debate on the subejct of whether a broader, absolute right to non-refoulement exists in customary international law, with reference to such provisions as Article 3 of the European Convention on Human Rights and Article 3 of the Convention Against Torture. However, the focus of this thesis is on the rights of refugees under the 1951 Convention does not allow for a discussion of this question. See generally Goodwin Gill and McAdam *op cit* at pp.285-354 and Chan "The Protection of Refugees and Internally Displaced Persons: Non-refoulement under Customary International Law?" (2006) 10(3) International Journal of Human Rights 231.

[81] Kalin, Caroni and Heim *op cit* at p.1359-1387. The right to non-refoulement pursuant to Article 3 of the European Convention on Human Rights is more generous to the plight of asylum seekers than the 1951 Refugee Convention, insofar as it does not demand any particular grounds for reliance on the inherent non-refoulement guarantee, nor can an asylum seeker be excluded from Article 3 protection on grounds of national security. See generally Goodwin-Gill and McAdam *op cit* at pp.201-277, and Lauterpacht and Bethlehem "The Scope and Content of the Principle of Non-refoulement" in Feller, Türk, and Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003), pp.78-177. However, it can perhaps be said that Article 3 imposes a negative obligation (ie a duty not to return) rather than a positive obligation (ie a duty to grant a person a particular status) and in this sense can be distinguished from the rights of refugees, including the right to asylum, as discussed further above.

not provide effective protection for refugees, because applicants might be rejected at borders or otherwise returned to persecution on the grounds that their claim has not been established."[82]

Kalin, Caroni and Heim derive the obligation to establish procedures with appropriate safeguards from the obligation to ensure that no person is returned to a country where they would face persecution contrary to Article 33.[83] It is for this reason that the right to refoulement is central to this thesis; for where substantive frameworks governing the definition of a refugee are unclear or impose overly restrictive conditions, and where states fail in their duty to establish effective procedures which ensure the recognition of refugees, the risk of refoulement arises.[84]

International Expansion of the Refugee Concept

In addition to the formal legal framework in respect of refugees, it is necessary also to consider briefly the extent to which the refugee concept has been affected by other developments, including the establishment of the United Nations High Commissioner for Refugees (UNHCR) and the evolution of its remit, the abortive attempt to agree a UN Convention on Territorial Asylum in 1977 and the establishment of regional frameworks for refugee protection. While it is clear that these developments do not amount to formal amendments to the Convention definition, "they nonetheless indicate a widening of the circumstances in which persons may be said genuinely to be in need of international protection."[85]

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[82] UNHCR ExCom *Note on International Protection* (1993). The provision thus applies not just to expulsion or deportation decisions but also interception, interdiction and border controls: see Kalin, Caroni and Heim *op cit* at p.1359.

[83] *Op cit* at p.1375.

[84] The right to non-refoulement in Irish law is considered in Chapter 2.

[85] Hathaway *The Law of Refugee Status* (Butterworths 1991) at p.11.

By resolution of 3 December 1949, the United Nations General Assembly decided to establish a High Commissioner's Office for Refugees as of 1 January 1951.[86] A further resolution of 14 December 1950 adopted the Statute of the UNHCR, which defined the competence of that agency as extending to providing international protection to:

> "refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting Governments and, subject to the approval of the Governments concerned, private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities."[87]

Article 6A of the UNHCR Statute furthermore provides that the competence of the High Commissioner shall extend to:

> "A. (i) Any person who has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928 or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;
> (ii) Any person who, as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion, is outside the country of his nationality and is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear or for

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[86] UN General Assembly *Resolution on Refugees and Stateless Persons* (December 3, 1949).

[87] Chapter 1, Article 1 of the Statute of the United Nations High Commissioner for Refugees, 14 December 1950.

reasons other than personal convenience, is unwilling to return to it....

B. Any other person who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence, because he has or had well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence."

There are a number of notable differences between the scope of UNHCR's competence under its statute when compared with the scope of the 1951 Convention, including the omission of any reference to claims grounded in membership of a particular social ground and the explicit exclusion of persons whose refusal to return is for reasons of personal convenience or of an economic character.[88] Article 6B is also noteworthy insofar as it extends protection to refugees on the basis of a past fear of persecution, in contrast to the Convention's emphasis on a forward-looking fear.[89]

Since 1957, the UN General Assembly, Economic and Social Council and the Executive Committee of the UNHCR have adopted a variety of means to respond to non-European refugee producing situations. [90]

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[88] Further distinctions arise in terms of the scope of exclusion from protection under the UNHCR Statute when compared with the equivalent provisions in the Refugee Convention; see further Hathaway *The Law of Refugee Status* (Butterworths 1991) at pp.12-13 and Goodwin-Gill and McAdam *op cit* at pp.20-35.

[89] See further the discussion of the well-founded fear in chapter 2.

[90] Pursuant to paragraph 4 of the Statute, an Advisory Committee on Refugees was established by the Economic and Social Council by Economic and Social Council Resolution 393 (XIII) B of 10 September 1951, and was later reconstituted as the United Nations Refugee Fund (UNREF) Executive Committee by Economic and Social Council Resolution 565 (XIX) of 31 March 1955 adopted pursuant to General Assembly Resolution 832 (IX) of 21 October 1954. The UNREF Executive Committee

UNHCR's sphere of responsibility has expanded radically in the interim, from its authorisation "to aid the full range of involuntary migrants, including victims of all forms of both man-made and natural disasters"[91] to the extension of responsibility to internally displaced persons.[92] As Hathaway states, "the essential criterion of refugee status under UNHCR auspices has come to be simply the existence of human suffering consequent to forced migration."[93]

As noted in the introductory chapter, the focus of this thesis is on the scope of protection afforded by the Refugee Convention; it is not possible to engage with the much broader question of the extent of protection generally available in international law.[94] For present purposes therefore, it suffices to say that the broader protection apparently available under the UNHCR Statute illustrates some of the restrictions in the Convention regime, which cannot be said to be a truly universal framework of refugee protection.

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was replaced in 1958 by the Executive Committee of the High Commissioner's Programme by General Assembly Resolution 1166 (XII) of 26 November 1957 and Economic and Social Council Resolution 672 (XXV) of 30 April 1958. Members of the Executive Committee are elected by the Economic and Social Council on the widest possible geographical basis from those States with a demonstrated interest in and devotion to the solution of refugee problems.

[91] Hathaway *The Law of Refugee Status* (Butterworths 1991) at p.13.

[92] See generally Goodwin-Gill and McAdam *op cit* at pp.23-35, Feller "UNHCR's Role in IDP Protection: Opportunities and Challenges" (2006) Forced Migration Review (Special Issue) 11 and Lanz "Subversion or Reinvention? Dilemmas and Debates in the Context of UNHCR's Increasing Involvement with IDPs" (2008) 21(2) Journal of Refugee Studies 192.

[93] Hathaway *The Law of Refugee Status* (Butterworths 1991) at p.13.

[94] See further, in this regard, Lewis *UNHCR and International Refugee Law: From Treaties to Innovation* (Routledge 2012) and Steiner, Gibney and Loescher (eds) *Problems of Protection: The UNHCR, Refugees and Human Rights* (Routledge 2013).

Contemporary alternative refugee definitions

In order to fully address the definition of the refugee in international law, it is also necessary briefly to consider more recent developments in relation to development of contemporary legal frameworks. The absence of an express statement of the right to asylum in the Refugee Convention remained a cause of concern to the United Nations General Assembly throughout the 1960s,[95] and ultimately led to a proposal for a new convention on territorial asylum.[96] A draft convention was prepared and presented to a conference of plenipotentiaries in 1977.[97] Hathaway suggests that while its principal purpose was to enhance the scope of protection available to Convention refugees, "its most noteworthy achievement may in fact have been the degree of consensus attained on changes to the definition of refugee status for the purposes of entitlement to refugee protection."[98]

The conference achieved a considerable measure of agreement on changes to the definition of refugee status for the purposes of entitlement to international legal protection, for example the proposal to replace the "well founded fear of persecution" formulation with the requirement that a refugee be 'faced with a definite possibility of persecution." There was also agreement to extend the grounds for refugee status to include colour, kinship, foreign occupation, alien domination and all forms of racism.[99] Whilst the drafting of the territorial asylum convention ended in stalemate, the affirmative vote in favour of an expanded definition of

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[95] Evidenced by a series of General Assembly Resolutions drawing on Article 14 UDHR: Resolutions 1839 (XVII) of 19 December 1962, 2100 (XX) of 20 December 1965 and 2203 (XXI) of 16 December 1966 concerning a declaration on the right of asylum.

[96] See Hathaway *The Law of Refugee Status* (Butterworths 1991) at pp.13-16.

[97] See generally Weis "The Draft United Nations Convention on Territorial Asylum" (1979) 50 British Yearbook of International Law 151.

[98] Hathaway *The Law of Refugee Status* (Butterworths 1991) at p.14.

[99] *Ibid.*

refugee status is seen by Hathaway as nonetheless "indicative of a willingness on the part of the international community to conceive the refugee concept more broadly than as elaborated in the Convention and Protocol."[100] Whatever about the accuracy of this statement at the time, it is doubtful whether a similar willingness could be ascribed to the international community today, in the light of recent trends by which states party to the Convention seek to limit access to the asylum system, and thus the right to asylum itself.[101]

In addition to this international development, three regional groups have enacted standards of refugee protection that extend the Convention definition in ways similar to the evolution of the UNCHR mandate and the scope of the proposed asylum convention. The Convention Governing the Specific Aspects of Refugee Problems in Africa was adopted by the Organisation of African Unity (OAU) in 1969.[102] Whilst this Convention replicated the 1951 Convention definition of a refugee, it also "realistically extended" it by providing protection to all persons compelled to flee across national borders by reason of any man-made disaster, whether or not they can be said to fear persecution:

> "2. The term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to

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[100] *Ibid.*

[101] Legomsky refers to a range of such measures, including accelerated filing deadlines; safe first country and safe third country concepts; expedited removal and other accelerated procedures; preventive detention while asylum claims are pending; criminal prosecution of asylum seekers for irregular entries; denial of permission to work; visa requirements and carrier sanctions, and interdiction of vessels on the high seas: Legomsky "Refugees, Asylum and the Rule of Law in the USA" in Kneebone (ed) *op cit* at p.145.

[102] Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 Sept 1969.

> leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality."[103]

Hathaway notes that "this standard represents an important conceptual adaptation of the Convention refugee definition, in that it successfully translates the core meaning of refugee status to the reality of the developing world."[104] The key features of the OAU include "an emphasis on objective circumstances that lead to the refugee's flight rather than the subjective inquiry into a person's fear of persecution",[105] thus acknowledging "that fundamental forms of abuse may occur not only as a result of the calculated acts of the government of the refugee's country of origin but also as a result of that government's loss of authority."[106] The broader recognition of circumstances giving rise to refugee flight, including external aggression, occupation and foreign domination goes further than the 1951 Convention, as does the extension of protection on the grounds of "events seriously disturbing or disrupting public order." There is general consensus that the drafting of the OAU Refugee Convention was "prompted by the reality of the political environment in the late 1960s" which rendered that Convention "well suited to the refugee-creating situations of the 1960s and 1970s" on the African continent at that time.[107] Hathaway concludes that:

> "the relevance of the OAU definition to conditions in the developing world has made it the most influential conceptual standard of refugee status apart from the Convention definition itself. It has provided the basis for enhanced UNCHR activity in Africa, was at the root of the proposed convention definition of

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[103] Goodwin-Gill and McAdam *op cit* at p.37.

[104] Hathaway *The Law of Refugee Status* (Butterworths 1991) at p.17.

[105] Van Garderen and Ebenstein "Regional Developments: Africa" in Zimmermann (ed) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (Oxford University Press 2011) at p.190.

[106] Hathaway *op cit* at p.17.

[107] Van Garderen and Ebenstein *op cit* at p.190.

> persons entitled to territorial asylum, and inspired the liberalization of various regional and national accords on refugee protection."[108]

The Cartagena Declaration on Refugees of 22 November 1984, which was adopted by ten Latin American states in 1984, is one such regional accord which was inspired by the African model. This was also a measure inspired in part by contextual concerns, namely the "many involuntary migrants from generalised violence and oppression in Central America."[109] The refugee definition in this declaration is similar to that enacted by OAU, in that it extended the Geneva definition to the:

> "persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order."[110]

The Cartagena Declaration shares some of the innovative features of the OAU Convention:

> "First, it acknowledges the legitimacy of claims grounded in the actions of external powers by virtue of its reference to flight stemming from foreign aggression. Second, it offers a qualified acceptance of the notions of group determination and claims in which basis or rationale for harm is indeterminate. The qualification stems from the fact that while generalised phenomena are valid bases for flight… all applicants for refugee status must nonetheless show that 'their lives, safety or freedom have been threatened.'"[111]

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[108] *Op cit* at p.19.

[109] Hathaway *op cit* at p.19.

[110] Third conclusion to the Cartagena Declaration, 1984.

[111] Hathaway *op cit* at p.20.

Goodwin-Gill and McAdam describe the Cartagena Declaration as "one of the most encompassing approaches to the refugee definition", while Poivesan and Jubilut note that "it brings forth more comprehensive criteria for refugee status determination as well as a new perspective on durable solutions while reaffirming the relevance of the 1951 Convention and the principle of non-refoulement even in mass influx situations." [112]

Even more significant from the Irish perspective are the regional developments which have taken place on the continent of Europe in the past fifty years. By way of recommendations and resolutions of the Committee of Ministers [113] and the Parliamentary Assembly, [114] the Council of Europe has adopted a number of soft law measures concerning refugee protection that go beyond the Convention definition,

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[112] Piovesan and Jubilut "Regional Developments: Americas" in Zimmermann (ed) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (Oxford University Press 2011) at p.217.

[113] See, eg, Committee of Ministers of the Council of Europe "Declaration on Territorial Asylum" 18 November 1977; Committee of Ministers of the Council of Europe "Resolution 14 (1967) on Asylum to Persons in Danger of Persecution" 29 June 1967; Committee of Ministers of the Council of Europe "Recommendation R (81) 16 on the Harmonisation of National Procedures Relating to Asylum" 5 November 1981; Committee of Ministers of the Council of Europe "Recommendation R (84) 1 on the Protection of Persons Satisfying the Criteria in the Geneva Convention who are not Formally Recognised as Refugees" 25 January 1984; Committee of Ministers of the Council of Europe "Recommendation R (2004) 9E to Member States on the Concept of "Membership in a Particular Social Group" (MPSG) in the Context of 1951 Convention" 30 June 2004.

[114] See, eg, Parliamentary Assembly of the Council of Europe "Recommendation 773 (1976) on the Situation of de facto Refugees" 26 January 1976; Parliamentary Assembly of the Council of Europe, 'Recommendation 1088 (1988) on the Right to Territorial Asylum', 7 Oct. 1988; Parliamentary Assembly of the Council of Europe, 'Recommendation 773 (1976) on the Situation of de facto Refugees', 26 January 1976; Parliamentary Assembly of the Council of Europe "Recommendation 1236 (1994) on the Right of Territorial Asylum" 12 April 1994; Parliamentary Assembly of the Council of Europe "Resolution 1765 (2010) on Gender-Related Claims for Asylum" 8 October 2010.

although Hathaway notes that the changes are significantly more modest than those of the OAU or OAS.[115] As noted by Fullerton et al, although these measures are only politically binding, and so do not have any immediate or direct legal consequences, they are nevertheless "useful as aids to interpretation of the undertakings of states with regard to international protection."[116]

Overall, Hathaway concludes that the Council of Europe has "acknowledged the legitimacy of the claim to protection of an expanded class of refugees but has not moved to formalise their status or rights."[117]

Also relevant in this context is the European Convention on Human Rights; although certain provisions of this Convention may be called in aid by refugees,[118] its single greatest deficiency in this regard is the absence of any express statement regarding the right to asylum or the specific rights of refugees.[119] The insistence by the European Court of Human Rights that refugees and asylum seekers may not invoke the right to a fair hearing guaranteed by Article 6, on the basis that there is no civil right to asylum, is by far the most significant limitation in the protection of refugee rights under the Convention,[120] insulating from challenge the procedural frameworks in contracting states irrespective of the extent to which such substantive frameworks may result in denial of refugee rights. The majority in *Maaouia v France* reached this

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[115] *Op cit* at p.21.

[116] Fullerton, Byrne, Chimni, Crépeau, Garlick, Guild, Jakuleviciene, Nagy, Peral and Vedsted-Hansen *The Refugee Law Reader* (6th ed 2011) at section V.

[117] *Op cit* at p.21.

[118] In particular, Article 3 ECHR which prohibits torture, inhuman and degrading treatment has been described as a guarantee of non-refoulement; see further above.

[119] It is noteworthy that Assembly Recommendation 1236 of 1994 proposed that the ECHR be amended to include a right to asylum, but this recommendation has not been acted on to date.

[120] See, eg, *Uppal and Singh v United Kingdom* [1979] 3 EHRR 391 (European Commission of Human Rights) and *Maaouia v France* [2001] EHRR 42 (European Court of Human Rights).

conclusion on the basis that "proceedings relating to the entry, stay and deportation of aliens were outside the scope of [Article 6] in so far as it concerned disputes over civil rights and obligations."[121]

It is submitted that the dissenting judgment of Loucaides J is to be preferred for its emphasis on the centrality of the right to a fair hearing in the concept of the rule of law:

> "It is, I believe, evident that the object and purpose of Article 6 was to ensure, through judicial guarantees, a fair administration of justice to any person in the assertion or determination of his legal rights or obligations. It would be absurd to accept that the judicial safeguards were intended only for certain rights, particularly those between individuals, and not for all legal rights and obligations, including those vis à vis the administration, where an independent judicial control is especially required for the protection of individuals against the powerful authorities of the State. In other words, it is inconceivable for a Convention which, according to its Preamble, was intended to safeguard 'those fundamental freedoms which are the foundation of justice ... in the world' and implement the principle of 'the rule of law' to provide for a fair administration of justice only in respect of certain legal rights and obligations, but not in respect of rights concerning relations between the individual and the State."[122]

In this regard, Loucaides J referred to the decision of the European Court of Human Rights in *Klass v Germany*, where it was held that the rule of law implies, inter alia:

> "that an interference by the executive authorities with an individual's rights should be subject to an effective control which

[121] *Maaouia v France* [2001] EHRR 42 at p.6.

[122] *Ibid* at p.20.

should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantee of independence, impartiality and a proper procedure."[123]

Loucaides J concluded that the words "civil rights and obligations" should be given the broadest possible meaning, calling in aid the principle of good faith under the Vienna Convention on the Law of Treaties in this regard. Notwithstanding this powerful dissent, the European Court of Human Rights has shown no inclination to reconsider its decision in *Maaouia*, which has the regrettable effect of excluding asylum seekers and refugees from the scope of protection of the right to a fair hearing, with regrettable consequences for the rule of law. Writing extra-judicially shortly after the decision in *Maaouia* was issued, Loucaides J lamented the decision of the majority in this case, noting the extensive protections which would be denied as a result, including issues of impartiality and bias, transparency and the right to a public hearing.[124]

It is in the context of the European Union that by far the most significant regional developments in the field of refugee law have occurred.[125] Although refugee protection might seem far removed from the initial scope of concern of the European Economic Community, the development and evalotion of a single common market and the abolition of internal borders had clear implications for the field of asylum law. It was not until 1997 that the European Union acquired Treaty competence to legislate on asylum matters; a new treaty Title IV titled "Visas, asylum, immigration and other policies related to free movement of persons" established a number of objectives, including the adoption within 5 years of measures on asylum in accordance with the 1951 Convention and 1967 Protocol. The Tampere Conclusions of 1999

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[123] *Klaas v Germany* unreported, judgment of 6 September 1978, at pp. 25-26.

[124] Loucaides "Questions of Fair Trial Under the European Convention on Human Rights" (2003) 3 Human Rights Law Review 27.

[125] See generally Byrne "Harmonization and Burden-Sharing in the Two Europes" (2003) 16 Journal of Refugee Studies 336.

emphasised "absolute respect for the right to seek asylum, full and inclusive application of the 1951 Convention", [126] but some commentators have complained that "the EU's asylum policy has never lost its close connection with immigration control objectives or the notion of what is referred to by critics as 'fortress Europe.'"[127]

The first phase of the EU asylum acquis produced five core legal instruments: the Temporary Protection Directive, [128] the Reception Directive,[129] the Qualification Directive,[130] the Procedures Directive,[131] and the Dublin II Regulation.[132] Building on these developments, the Lisbon Treaty committed to the establishment of a "common European asylum system" with common standards for the determination of refugee status as well as common procedures.[133] The Stockholm Programme

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[126] See generally Egan "European Asylum Policy: Reflections on the Tampere Conclusions" in Driscoll (ed) *Irish Human Rights Review 2000* (Round Hall Sweet and Maxwell 2000).

[127] Klug "Regional Developments: Europe" in Zimmermann (ed) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (Oxford University Press 2011) at p.128.

[128] Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

[129] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

[130] Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

[131] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

[132] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

[133] See further Klug "Regional Developments: Europe" in Zimmermann (ed) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (Oxford University Press 2011) at pp.128-129.

concerns the next phase in the development of the EU asylum acquis up to 2014; during this phase, the Commission has secured agreement to Recast Procedures Directive[134] and Recast Qualification Directive,[135] as well as a new Dublin III Regulation. [136] During this period, the competence of the Court of Justice of the European Union was dramatically widened; having initially been given a limited role in relation to Title V, these restrictions were lifted by the Lisbon Treaty with the result that the CJEU is now the first supranational court with jurisdiction concerning refugee law.[137]

The development of a common European asylum system remains an ongoing project; it is notable in this regard that a Council recommendation from 2009 proposed that the EU seek accession to the 1951 Convention and the 1967 Protocol,[138] although to date this has not occurred. By far the most significant development in the context of EU

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[134] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast).

[135] Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).

[136] Regulation (EU) No.604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

[137] See Carruthers "The Treaty of Lisbon and the Reformed Jurisdictional Powers of the European Court of Justice in the Field of Justice and Home Affairs" (2009) 6 European Human Rights Law Review 784.

[138] EC Council No.17024/09 (2009) Chapter 6.2.1, which states "The development of a Common Asylum Policy should be based on a full and inclusive application of the Geneva Convention on the status of refugees and other relevant international treaties. Such a policy is necessary in order to maintain the long-term sustainability of the asylum system and to promote solidarity within the EU. Subject to a report from the Commission on the legal and practical consequences, the European Union should seek accession to the Geneva Convention and its 1967 Protocol."

asylum law is the inclusion of a right to asylum in the EU Charter of Fundamental Rights, Article 18 of which provides:

> "The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 18 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaties establishing the European Communities."

Klug describes this provision as "a compromise formulation", but nonetheless one which "establishes an individual right which can be directly invoked before the national courts of member states."[139] The Charter of Fundamental Rights came into force on 1 December 2009, and the jurisprudence of the CJEU in the field of refugee law is therefore in its early stages of development;[140] in particular, the court has not yet given detailed consideration to the right to asylum in Article 18CFR.[141]

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[139] *Op cit* at p.130. See further Gil-Bazo "The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law" (2008) 27(3) Refugee Survey Quarterly 33.

[140] As Costello notes, "As of yet, the CJEU has not been drawn on the implications of the right to asylum", preferring instead to focus "on the orthodox obligations of non-refoulement" in the case law before it to date, such as *Joined Cases C-411/10 and C-493/10 NS v Secretary of State for the Home Department and ME v Refugee Applications Commissioner* unreported, Court of Justice of the European Union, December 21, 2011: see Costello "Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored" (2012) 12(2) Human Rights Law Review 287 at p.308.

[141] In *Zuheyr Frayeh Halaf v Darzhavna agentsia za bezhantsite pri Ministerskia savet (Case C-528/11)*, Court of Justice of the European Union, 30 May 2013, the CJEU was asked *inter alia* the content of the right to asylum under Article 18 of the Charter, in the context of a proposed transfer of an asylum seeker from Bulgaria to Greece, in circumstances where Greece had failed to respond to the request to accept responsibility. Having decided the case on the basis that Bulgaria was entitled to accept responsibility for the asylum application under the sovereignty clause in Article 3(2) of the Dublin II Regulation, the court decided that it was unnecessary to proceed to

While much depends on the view taken by the CJEU, the right to asylum in Article 18 could potentially have a significant impact on both substantive and procedural aspects of the rights of refugees under EU law. As noted above, the European Court of Human Rights in *Maaouia* held that in the absence of a civil right to asylum, Article 6 on the right to a fair hearing did not apply to decisions regarding entry, stay or expulsion of aliens, including refugees and asylum seekers. To what extent must this decision be reconsidered, in the light of the express statement in Article 18 of the Charter of a right to asylum? The potential for EU law to revitalise this disappointing limitation on the right to a fair hearing as understood by the European Court of Human Rights is apparent; it is submitted that much depends on the commitment of the Court of Justice of the European Union to the concept of the rule of law in this regard, and in particular the extent to which it is willing to adopt a substantive, rights-based conception.

Specific consideration of the impact of particular measures adopted under the EU asylum acquis will be undertaken in Chapters 3 and 4. The EU's stated aim of achieving a "common European asylum system" remains very much aspirational, notwithstanding the adoption of the various measures outlined above. Klug notes:

> "The interpretation of the 1951 Convention and asylum standards continue to vary widely in Europe. The harmonisation and standard setting process has not led to comparable protection standards, not within the EU. It is hoped, but far from certain, that the next phase of the establishment of a common European asylum system will get closer to this goal and in such a way that protection will be predictably granted to those in need wherever it is sought, at least within the EU."[142]

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address the second question concerning the scope of the right to asylum (which would only have arisen in the event of the applicant's return to Greece).

[142] *Op cit* at p.144.

It is submitted that in fact, the future prospects of the common European asylum system look far from certain. Concerns have repeatedly been raised regarding non-compliance by some member states with even the minimum standards required under the EU asylum acquis; this occurred most clearly in the context of the Greek system in the decisions of the European Court of Human Rights in *MSS v Belgium*[143] and the Court of Justice in *NS v Secretary of State for the Home Department.*[144] However, systemic concerns have also been raised regarding other member states, including Italy, Malta, Spain and most recently Bulgaria. In addition to this, Ireland's decision to opt out of the Recast Qualification and Procedures Directives further fragments the refugee framework in EU law and the consequences of such action for the EU asylum acquis remains as yet unclear.

Toward a Modern Conception of the Refugee

Hathaway suggests that there is evidence of an expanding conceptualisation of refugee status in the practice of states, and asks whether it can be said:

> "taking into account the consensus on the extension of the mandate of the UNHCR, the agreement reached on broadening the definition of a refugee at the Conference on Territorial

[143] *MSS v Belgium and Greece* (2011) 53 EHRR 2.

[144] *Joined cases C-411/10 and C-493/10 NS v Secretary of State for the Home Department and ME v Refugee Applications Commissioner* Court of Justice of the European Union (Grand Chamber) 21 December 2011. In *NS and ME* the CJEU held that members states were precluded from transferring asylum seekers to Greece pursuant to the Dublin II mechanism, owing to systemic concerns regarding access to the asylum procedure in Greece and the risk of refoulement for refugees unable to access the protection mechanism. This decision was grounded in Article 3 of the European Court of Human Rights, thus avoiding the difficulties of the decision in *Mouiaa v France* discusssed further below. See further Costello "Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored" (2012) 12(2) Human Rights Law Review 287 at p.308.

> Asylum, the conceptual advances of the three regional accords, and the consequent shifts in the practice of states ... that modern international law recognises any duty towards a class of refugees more broad than as defined in the Convention and Protocol?"[145]

As noted above, Goodwin-Gill has previously argued that a new class of refugee is recognised in customary international law, arguing that the obligation of states to observe the principle of non-refoulement, implying at least temporary refuge in the face of imminent danger, now extends to persons outside the Convention definition in so far as they may be said to lack government protection against harmful events beyond their choosing or control.[146] However, this is a highly contested notion, with Hailbronner describing it as "wishful legal thinking" on the basis that there is neither extensive and uniform state practice nor opinio juris sufficient to warrant an assertion of international rights for refugees outside the scope of the Convention.[147]

Hathaway suggests that Goodwin-Gill overstated the extent of international consensus in regard to non-Convention refugees, pointing to the wide disparity in State practice across the spectrum of refugee issues.[148] More recently, it would appear that Goodwin-Gill has moderated his views in this regard; he now suggests that:

> "refugees within the mandate of UNHCR, and therefore eligible for protection and assistance by the international community, include not only those who can, on a case by case basis, demonstrate a well founded fear of persecution on certain

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[145] *Op cit* at p.24.

[146] Goodwin-Gill "Non-Refoulement and the New Asylum Seekers" (1986) 26(4) Virginia Journal of International Law 897.

[147] Hailbronner "Non-refoulement and 'Humanitarian' Refugees: Customary International Law or Wishful Legal Thinking" (1986) 26(4) Virginia Journal of International Law 857.

[148] *Op cit* at pp.25-26.

grounds (so called 'statutory refugees'); but also other often large groups of persons who can be determined or presumed to be without the protection of the government of their state of origin."[149]

While it is undoubtedly the case that there are additional forms of protection available outside of the Refugee Convention, the focus of this thesis is on what Goodwin-Gill terms "statutory refugees"; who is entitled to recognition as a refugee, and to what extent are their rights protected under Irish law? It is to the first of these questions that the discussion now turns.

[149] Goodwin-Gill and McAdam *op cit* at p.49.

Chapter 2 "Who is a refugee?"

Introduction

Having addressed the origins and evolution of international refugee law, this chapter sets out a detailed critique of the core element in the definition of a refugee, encompassing the notions of alienage, a well founded fear, the concept of persecution and the five Convention grounds of race, religion, nationality, political opinion and membership of a particular social group. This discussion is drawn not just from an analysis of the provisions of the Refugee Convention itself, but also the provisions of the Qualification Directive adopted under EU law, and the extent to which the European regime is consistent with the Convention. This is important from the perspective of the rule of law insofar as concerns have been expressed that in some instances, the standards adopted under the Qualification Directive are lower than the Convention, thus potentially threatening the integrity of the international framework and also allowing for violation of the rights of refugees in the gaps which may exist between these two frameworks.

Alienage

The first element of Convention refugee status is that the claimant must be outside his or her country of origin.[1] As Hathaway comments, there is "nothing inherently obvious in this requirement: many if not most of the persons forced to flee their homes in search of safety remain within the boundaries of their States."[2] Their plight may be every bit as serious as

[1] See generally, Shacknove "Who Is a Refugee?" (1985) 95 Ethics 274.

[2] Hathaway *The Law of Refugee Status* (Toronto: Butterworths, 1991), at p.29.

that of individuals who cross borders, yet the Convention definition of refugee status excludes internal refugees from the scope of global protection. To this extent, the alienage requirement clearly diverges from the ancient concept of asylum or sanctuary as discussed in chapter 1. Furthermore, the strict insistence on this territorial criterion has prompted concern that there is a mismatch between the definition and the human suffering consequent to involuntary migration.[3] In one sense, the exclusion of internal refugees is clearly unfair: it does not recognise the existence of social, legal and economic barriers which make it impossible for all to escape to international protection. It has been rightly suggested, therefore, that the Convention definition responds in a less than even handed way to the needs of persons similarly at risk of persecution.[4]

Three reasons are generally given to explain requirement that only persons outside their State be eligible for Convention refugee status. The first concerns limited resources; namely that the intention is not to relieve suffering of all involuntary migrants, but rather to deal only with the problems legal protection and status. Thus, the goal is to assist those migrants outside of their country and lacking the protection of their government, and who therefore require short-term surrogate international rights until they acquired new or renewed national protection.[5] The second reason relates to concern around State participation, derived from a practical concern that inclusion of internal refugees in the international protection regime might prompt states to shift responsibility for the well-being of large parts of their own population to the world community. In this event, there is a risk that the obligations of States under the Convention would be therefore increased, as a result of which fewer

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[3] *Ibid* at pp.29-33.

[4] *Ibid.*

[5] Internal refugee displacements, while of humanitarian concern, were regarded as separate problems of a different character, the alleviation of which would require a more sustained commitment of resources than was available to the international community: *ibid* at p.30.

States would be likely to participate in the Convention regime.[6] The third reason relates to respect for sovereignty, arising from anxiety that any attempt to respond to the needs of internal refugees would constitute an infringement of the national sovereignty of the State in which the refugee resided.[7] As Hathaway observes, as a part of international human rights law, refugee law "constitutes a recent and carefully constrained exception to the long-standing rule of exclusive jurisdiction of States over their inhabitants."[8]

None of these three factors is so much a matter of conceptual principle, but rather is a reflection of the limited reach of international law. Thus, Shacknove makes the comment that "alienage is an unnecessary condition for establishing refugee status. It is a subset of a broader category: the physical access of the international community to the unprotected person".[9] In other words, "the physical presence of the unprotected person outside his or her country of origin is not a constitutive element of her refugeehood, but is rather a practical condition precedent to placing that person within the effective scope of international protection."[10]

The territorial dimension of the Convention definition of refugee status was thus dictated by the existing authority of international law: "its purpose was not to divide involuntary migrants into those who are worthy of international protection and those who are not, but was instead to define the scope of refugee law in a realistic, workable way."[11] As the

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[6] See Goodwin-Gill and McAdam *The Refugee in International Law* (3rd ed 2007) at pp.35-37.

[7] See generally, Krivenko "Hospitality and Sovereignty: What Can We Learn From the Canadian Private Sponsorship of Refugees Program?" (2012) 24(3) International Journal of Refugee Law 579.

[8] Hathaway *op cit* at p.31.

[9] Shacknove *op cit* at p.277.

[10] *Ibid.*

[11] Hathaway *op cit* at p.32.

authority of the international community over human rights has increased with the passage of time, so too has the reach of refugee law expanded, at least tentatively, to protect some internal refugees.[12] Thus, since 1972 the United Nations High Commissioner for Refugees (UNHCR) has been called upon to provide material assistance to various groups of refugees within their national boundaries (IDPs),[13] which can be seen as evidence of the increasing acknowledgement of an international role in the protection of internal refugees.

The existence of the alienage criterion as a condition precedent has been the subject of some criticism, with Goodwin-Gill and McAdam noting that the consequence is that refugee law remains an incomplete legal regime of protection;[14] however, it is clear that despite such criticisms, the overriding requirement to respect state sovereignty demands that this criterion remains in place.

Well founded fear

As the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status notes, [15] the phrase "well-founded fear of being persecuted" is the key phrase of the refugee definition.[16] In chapter 1 it was seen how this individualised conception replaced the earlier juridical and social perspective methods which largely defined refugees by categories; furthermore, it is implicit within this formulation that there is an emphasis on the subjective assessment of the individual applicant's

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[12] See Phuong *The International Protection of Internally Displaced Persons* (Cambridge University Press 2009) at pp.39-76.

[13] For a comprehensive discussion of the statute of the UNHCR, development of the statutory definition and extension of the mandate concerning responsibility for internally displaced persons, see Goodwin Gill and McAdam *op cit* at pp.20-34.

[14] Gill and McAdam *op cit* at p.1.

[15] Hereafter the UNHCR Handbook.

[16] *Ibid* at para.37.

circumstances.[17] However, the concept of a "well-founded fear", which may at first glance appear to be straightforward, has in fact given rise to significant debate as to its true meaning.

The UNHCR Handbook articulates the following approach:

> "To the element of fear – a state of mind and a subjective condition – is added the qualification 'well-founded'. This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term 'well-founded fear' therefore contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration."[18]

Thus, UNHCR clearly advocates a hybrid objective-subjective assessment, *ie* a subjective assessment of whether the individual applicant has a fear of persecution, but also that such fear is objectively well founded having regard to the circumstances in the country of nationality.[19] This approach has also been adopted by the courts of numerous States party to the Refugee Convention;[20] for example, in

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[17] Thus, "determination of refugee status will therefore primarily require an evaluation of the applicant's statements rather than a judgement on the situation prevailing in his country of origin.": *Ibid.*

[18] UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* (HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992) at para.38.

[19] *Op cit* at paras.

[20] See, eg in the United Kingdom, *R. v Immigration Appeal Tribunal Ex p. Sardar Ahmed* [1999] INLR 473; New Zealand; in Australia, *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 and *Miah v Minister for Immigration and Multicultural Affairs* [2001] HCA 22; (2001) 206 CLR 57; United States in *INS v Cardoza - Fonseca* 480 US 421 (1987); and in Ireland *Imafu v Refugee Appeals Tribunal* [2005] IEHC 182 and *NK v Refugee Appeals Tribunal* [2004] 2 ILRM 550 (these latter decisions will be further considered in Chapter 4).

Horvath v Secretary of State for the Home Department (United Nations High Commissioner for Refugees Intervening) it was held that:

> "credibility findings can only really be made on the basis of a complete understanding of the entire picture. It is our view that one cannot assess a claim without placing that claim into the context of the background information of the country of origin. In other words, the probative value of the evidence must be evaluated in the light of what is known about the conditions in the claimant's country of origin."[21]

Thus, the subjective element of the assessment (testing the probative value of the applicant's evidence) must also be assessed with reference to objectively verifiable information (namely country of origin information).

However, this approach has been trenchantly criticised by academic commentators. For instance, Hathaway argues that the correct test for determining the "well founded fear" is exclusively objective, positing that the use of the term "fear" was intended to emphasise the forward-looking nature of the test, and not to ground refugee status in an assessment of the refugee applicant's state of mind.[22] It has further been argued that the hybrid (or "bipartite") approach is incompatible with the object and purpose of the Refugee Convention itself:

> "The bipartite approach can lead to denial of refugee status to at-risk applicants who either are not fearful, or whose trepidation is not identified as such by decision-makers. This concern arises most obviously in the assessment of refugee claims made by

[21] [1999] INLR 7.

[22] Hathaway *op cit* at p.69.

children and mentally disabled persons, who may be unable to experience or to articulate the requisite emotional state."[23]

Concerns have also been expressed that over-emphasis on the subjective element of the well-founded fear affords decision-makers too much scope for determining refugee cases on personal credibility alone, resulting in a denial protection to a "variety of applicants who, by reason of their age, mental health, stoic nature, gender, or culture are unable either to experience or effectively to communicate their subjective fear to the decision-maker."[24]

Notwithstanding such criticisms in academic commentaries, it would appear that the current practice, as evidenced by UNHCR's continued insistence on the hybrid model and its application by the courts of many states party to the Convention, results in a divergence between theory and practice.

Regardless of the differing views on the relevance of the subjective element to the determination of a "well-founded fear", it is beyond doubt that the objective element to this determination requires examination of conditions in the country of origin, and the related issue of the burden of proof. Conditions in the country of origin are assessed by reference to "country of origin information", which may derive from a number of sources.[25]

The final issue to be addressed in respect of the "well founded fear" element is the burden of proof, in respect of which the Refugee

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[23] Hathaway and Hicks "Is There a Subjective Element in the Refugee Convention's Requirement of a 'Well-Founded Fear'" (2005) 26 Michigan Journal of International Law 505 at 512.

[24] *Ibid* at p.560. The role of credibility in refugee status determinations will be further explored in Chapter 4.

[25] See generally Goodwin Gill "Safe Country – Says Who" (1992) 4(2) International Journal of Refugee Law 248.

Convention is silent. The UNHCR Handbook suggests that, in general, an applicant's fear should be considered well-founded if he can establish, "*to a reasonable degree*, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there."[26]

Perhaps the leading judicial authority addressing this issue is the decision of the US Supreme Court in *INS v Cardoza-Fonseca*.[27] This decision rejected the contention that the only way to demonstrate a "well founded fear" was by proving "a clear probability of persecution", a plainly restrictive threshold. [28] *Cardoza-Fonseca* is often cited as establishing the principle that a "one in ten" risk as sufficient;[29] however, this terminology was not in fact used by the court itself in its reasoning. Rather, Stephens J quoted the following passage from Grahl-Madsen:

> "Let us . . . presume that it is known that in the applicant's country of origin every tenth adult male person is either put to death or sent to some remote labor camp. . . . In such a case it would be only too apparent that anyone who has managed to escape from the country in question will have 'well-founded fear of being persecuted upon his eventual return."[30]

It was in this context that Stephens J stated "one can certainly have a well-founded fear of an event happening when there is less than a 50%

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[26] *Op cit* at para.42 (emphasis added).

[27] 480 US 421 (1987).

[28] *Ibid* at para.9 per Stevens J.

[29] See, eg, Saxena "More Than Mere Semantics: The Case for an Expansive Definition of Persecution in Sexual Minority Asylum Claims" (2005-2006) 12 Michigan Journal of Gender and Law 331; Byrne et al *Refugee Law Reader: Cases, Documents and Materials* (2008) at II.2.1.2; Aschenbrenner "Discretionary (In)Justice: The Exercise of Discretion in Claims for Asylum" (2012) 45(3) University of Michigan Journal of Law Reform 595.

[30] Grahl-Madsen *The Status of Refugees in International Law* (1966) at p.180.

chance of the occurrence taking place", before later concluding that "a moderate interpretation of the 'well-founded fear' standard would indicate 'that so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility.'"[31] Whilst the decision in *Cardoza-Fonseca* was widely welcomed and remains as one of the most frequently cited and approved judgments on the appropriate standard of proof,[32] there is a degree of ambiguity inherent in the decision. Most particularly, the Supreme Court failed to "elaborate the standard of proof more precisely, being of the view that a term like 'well-founded fear' is ambiguous to a point, and can only be given concrete meaning through a process of case-by-case adjudication."[33]

As Goodwin-Gill and McAdam note, ongoing debate surrounding the standard of proof "reveals some of the inherent weaknesses of a system of protection founded upon essays in prediction."[34] As noted in the introductory chapter, certainty is one of the key indicators of the rule of law; the ambiguity in the Refugee Convention as to the appropriate standard of proof on this view fails to conform to this requirement. This has clear implications for the rights of refugees, including the ultimate right of non-refoulement, insofar as an overly restrictive approach to the standard of proof may lead to refusal of refugee status and ultimately expose a refugee to the risk of refoulement. Furthermore, Kneebone notes that "another indication of the asylum 'lottery'" is the different

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[31] *Op cit* at para.11.

[32] See, eg, the Canadian Federal Court of Appeal decision in *Adjei v Minister of Employment and Immigration* [1989] 2 FC 680; the Australian High Court decision in *Chan v Minister for Ethnic Affairs* (1989) CLR 379 and the decision of the United Kingdom House of Lords in *R v Secretary of State for the Home Department, ex parte Sivakumaran* [1988] 1 AC 958.

[33] Goodwin-Gill and McAdam *The Refugee in International Law* (3rd ed 2007) at p.58.

[34] *Ibid.*

interpretations of certain key concepts, including "varying standards of proof."[35]

Somewhat surprisingly, the standard of proof to be applied to the requirement to establish a well founded fear is not directly addressed by the Qualification Directive. Noll notes that although Article 4 of the Qualification Directive provides an "intriguing catalogue of norms" to be applied by refugee decision-makers in the assessment of facts and evidence,[36] "certain central, evidentiary issues are not regulated by the Directive", pointing out that the Directive contains no rule prescribing a standard of proof.[37] Significantly, Battjes points out that the failure to stipulate a standard of proof in the Directive renders decisions at the national level on this matter outside of the scope of review by the CJEU.[38] He notes that in this regard, the terms of the Directive departed from the original proposal which included a standard of proof;[39] had this standard been included, this aspect of the Qualification Directive would have been amenable to review by the Luxembourg court (thereby further strengthening the rule of law in this regard). Its absence has the result that the matter is left to domestic law, further contributing to the risk of divergent practices giving rise to an "asylum lottery."[40]

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[35] Kneebone *op cit* at p.30.

[36] Including a "facultative evidentiary rule" on the applicant to submit all relevant evidence as soon as possible, an "alleviating evidentiary rule" for cases of earlier persecution, and a "general alleviating evidentiary rule" in cases where the facultative evidentiary rule applies: see Noll *Evidentiary Assessment and the EU Qualification Directive* (New Issues in Refugee Research, Working Paper No.117, June 2005) at pp.2-3.

[37] *Ibid* at p.3.

[38] Battjes *European Asylum Law and International Law* (Martinus Nijhoff 2006) at p.564

[39] European Commission *Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection* (COM(2001)510 final) September 9, 2001. Article 7 of the Commission's proposal advocated a standard of a "reasonable possibility" of persecution.

[40] Battjes *op cit* at p.564. See also Kneebone *op cit* at p.30.

This omission was not rectified by the provisions of the Recast Qualification Directive, which further compounds the potential for divergence arising from the lack of clarity in the Qualification Directive in respect of a fundamental component in the substantive definition of a refugee, to the detriment of the rule of law protection afforded to affected individuals.

Persecution

The concept of "persecution" is at the heart of the Refugee Convention,[41] so on one view it is somewhat surprising then that the Convention itself offers no definition of the term. However, Goodwin-Gill has sought to justify this apparent omission by noting its necessity: "there being no limits to the perverse side of human imagination, little purpose is served by attempting to list all known measures of persecution."[42]

There is broad agreement that acts amounting to torture or inhuman and degrading treatment constitute persecution, as well as violations of international humanitarian law, genocide, crimes against humanity and related offences;[43] furthermore, Kneebone suggests that it is now well established that the "meaning of 'persecution' should be interpreted within a human rights framework which includes reference to the

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[41] See eg Zimmermann and Mahler "Article 1A, paragraph 2" in Zimmermann (ed) *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (Oxford University Press 2011) at p.345.

[42] Goodwin-Gill *The Refugee in International Law* (2nd ed 1996) at p.69.

[43] See eg Hathaway *The Rights of Refugees in International Law* (Cambridge University Press 2005) at pp.5-10, Goodwin-Gill and McAdam *The Refugee in International Law* (3rd ed Oxford University Press 2007) at pp.93-94 and Foster *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge University Press 2007), Chapter 2. However, there is some disagreement between scholars as to the role of customary law and soft law in this context; see further Kneebone, *infra*.

standards provided by the main human rights treaties."[44] Hathaway and Foster advocate an approach that meets the twin challenges of flexibility and principled consistency based on a test of whether there is evidence of "a sustained or systemic denial of human rights demonstrative of a failure of state protection," using international human rights law as the benchmark.[45] Article 9 of the Qualification Directive is consistent with this approach, defining acts of persecution as follows:

> "1. Acts of persecution within the meaning of Article 1A of the Geneva Convention must:
> (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
> (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a)."[46]

Perhaps reflecting the individualised conception of the refugee at the heart of the Convention, Goodwin-Gill and McAdam suggest that ultimately, the assessment of persecution must be made "from case to case, taking account, on the one hand, of the notion of individual integrity and human dignity and on the other hand, of the manner and

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[44] Kneebone "Introduction: Refugees and Asylum Seekers in the International Context: Rights and Realities" in Kneebone (ed) *Refugees, Asylum Seekers and the Rule of Law* (Cambridge University Press 2009) at p.6.

[45] Hathaway and Foster *The Law of Refugee Status* (Cambridge University Press 2014) at p.182. See also Foster *International Refugee Law and Socio-Economic Rights – Refuge from Deprivation* (Cambridge University Press 2007).

[46] This provision was not amended by the Recast Qualification Directive other than the substitution of the single "an act of persecution" for the plural "acts of persecution"; insofar as this may impact State practice by clarifying that a single instance of persecution is sufficient to constitute persecution, it is to be welcomed. See further below, chapter 4.

degree to which they stand to be injured."[47] The indeterminacy inherent in such approach is problematic from the perspective of the principles of certainty and predictability.

Unlike the general consensus regarding torture, inhuman and degrading treatment and breaches of international humanitarian law as persecution, different opinions are evident in respect of when discriminatory acts are capable of amounting to persecution. UNHCR suggests that individual instances of discrimination may not be sufficient per se, but that in some circumstances such instances combined with other adverse factors, such as a general atmosphere of insecurity in the country of origin, may "produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on 'cumulative grounds.'" [48] It is particularly in the context of discrimination as persecution that the notion of a threshold arises;[49] not all instances of discrimination will amount to persecution. It has been suggested that the appropriate standard to apply in this regard is whether "measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, *eg* serious restrictions on his right to earn his livelihood, his right to practise his religion, or his access to normally available educational facilities."[50]

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[47] *Op cit* at p.94. The subjective element inherent in the concept of persecution is also emphasised by the UNHCR Handbook, which states "Due to variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary.": *op cit* at para.52.

[48] *Op cit* at para.53. The UNHCR Handbook specifically declines to lay down a general rule as to what cumulative reasons can give rise to a valid claim to refugee status, point out "This will necessarily depend on all the circumstances, including the particular geographical, historical and ethnological context."

[49] Clearly it would be inappropriate for such a threshold to be applied in respect of instances of torture or inhuman and degrading treatment, given the absolute nature of the rights engaged in that context.

[50] *UNHCR Handbook op cit* at para.54. Bagaric and Dimopoulos offer a compelling critique of the incoherence and inconsistency which exists in relation to this most important issue, before proposing a single, exhaustive test for determining the existence

Article 9(2) of the Qualification Directive explicitly recognises that acts of persecution can arise from discriminatory practices, providing that acts of persecution as qualified in paragraph 1, can, inter alia, take the form of:

> "(a) acts of physical or mental violence, including acts of sexual violence;
> (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;
> (c) prosecution or punishment, which is disproportionate or discriminatory;
> (d) denial of judicial redress resulting in a disproportionate or discriminatory punishment..."[51]

The CJEU was recently called upon to consider the interaction between persecution and discrimination in *X, Y and Z.*[52] One of the issues which arose for determination was the extent to which laws which criminalise homosexuality or homosexual acts may be said, ipso facto, to amount to persecution. The Court of Justice accepted that in each of the countries of origin in question (Sierra Leone, Uganda and Senegal) laws existed

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of persecution: "1. Does the law on its face impose an additional burden for a Convention reason? 2. If the answer is no, it is necessary to examine if the practical effect of the law is to impose an additional burden on people for a Convention reason, either because the law selectively targets people for a Convention ground or disproportionately applies against people for a Convention ground? 3. If the answer to both questions is 'no', the law does not constitute persecution. 4. If the answer to question 1 or 2 is 'yes', then the law will constitute persecution unless there is a relevant basis for causing serious harm to people for a Convention reason": Bagaric and Dimopoulos "Discrimination as the Touchstone of Persecution in Refugee Law" (2007) 3 Journal of Migration and Refugee Law 14.

[51] This provision was unchanged by the Recast Qualification Directive.

[52] *(C-199/12) Minister voor Immigratie en Asiel v X, (C-200/12) Y v Minister voor Immigratie en Asiel and (C-201/12) Z v Minister voor Immigratie en Asiel* unreported, Court of Justice of the European Union, November 7, 2013.

which criminalised homosexuality.[53] The Court of Justice referred to the provisions of Article 9 of the Qualification Directive, emphasising the threshold for acts to be deemed persecutory, and concluded that "not all violations of fundamental rights suffered by a homosexual asylum seeker will necessarily reach that level of seriousness."[54] The court held that, although the mere existence of legislation criminalising homosexual acts could not be regarded as an act affecting an applicant in a manner so significant that it reached the level of seriousness necessary for a finding that it constituted persecution within the meaning of Article 9(1), nevertheless the term of imprisonment which accompanied a legislative provision which punished such acts was capable of grounding such a finding, provided that it was actually applied in the country of origin which adopted such legislation.[55]

The decision of the Court of Justice in this regard can be criticised on a number of grounds. First, as Spijkerboer rightly notes:

> "the existence of criminal laws concerning consensual same sex acts should, even in the absence of information about enforcement, be considered sufficient for refugee status. … As criminalisation constitutes a permanent threat to the freedom – and in some cases, also to the lives – of lesbians, gays and bisexuals, criminalisation in itself is to be considered persecution."[56]

It has also been noted that the mere absence of information regarding active enforcement or prosecution does not discount the possibility of

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[53] *Ibid* at para.26.

[54] At para.53.

[55] At para.55-56.

[56] Spijkerboer *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum* (Routledge 2013) at p.7. The parallels with the decision of the European Court of Human Rights in *Norris v Ireland* (1988) 13 EHRR 186 are called to mind in this regard.

such events occurring. As the UN Committee Against Torture stated in *Uttal Mondal v Sweden,* "the State party's argument that Bangladeshi authorities are not actively persecuting homosexuals does not rule out that such prosecution can occur."[57] The decision of the Court of Justice in *X, Y and Z* is ultimately disappointing for its failure to adopt a substantive approach to the protection of the rights of the refugee by adopting a narrow and somewhat limited conception of the notion of persecution.

Other aspects of the notion of persecution have also generated significant debate. The requirement, if any, that the conduct amounting to persecution is accompanied by "persecutory intent" has been the subject of judicial and academic discussion in a number of jurisdictions.[58] It would appear that there is now general consensus that it is not necessary to prove that the acts in question are motivated by "enmity and malignity", but there remains a need to show that the persecution is motivated by one or more of the Convention grounds.[59] Whether the persecutory acts must be "sustained or systemic" has also given rise to some disparities in practice,[60] although the better view appears to be that offered by Lambert, namely that "persistency is a usual but not a universal criterion of persecution."[61]

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[57] Decision of the Committee Against Torture, 23 May 2011.

[58] See eg Goodwin-Gill and McAdam *op cit* at pp.100-102 and Grahl Madsen *op cit* at p.212.

[59] The Convention grounds are discussed below.

[60] See eg Hathaway *The Law of Refugee Status* (1991) at p.102; Grahl Madsen *op cit* at p.192; Zimmermann and Mahler *op cit* at pp.348-239. This issue is further considered below in chapter 3.

[61] Lambert "The Conceptualisation of 'Persecution' by the House of Lords: *Horvath v. Secretary of State for the Home Department*" (2001) 13 International Journal of Refugee Law 1 at pp.16, 22-23.

There has been a protracted debate as to the dividing line between prosecution and persecution,[62] raising difficult questions around the notion of state sovereignty and the limits of protection offered by the Refugee Convention.[63] Thus, the general rule is that prosecution and punishment will not prima facie amount to persecution, unless it can be demonstrated that the law is being used deliberately as an instrument of persecution.[64]

The notion of "agents of persecution" has also historically given rise to divergences in practice; some States party to the Refugee Convention insisted that acts of persecution could only occur at the hands of State agents, which excluded persecution from non-State actors from the scope of protection.[65] The requirement that persecution be attributable to State agents was expressly disapproved by the Qualification Directive, so that EU law now recognises persecution may occur at the hands of either State or non-State agents. Article 6 of the Directive provides that actors of persecution or serious harm include:

(a) the State;

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[62] See, eg, Goodwin-Gill *The Refugee in International Law* (2nd ed OUP 1996) at pp.66-70, UNHCR Handbook *op cit* at paras.56-60 and Hathaway *The Law of Refugee Status* (1991) at pp.169-179.

[63] As Goodwin-Gill and McAdam state "Every government has the right to enact, implement and enforce its own legislation, inherent in its sovereignty and in the principle of the reserved domain of domestic jurisdiction": *op cit* at p.103.

[64] Goodwin-Gill *The Refugee in International Law* (2nd ed OUP 1996) at p.67. This thorny issue was recently considered by the Advocate General and the Court of Justice of the EU in the context of laws criminalising consensual homosexual acts in *X, Y and Z v Minister voor Immigratie (Cases C-199/12, 200/12 & 201/12)* Advocate General's opinion of July 11, 2013, judgment of the court of November 8, 2013.

[65] For example, in *R. v Secretary of State for the Home Department, ex parte Adan & Aitseguer* [2001] 2 WLR 143, the applicants successfully resisted removal to France and Germany respectively, on the basis that these could not be regarded as "safe third countries" in circumstances where they did not recognise persecution by non-State agents as qualifying for protection under the Refugee Convention unless it could be demonstrated that the State was in some way complicit in the persecution.

(b) parties or organisations controlling the State or a substantial part of the territory of the State;

(c) non-State actors, if it can be demonstrated that the actors mentioned in (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7.

It is clear from the wording of Article 6(c) that the Qualification Directive interlinks the notions of persecution and protection. Thus, whilst acts of persecution may be committed by non-State actors, in such cases it must also be demonstrated that the State and/or international organisations controlling the State or a substantial part thereof are either unable or unwilling to provide protection,[66] echoing the formulation offered by the House of Lords in *Horvath* that "persecution equals serious harm plus the failure of State protection."[67] The incorporation of the availability of protection into the definition of persecution also gives rise to the "internal protection alternative", which posits that a fear of persecution is neutralised where the individual can safely relocate to another part of the country of origin.[68]

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[66] There was some controversy over the notion of international organisations as actors of protection, given their limited mandates and lack of accountability in this regard; see, eg, Lambert "The EU Asylum Qualification Directive, Its Impact on the Jurisprudence of the United Kingdom and International Law" (2006) 55(1) International and Comparative Law Quarterly 161 at 173-174. These concerns have been addressed by the provisions of the Recast Qualification Directive, albeit that this Directive is not binding on a number of member states including Ireland.

[67] [2001] 1 AC 489 at 515-516.

[68] See generally Storey "The Internal Flight Alternative Test: The Jurisprudence Re-examined" (1998) 10(3) International Journal of Refugee Law 499, Kelley "Internal Flight/Relocation/Protection Alternative: Is It Reasonable?" (2002) 14(1) International Journal of Refugee Law 4 and Hathaway and Foster "Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination" in Feller, Türk, and Nicholson (eds) *Refugee Protection in International Law' UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003) at pp.357-417.

There is, therefore, as Zimmermann and Mahler are right to suggest, no "coherent or consistent jurisprudence with regard to the interpretation of the concept of persecution."[69] Whilst there may be much merit to Goodwin-Gill's observation that an exhaustive list of persecutory acts may be neither possible nor desirable, the failure of the Refugee Convention to address more general matters such as the threshold for persecution and the issue of persecutory intent is unsatisfactory insofar as it allows for divergence in State practice which may in turn result in failure to protect persons at risk, thereby undermining the very purpose of the Convention itself. The looseness in the definition of such a core concept in the definition of a refugee, and the failure to delineate the term with sufficient precision at the international level, requires to be compensated for at the national level with potentially negative consequences for the overall consistency of approach to the concept of persecution.

The Five Convention grounds

It is important to recall that, as Bagaric and Dimopoulos highlight, the Refugee Convention does not provide a general protection against denial of human rights.[70] In order to qualify as a refugee, it is necessary not only to prove the existence of a well founded fear of persecution, but also that such persecution can be linked to one of the five Convention grounds, namely "race, religion, nationality, membership of a political group or political opinion."[71] It has been commented that given the "prevailing primacy of the civil and political paradigm of human rights" at the time of drafting the Refugee Convention:

> "it was contextually logical that marginalisation should be defined by reference to norms of non-discrimination... The

[69] *Op cit* at p.347.

[70] "Discrimination as the Touchstone of Persecution in Refugee Law" (2007) 3 Journal of Migration and Refugee Law 14 at 18.

[71] Article 1A(2) of the Convention.

> rationale for this limitation was not that other persons were less at risk, but was rather that, at least in the context of the historical moment, persons affected by these forms of socio-political disenfranchisement were less likely to be in a position to seek effective redress from the State."[72]

An alternative, perhaps more cynical view, suggests that the emphasis on violation of civil political rights, and therefore the exclusion of breaches of socio-economic rights, was a reflection of the "strategic dimension" to the drafting process and that:

> "by mandating protection for those whose Western inspired civil and political rights are jeopardised, without at the same time protecting persons whose socialist inspired socio-economic rights are at risk, the Convention adopted an incomplete and politically partisan human rights rationale."[73]

Although more recent developments in certain regional protection regimes have broadened out the basis for protection,[74] the definition of a refugee for the purposes of the Refugee Convention, and indeed European Union law, remains fixed to the requirement that persecution must be linked to one of the five grounds specified; it is to these five grounds that the discussion now turns.

Race

While the term is not defined in the Convention, Hathaway says it is clear from the historical context that the intention was to include those Jewish victims of Nazism who had been persecuted because of their

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[72] Hathaway *The Law of Refugee Status* (Butterworths 1991) at p.136. See also Hathaway and Foster *The Law of Refugee Status* (Cambridge University Press 2014) chapter 5.

[73] *Ibid* at p.8.

[74] See further chapter 1.

ethnicity, whether or not they actively practised their religion.[75] He further notes that this historical rationale is important, because it "legitimises the attribution of a broad social meaning to the word 'race' which includes all persons of identifiable ethnicity." [76] However, Zimmermann and Mahler suggest that the term "race" itself is problematic, noting that the scientific validity of the notion of "races" is contested[77] and that it furthermore presupposes a categorisation which the international community denies.[78] Whilst such scientific views may well be objectively well grounded, both past and recent events demonstrate that the social constructs of race and racial difference can give rise to gross violations of human rights and it is perhaps in that context that the Convention's recognition of race as a ground for persecution should be understood.

The UNHCR Handbook states that the term race must be understood "in its widest sense to include all kinds of ethnic groups that are referred to as 'races' in common usage",[79] often arising in the context of a specific social group of common descent forming a minority within a larger population. Hathaway refers to various Canadian cases which equate race with "ethnic background", "heritage", and "distinct minority" status, noting that "the primary notion which unites such groups is their exclusion from state protection based on identifiable ethnicity." [80] There is broad agreement that useful guidance can be obtained from the Convention on the Elimination of Racial Discrimination, Article 1 of which states that the term "racial discrimination" shall mean any

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[75] Hathaway *The Law of Refugee Status* (Butterworths 1991) at p.141.

[76] *Ibid.*

[77] *Op cit* at p.375. For example, the UNESCO Schlaining Declaration from 1996 states "there is no scientifically reliable way to characterise human diversity using the rigid terms of 'racial' categories or the traditional 'race' concept. There is no scientific reason to continue using the term 'race'".

[78] *Op cit* at p.375.

[79] *Op cit* at para.68.

[80] *Op cit* at pp.142-143.

distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin. This is echoed in EU law by Article 10 of the Qualification Directive, which provides that the concept of race shall in particular include considerations of colour, descent, or membership of a particular ethnic group.

Zimmermann and Mahler note that there seems to be little case law concerning 'race' as being the exclusive reason for persecution.[81] Many commentators agree that persecution on grounds of race often overlaps with other Convention grounds, such as religion, nationality or membership of a particular social group,[82] and it is likely for this reason that the concept remains somewhat undeveloped.

Religion

Persecution on the basis of religious belief is a persistent feature of human history; Goodwin-Gill refers to the Huguenots who fled from France to England (and indeed in smaller numbers to Ireland[83]) in the 17th century as a result of massacres and oppression, the pogroms of Jews in Russia and Armenian Christians in Ottoman Turkey as well as more recent events such as the persecution of Jews by the Nazis and their allies in Europe in the 1930s and 1940s.[84] Perhaps in the light of this history, international human rights law contains numerous expressions of the right to freedom of religion.[85] Although one might express the forlorn hope that in the light of such experiences, lessons have been learned, Zimmermann and Mahler suggest to the contrary:

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[81] *Op cit* at p.377.

[82] See eg Hathaway *op cit* at p.143; Zimmermann *op cit* at p.377.

[83] For a brief history of refugee populations in Ireland, see chapter 3.

[84] *Op cit* at p.71.

[85] Eg, Article 18 of the Universal Declaration on Human Rights, Article 18 of the International Covenant on Civil and Political Rights, Article 1 of the UN Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion and Belief and indeed Article 9 of the European Convention on Human Rights.

"due to rising fundamentalism in many States, it is expected that refugee claims based on religion are likely to increase in the future."[86]

Hathaway suggests that religion as defined in international law consists of two elements:

> "First, individuals have the right to hold or not to hold any form of theistic, non-theistic or atheistic belief. The decision is entirely personal, and neither the State nor its official or unofficial agents may interfere with an individual's right to adhere to or refuse a belief system, nor with a decision to change one's beliefs. Second, an individual's right to religion implies the ability to live in accordance with a chosen belief, including participation in or abstention from formal worship or other religious acts, expression of views and the ordering of personal behaviour."[87]

Following on from this, Hathaway notes that because religion encompasses both the beliefs that one may choose to hold and behaviour which stems from those beliefs, religion as a ground for refugee status similarly includes two dimensions:

> "First is the protection of persons who are in serious jeopardy because they are identified as adherents of a particular religion. It is not necessary that a claimant have taken any kind of active role in the promotion of her beliefs, nor even that she be particularly observant of its precepts of rituals ... The central issue must be whether there is a linkage between the threat of persecution and the claimant's self-defined or externally ascribed religious beliefs, in which case refugee protection is warranted. Alternatively, because religion includes also behaviour which flows from belief, it is appropriate to recognise as refugees

[86] *Op cit* at p.379.

[87] *Op cit* at pp.145-146.

> persons at risk for choosing to live their convictions... The peaceful expression of one's beliefs, including engaging in worship, playing an active role in religious affairs and proselytising may give rise to a genuine need for protection."[88]

However, it appears that there has been some divergence in practice, particularly in terms of the scope of protection from persecution on the basis of religious beliefs. Zimmermann and Mahler draw a distinction between the *forum internum,* defined as restrictions on freedom of religion in the private sphere which must be free from any external coercion, and the *forum externum* which can be made subject to certain limitations, such as the protection of public order, health or morals or the protection of the rights and freedoms of others.[89]

In this regard, Musalo notes that the travaux preparatoires of the Refugee Convention do not include any discussion of religion as a ground for persecution, and laments that to date, there has been very little interpretive guidance on religion-based claims including such key issues as "what is a religion, what constitutes persecution in the context of religious practice [and] when is the persecution 'for reasons of' the individual's religious beliefs."[90] Perhaps some of these concerns have been addressed in the context of EU law by the provisions of the Qualification Directive and a recent landmark judgment of the Court of Justice, discussed below.

Article 10(b) of the Directive, which deals with reasons for persecution, states:

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[88] *Ibid.*

[89] As provided, for example, by Article 18(3) of the ICCPR and Article 9(2) of the ECHR. See Zimmermann and Mahler *op cit* at pp.381-382.

[90] Musalo "Claims for Protection Based on Religion or Belief" (2004) 16(2) International Journal of Refugee Law 165.

> "the concept of religion shall in particular include the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief."[91]

The scope of refugee protection for people persecuted on the basis of their religious beliefs was recently considered by the Grand Chamber of the Court of Justice of the European Union in *Y and Z.*[92] The applicants were both Pakistani citizens who claimed asylum in Germany on the basis of a fear of persecution on account of their Ahmadi faith. In addition to claims of physical mistreatment and threats directed at both applicants, the general provisions of the Pakistani Criminal Code were also relevant, which specifically criminalised the Ahmadi faith and prescribed a maximum penalty of death for "any person who defiles the name of the Prophet Mohammed". The legal issue in the case concerned the distinction drawn in German law between interference with "core areas of religious freedom" (or Zimmermann and Mahler's "*forum*

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[91] This formulation remains unaltered in the Recast Directive (Directive 2011/95/EU) and is largely consistent with the approach recommended by the UNHCR Handbook, albeit that no express reference is made in the Directive to the particular situation of change of religion. Para 71 of the Handbook notes that the Universal Declaration of Human Rights and the Human Rights Covenant proclaim the right to freedom of thought, conscience and religion, which right includes the freedom of a person to change his religion and his freedom to manifest it in public or private, in teaching, practice, worship and observance. Paragraph 72 goes on to state that persecution for reasons of religion may assume various forms, e.g. prohibition of membership of a religious community, of worship in private or in public, of religious instruction, or serious measures of discrimination imposed on persons because they practise their religion or belong to a particular religious community. The Handbook also makes the point that in general, mere membership of a particular religious community will not normally be sufficient to give rise to an entitlement to refugee status, but that there may be special circumstances where mere membership will suffice: para.73.

[92] *Bundesrepublik Deutschland v Y and Z (Joined Cases (C-71/11 and C-99/11),* unreported, judgment of 5 September 2012.

internum") and restrictions on the public practice of faith (the "*forum externum*"), whereby only the former was regarded as persecution. Three questions were referred to the CJEU from the Federal Administrative Court, essentially asking (i) whether any interference with religious freedom must be regarded as an act of persecution; (ii) whether the distinction between core areas of religious freedom and its external manifestation was permissible; and (iii) whether a fear of persecution on religious grounds could be neutralised by the exercise of discretion or abstaining from certain religious practices.

The CJEU dealt with the first two questions together, and commenced its analysis by noting that freedom of religion is one of the foundations of a democratic society and is a basic human right.[93] However, the court considered that not every interference with the right to religious freedom would constitute an act of persecution, pointing to the language of Article 9(1) of the Directive which requires "severe violations" of basic human rights. This is consistent with the approach adopted by the court in *X, Y and Z,*[94] and to the extent that it adopts a less than substantive conception of the rights of refugees, it is to be regretted.

Having established a threshold test for persecution based on the severity of measures and sanctions applied and their impact on the individual, however, the court went on to disapprove of the distinction between the *forum internum* and *forum externum* as follows:

> "For the purpose of determining, specifically, which acts may be regarded as constituting persecution within the meaning of Article 9(1)(a) of the Directive, it is unnecessary to distinguish acts that interfere with the 'core areas' ('*forum internum*') of the basic right to freedom of religion, which do not include religious

[93] At para.57.

[94] Discussed further below in the context of the particular social group.

activities in public (*'forum externum'*), from acts which do not affect those purported 'core areas'.

Such a distinction is incompatible with the broad definition of 'religion' given by Article 10(1)(b) of the Directive, which encompasses all its constituent components, be they public or private, collective or individual. Acts which may constitute a 'severe violation' within the meaning of Article 9(1)(a) of the Directive include serious acts which interfere with the applicant's freedom not only to practice his faith in private circles but also to live that faith publicly."[95]

Lebouef and Tsourdi note that in this regard, the court followed the groundbreaking analysis of Advocate General Bot, departing from an abstract definition of persecution as an act that violates the core of the right to freedom of religion and instead focusing on "a concrete approach focused on the nature of the harm feared by those who would exercise their faith when returned to their home country."[96] Further assistance was offered by the court to the national authorities charged with making protection decisions, by the enumeration of a list of subjective and objective factors to be considered in this regard, in particular whether the observance of a certain religious practice in public is of particular importance to the person concerned in order to preserve his religious identity.[97]

On the issue of discretion in the exercise and manifestation of religious belief, the court somewhat tersely held:

"where it is established that, upon his return to his country of origin, the person concerned will follow a religious practice

[95] Paras.62 and 63.

[96] Lebouef and Tsourdi "Towards a redefinition of persecution? Assessing the potential impact of *Y and Z*" (2013) 13(2) Human Rights Law Review 402 at 406.

[97] At para.70.

> which will expose him to a real risk of persecution, he should be granted refugee status, in accordance with Article 13 of the Directive. The fact that he could avoid that risk by abstaining from certain religious practices is, in principle, irrelevant."[98]

The court's justification for this finding is the lack of a textual basis in the Directive for any such requirement; it is perhaps regrettable that the court did not consider advancing a more substantive, rights-based rationale for this finding.[99] While the decision of the Court of Justice in *Y and Z* has been welcomed for sweeping away the distinction between internal and external manifestations of religious belief, the decision has also been criticised for adopting "a narrow, conceptually vague" approach to the notion of persecution. Lehmann in particular regrets that the CJEU, as the only supranational court charged with interpreting the Refugee Convention, did not seize the opportunity to set out a sound and coherent theoretical basis in respect of such vital issues as the notion of being persecuted, given the central role of this concept in the vindication of the rights of refugees.[100]

Nationality

As noted above, the concept of nationality is closely linked to the notions of race and ethnicity. As in the case of race, the Convention offers no definition of this term, although Zimmermann and Mahler note that "nationality has been described as 'the right to have rights', since it

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[98] At para.79.

[99] For example, it could have justified this conclusion with reference to the nature of the fundamental rights in issue. A similar approach to *Y and Z* on the issue of discretion-reasoning was adopted by the Court of Justice in *X, Y and Z v Minister voor Immigratie (Cases C-199/12, 200/12 and 201/12)* judgment of the Court of Justice of the European Union, 7 November 2013 which will be discussed further below.

[100] Lehmann "Persecution, Concealment and the Limits of a Human Rights Approach in (European) Asylum Law: The Case of *Germany v Y and Z* in the Court of Justice of the European Union" (2014) 26(1) International Journal of Refugee Law 1 at 1 and 17.

not only provides people with a sense of identity but also entitles the respective individuals to enjoy many civil and political rights, the guarantee of which is reserved to the nationals of the State concerned." [101] Hathaway notes that early commentators assumed a narrow meaning of the term, roughly equivalent to formal citizenship, "leading to the obvious question of why a state would choose to persecute its own citizens merely by reason of their status of citizens."[102] However, he proceeds to observe that a slightly more expansive interpretation of citizenship suggests at least four situations in which disenfranchisement on the basis of formal political status is conceivable:

> "First, resident internationally unprotected persons, such as refugees and stateless persons, might be the subject of human rights abuse by reason of their status as "foreigners". While inhabitants who retain the formal and effective citizenship of another state could not advance a claim to refugee status in relation to the state of domicile, those who cannot enjoy meaningful protection elsewhere are properly assessed as refugees in accordance with the concept of state of former habitual residence. Second, persons who are denied full citizenship in their own state ... could qualify as nationally defined refugees insofar as their inferior political status can be shown to put them at risk of persecution. Third, some states may disenfranchise a portion of their population by ascribing a different nationality to them ... and establishing regimes which fail to guarantee basic human rights to those assigned the new nationality. Fourth, persecution based on nationality might arise in the context of a state composed of previously sovereign territories ... where measures are directed against those who

[101] *Op cit* at p.387.

[102] *Op cit* at p.144.

define their nationality in terms of allegiance to the predecessor state."[103]

However, the UNHCR Handbook cautions that the term "nationality" in this context is not to be understood only as "citizenship":

> "It refers also to membership of an ethnic or linguistic group and may occasionally overlap with the term "race". Persecution for reasons of nationality may consist of adverse attitudes and measures directed against a national (ethnic, linguistic) minority and in certain circumstances the fact of belonging to such a minority may in itself give rise to well-founded fear of persecution."[104]

This is echoed in Article 10(1)(c) of the Qualification Directive, which provides that the concept of nationality shall not be confined to citizenship or lack thereof but shall, in particular, include membership of a group determined by its cultural, ethnic or linguistic identity, common geographical or political origins or its relationship with the population of another State.[105]

As in the case of race, UNHCR emphasises the potential for overlap, noting that "it may not always be easy to distinguish between persecution for reasons of nationality and persecution for reasons of political opinion when a conflict between national groups is combined with political movements, particularly where a political movement is identified with a specific 'nationality'."[106] Given the apparent consensus as to the scope of application of the nationality ground, no concerns arise in this context from the perspective of the rule of law.

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[103] *Ibid.*

[104] *Op cit* at para.74. See also Zimmermann and Mahler *op cit* at p.389.

[105] This formulation also remains unchanged in the Recast Qualification Directive.

[106] At para.75.

Political opinion

Article 19 of the Universal Declaration on Human Rights provides that everyone has the right to freedom of opinion and expression, which includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers. Other international human rights instruments contain equivalent statements of protection.[107] Although the term "political opinion" is not itself defined within the Refugee Convention, Goodwin-Gill and McAdam suggest the term should be understood broadly so as to "incorporate, within substantive limitations now developing generally in the field of human rights, any opinion on any matter in which the machinery of State, government and policy may be engaged."[108]

Hathaway makes the important point that the Convention protects "political opinion" and not merely "political activity", so that there is no requirement that a person had expressed, or otherwise manifested, those opinions in a public context in order to qualify for refugee status.[109] Indeed, there is general agreement that a person may be recognised as a refugee on the basis of a political opinion that he or she does not even hold, provided it can be demonstrated that the agents of persecution perceive the existence of such an opinion.[110] There is also general consensus that in order to determine whether a person's opinion or activity can be characterised as political requires a context-sensitive

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[107] Such as Article 19 of the ICCPR, Article 4 of the CERD and Article 10 of the ECHR.

[108] *Op cit* at p.87, noting that this formulation was endorsed by the Supreme Court of Canada in *Attorney General v Ward* [1993] 2 SCR 689.

[109] *Op cit* at p.149.

[110] See eg UNHCR Handbook *op cit* at paras.82-83 and Zimmermann and Mahler *op cit* at pp.400-401. See also Article 10(2) of the Qualification Directive.

approach.[111] Particular difficulties can arise in this regard in trying to determine whether an act should properly be construed as reflecting a political opinion, specifically in circumstances where a "certain political opinion may unambiguously be derived from a political act, especially if the latter stands on its own without being accompanied by a clear expression of opinion."[112]

The issue of motivation and expression of political opinion also arises in the context of "sur place" refugee claims, where a refugee applicant has not manifested a political opinion in the country of origin but rather engages in conduct in the country of refuge which may be deemed political (often in the context of criticisms of the governing authorities in the country of origin). Although there is no requirement per se to demonstrate that the political opinion was held prior to departure from the country of origin, given the forward looking nature of the assessment of a refugee application, this may ultimately give rise to a close examination of the credibility of the overall claim. This is recognised by Article 5(2) of the Qualification Directive, which provides:

> "A well-founded fear of being persecuted ... may be based on activities which have been engaged in by the applicant since he left the country of origin, in particular where it is established that the activities relied upon constitute the expression and

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[111] As Zimmermann and Mahler note "what may be non-political in the State of refuge may have been perceived as being highly political in the claimant's State of origin, considering the different political situation there": *op cit* at p.399. See also Goodwin-Gill and McAdam *op cit* at pp.87-88. As the UNHCR Handbook notes, "The political opinions of a teacher or writer may be more manifest than those of a person in a less exposed position. The relative importance or tenacity of the applicant's opinions--in so far as this can be established from all the circumstances of the case--will also be relevant": *op cit* at para.80.

[112] Zimmermann and Mahler *op cit* at p.402, discussing in particular the jurisprudence on the difficult issue of when refusal to service in a national army or defiance of forced conscription amounts to political opinion for the purposes of the Refugee Convention.

continuation of convictions or orientations held in the country of origin."[113]

However, concerns have been expressed that Article 5(3) potentially undermines the scope of protection in this regard, providing:

> "Without prejudice to the Geneva Convention, Member States may determine that an applicant who files a subsequent application shall normally not be granted refugee status, if the risk of persecution is based on circumstances which the applicant has created by his own decision since leaving the country of origin."[114]

Goodwin-Gill and McAdam are particularly critical of the internal inconsistency between Articles 5(2) and 5(3);[115] the Court of Justice of the European Union may ultimately be required to reconcile this apparent divergence, although it has not yet done so to date. To the extent that such divergence also negatively impacts on the clarity and certainty of the law on this issue, it may also be said to fall short of the requirements of the rule of law.

The issue of discretion or restraint, which has arisen in the context of religious-based claims, could also potentially arise in respect of political opinion. However, having regard to the high value placed on freedom of

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[113] This provision was not substantively altered by the Recast Qualification Directive (although there were minor grammatical amendments).

[114] Save for the correction of a split infinitive, this provision was not altered by the Recast Qualification Directive. The phrase "without prejudice to the Geneva Convention" is a curiosity, whose precise meaning is unclear. Insofar as it may be indicative of a divergence from the terms of the Convention, it clearly constitutes a reduction in the scope of the international regime of protection and is to be deprecated. For a discussion of the interaction between the EU asylum regime and international law obligations, see further Battjes *op cit* at pp.603-604 and Hathaway "EU Accountability to International Asylum Law: The Case of Asylum" (2011-2012) Michigan Journal of International Law 1.

[115] *Op cit* at p.89.

expression in international human rights law, and the approach adopted by the CJEU in *Y and Z* it is submitted that a refugee claim ought not be refused on the basis that the applicant can moderate or suppress their political opinions and thus avoid persecution.[116]

Membership of a particular social group

It has been suggested that the fifth and final Convention ground, namely membership of a particular social group, is "the ground with the least clarity." [117] Hathaway and Foster note that given the paucity of explanatory material in the drafting history, "decision-makers have been left to formulate principles with little historical guidance", which has led to divergent approaches between and even within different jurisdictions.[118] Indeed, some have queried:

> "whether the membership of a particular social group ground is amenable to a comprehensive definition or analytical framework, or whether any attempt to devise a framework should be eschewed in favour of an incremental approach that recognises membership of a particular social group on the basis of the facts of individual cases."[119]

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[116] This is consistent with the approach advocated by the UNHCR Handbook, which states "There may … be situations in which the applicant has not given any expression to his opinions. Due to the strength of his convictions, however, it may be reasonable to assume that his opinions will sooner or later find expression and that the applicant will, as a result, come into conflict with the authorities. Where this can reasonably be assumed, the applicant can be considered to have fear of persecution for reasons of political opinion": *op cit* at para.82.

[117] Foster *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (Cambridge University Press 2007) at pp.292-293.

[118] Hathaway and Foster "Membership of a Particular Social Group: Discussion Paper No.4, Advanced Refugee Law Workshop, International Association of Refugee Law Judges, October 2002" (2003) 15(3) International Journal of Refugee Law 477.

[119] *Ibid.*

Such an approach embodies an unacceptable degree of indeterminacy, and as the discussion below demonstrates, has not generally found favour in the approach to this ground. Goodwin-Gill has suggested that the inclusion of this ground might have been intended to apply to contemporary examples of persecution, including events such as the "restructuring" of society then underway in communist states and the harsh treatment of the petite bourgeoisie.[120] However, it is now generally agreed that this category should not be so narrowly understood;[121] as Lord Hoffmann stated in *Islam v Secretary of State for the Home Department*:

> "the concept of a social group is a general one and its meaning cannot be confined to those social groups which the framers of the Convention may have had in mind. In choosing to use the general term 'particular social group' rather than an enumeration of specific social groups, the framers of the Convention were in my opinion intending to include whatever groups might be regarded as coming within the anti-discriminatory objectives of the Convention."[122]

Hathaway notes that as the discussion of the correct approach to this ground developed in the literature, two competing views could be identified:

> "On the one hand, it is argued that membership of a particular social group should be seen as 'clarifying certain elements in the more traditional grounds for persecution', those being race, religion, nationality and political opinion.... Under this approach, the notion of membership of a particular social group became largely superfluous, since this groups which were recognised ...

[120] *Op cit* at p.74.

[121] See, eg, Goodwin-Gill & McAdam who state "there is no reason in principle why this ground, like every other, should not be progressively developed": *ibid.*

[122] [1999] 2 AC 629 at 651.

could already be protected under the rubric of the other four categories"[123]

This narrow approach was expressly disapproved by the Canadian Supreme Court in *Attorney General v Ward.*[124] At the other extreme was the liberal "safety net" approach, exemplified by Helton as follows:

> "The delegates intended to guarantee security from persecution to all refugees, without invidious or unnecessary distinctions. The 'social group' category, designed to reaffirm this commitment, was adopted in the UN Convention without dissent, extending the protection of refugees far beyond what had previously been the norm… The intent of the framers of the Refugee Convention was not to address prior persecution of social groups, but rather to save individuals from future injustice. The 'social group' category was meant to be a catch-all which could include all the bases for and types of persecution which an imaginative despot might conjure up."[125]

Hathaway contends that whilst this approach is "seductive from a humanitarian perspective", it is incorrect as it eliminates the need to consider the issue of linkage between fear of persecution and civil or political status, which goes to the heart of the refugee concept in the Convention.[126]

As Zimmermann and Mahler note, there are two main approaches to the definition of a particular social group, namely the "protected characteristics" or internal approach, and the "social perception" or

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[123] *Op cit* at pp.157-158.

[124] (1993) 2 SCR 689

[125] Helton "Persecution on Account of Membership of a Particular Social group as a Basis for Refugee Status" (1983) 15 Columbia Human Rights Law Review 39 at 41-42, 45.

[126] *Op cit* at p.159.

external approach.[127] The protected characteristics or internal approach has been adopted in a number of leading US and Canadian decisions; for example, in *Matter of Acosta* it was held:

> "[T]he other four grounds of persecution enumerated in the Act and the Protocol restrict refugee status to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution. Applying the doctrine of ejusdem generis, we interpret the phrase 'persecution on account of membership in a particular social group' to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. .... The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.
>
> Only when this is the case does the mere fact of group membership become something comparable to the other four grounds of persecution under the Act, namely, something that either is beyond the power of an individual to change or that is so fundamental to his identity or conscience that it ought not be required to be changed. By construing 'persecution on account of membership in a particular social group' in this manner, we preserve the concept that refuge is restricted to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution."[128]

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[127] *Op cit* at p.392.

[128] 20 Immigration & Nationality Decisions 211 (BIA 1985) at paras.53-55.

The Canadian Supreme Court in *Attorney General v Ward* also adopted the protected characteristics approach, based on three distinct subcategories of particular social group within the meaning of Article 1A(2) of the Refugee Convention:

> "(1) groups defined by an innate or unchangeable characteristic;
> (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
> (3) groups associated by a former voluntary status, unalterable due to its historical permanence."[129]

Hathaway and Foster note the advantages of the protected characteristics approach include its provision of "a firmly principled framework" which promotes consistency in decision-making, while allowing for "responsible evolution" of the particular social group ground. [130] However, this approach has also been criticised for unnecessarily complicating the refugee inquiry in a way that could be avoided by simply giving the phrase its ordinary meaning, on the basis that the framework is not always easy to apply and that clear answers are not always available.[131]

In contrast to the protected characteristics approach, which is concerned with the internal classification of the group, the "social perception" approach is concerned with the external perception of the group, namely "whether the group has characteristics in common which make them a recognisable group or set them apart from society at large."[132] This approach emerged from the decision of the High Court of Australia in *A v Minister for Immigration and Ethnic Affairs*, where Dawson J described a particular social group as:

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[129] (1993) 104 ILR 222 at 255.

[130] *Op cit* at pp.481-482.

[131] *Ibid* at p.482.

[132] Zimmermann and Mahler *op cit* at p.392.

> "a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large. That is to say, not only must such persons exhibit some common element, the element must unite them, making those who share it a cognizable group within their society."[133]

Aleinikoff commends the social perception approach for offering a potentially wider basis for protection than the protected characteristics approach,[134] whilst avoiding the pitfalls of the "safety-net" approach advocated by Helton. However, for Hathaway and Foster this approach is nonetheless still overly broad, and in failing to effect a meaningful delimitation of the class of beneficiaries, it "risks trivialising the value of refugee protection."[135]

A middle ground approach was proposed by UNHCR in 2002 in the following terms:

> "The protected characteristics approach may be understood to identify a set of groups that constitute the core of the social perception analysis. Accordingly, it is appropriate to adopt a single standard that incorporates both dominant approaches: *a*

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[133] [1997] HCA 4, (1997) 190 CLR 225 at 241. See also the dictum of McHugh J at p.263 that a particular social group is defined by "a common attribute and a societal perception that they stand apart."

[134] Giving the examples of "claims asserted by private entrepreneurs in a socialist State, wealthy landowners targeted by guerrilla groups, or members of a labour union. According to the facts of the particular society, either might constitute a social group under the social perception approach; it would be far harder to reach such a conclusion under the protected characteristics approach": Aleinikoff "Protected Characteristics and Social Perceptions: An Analysis of the Meaning of 'Membership of a Particular Social Group'' Determination" in Feller, Türk, and Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003) at p.272.

[135] *Op cit* at p.484.

particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable or which is otherwise fundamental to identity, conscience or the exercise of one's human rights."[136] [Emphasis added]

However, this combined approach has also attracted some criticism for being overly broad,[137] albeit some commentators have endorsed the UNHCR guidelines in this context.[138] Aleinikoff attempts an interesting synthesis, suggesting:

> "the two approaches can be seen as consistent if the protected characteristics analysis is understood to define a core set of groups that are virtually ensured recognition under the social perception test. Understood in that fashion, the protected characteristics test can be applied by adjudicators who find that approach more suitable; such adjudicators can be safe in the knowledge that the approach will identify the vast bulk of groups that should be afforded protection under the Convention. I have argued, however, that they should be willing to assess claims that fail the protected characteristics test under the social perception test as well."[139]

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[136] UNHCR *Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees* (7 May 2002, HCR/GIP/02/02 at para.11.

[137] *Eg* Hathaway and Foster state that "despite its advocacy of conceptual merger, UNHCR is effectively endorsing the social perception test as the determinative paradigm without recommending any modifications to take account of the conceptual and practical concerns identified by some courts and commentators": *op cit* at p.490.

[138] Zimmermann and Mahler *op cit* at p.393.

[139] Aleinikoff *op cit* at p.310.

A further complication arises from an examination of the approach adopted in EU law to the construction of a particular social group. Referred to by Zimmermann and Mahler as the "combined cumulative approach", Article 10(1)(d) of the Qualification Directive provides that a group shall be considered to form a particular social group where in particular:

> "members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society..." [Emphasis added]

The apparent requirement to meet both the "protected characteristics" approach embodied in the first clause, and the "social perception" approach in the second clause was criticised as being overly restrictive and contrary to Article 1A(2) of the Refugee Convention by the House of Lords in *Fornah*,[140] as well as misunderstanding the combined approach advocated by UNHCR.[141] It is therefore particularly disappointing that these comments were not taken into account in the Recast Qualification Directive, which retains the "combined cumulative

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[140] As Lord Bingham stated, "If ... this article were interpreted as meaning that a social group should only be recognised as a particular social group for purposes of the Convention if it satisfies the criteria in both of sub-paragraphs (i) and (ii), then in my opinion it propounds a test more stringent than is warranted by international authority": [2006] UKHL 46 at para.16. Similarly, the UNHCR *Annotated comments on the EC Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted*, 28 January 2005 stated at p.22: "To avoid any protection gaps, UNHCR therefore recommends that Member States reconcile the two approaches to permit alternative, rather than cumulative, application of the two concepts."

[141] Zimmermann and Mahler *op cit* at p.394.

approach." Such an approach runs the risk of setting the bar too high for refugees to meet, thus potentially excluding persons properly eligible from refugee protection.

Notwithstanding the differences between the "protected characteristics" and "social perception" approaches, there are certain principles in respect of which there is broad agreement regardless of the conceptual framework applied. For example, it is generally agreed that there is no requirement of homogeneity or cohesion in order to constitute a particular social group.[142] There is also a broad consensus that "common victimisation" is not sufficient to constitute a particular social group:

> "It would indeed be a circular way of reasoning to consider a persecuted group a special social group under Article 1A(2) due to the very fact of persecution alone. Such a tautology would be contrary not only to legal reasoning, but to logic in general".[143]

However, Aleinikoff cautions that this is a principle which is apt to be misapplied, pointing out the definition of the class must describe a group "that stands apart in society where the shared characteristic of the group reflects the reason for the persecution. This is importantly different from saying that a defined class must only include persons likely to be persecuted."[144]

This difficulty can be clearly seen in the context of gender-based claims.[145] Although not specifically mentioned in Article 1A(2), there is

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[142] The requirement for a certain degree of cohesiveness was evident in a number of earlier US decisions, eg *Sanchez-Trujillo v INS* 801 F.2d 1571 (US), but was later abandoned in *Hernandez-Montiel v INS* 225 F.3d 1084.

[143] Zimmermann and Mahler *op cit* at p.395. See also

[144] *Op cit* at p.289.

[145] See generally UNHCR *Guidelines on international protection no.2: 'membership of a particular social group' within the context of article 1A(2) of the 1951 Convention and/or its 1967 protocol relating to the status of refugees*, 7 May 2002 and Haines

now a well-established line of jurisprudence that gender-based claims are capable of coming within the definition of a particular social group.[146] However, at times refugee decision-makers have struggled with fully appreciating the distinction that "the concept of women being persecuted as women is not the same as women being persecuted *because* they are women."[147] Thus, while some courts have recognised women who have experienced domestic/family violence as members of a particular social group in some cases,[148] others have rejected such claims.[149] This clearly demonstrates the risks of divergence and protection gaps which can arise from a lack of clarity in core elements of the definition of a refugee, including the particular social group ground.

Another social group which has come to some prominence recently is that of lesbian, gay, bisexual and transgender people, described by

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'Gender-related persecution' in Feller, Türk and Nicholson (eds) *Refugee protection in international law: UNHCR's global consultations on international protection* (Cambridge University Press 2003) at pp.319-350.

[146] For example, women in societies which practice female genital mutilation have been recognised as members of a particular social group by the United Kingdom House of Lords in *Secretary of State for the Home Department v K; Fornah v. Secretary of State for the Home Department* [2006] UKHL 46 as well as the UK Board of Immigration Appeals in *Matter of Kasinga* 21 Immigration & Nationality Decisions 357 (BIA 1996); women who fear forced marriages were recognised as a particular social group in *Gao v Gonzales* 440 F. 3d 62 (2nd Cir. 2006); women who contravene the social or moral codes of their societies were recognised as a particular social group in *R. v Immigration Appeal Tribunal ex parte Shah; Islam v Secretary of State for the Home Department* [1999] 2 AC 629.

[147] Zimmermann and Mahler *op cit* at p.409.

[148] Eg *Aguirre-Cervantes v INS* 242 F. 3d 1169 (9th Cir 2001).

[149] Eg *Gomez v INS* 947 F. 2d 660 (2nd Cir 1991) rejected a social group claim where the group was defined as "women who have been previously battered and raped by Salvadorean guerrillas" on the basis that "possession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group" and "Gomez failed to produce evidence that women who have previously been abused by the guerillas possess common characteristics--other than gender and youth--such that would-be persecutors could identify them as members of the purported group" (at paras.19-20).

Zimmermann and Mahler as a "still emerging field of refugee law."[150] The 2007 Yogyakarta Principles which recognised "each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender, or more than one gender" [151] have undoubtedly underpinned much of this development, being cited by the UNHCR guidance note on refugee claims relating to sexual orientation and gender identity[152] as well as numerous court decisions.[153]

However, the fact that one of the questions referred to the Court of Justice in *X, Y and Z* was whether "foreign nationals with a homosexual orientation form a particular social group" perhaps demonstrates that this is not yet regarded as a universally settled principle (albeit the Court of Justice disposed of this question in the affirmative in a concise and definitive statement). [154] Even where decision-makers are willing to acknowledge a particular social group in the context of a claim based on sexual orientation or gender identity, other aspects of practice give rise to concern. In particular, the imposition of a "discretion" requirement by some decision-makers has the potential to defeat a refugee claim on the basis that, notwithstanding a determination that a person has a well-founded fear of persecution on the basis of his or her sexual orientation or gender identity, that fear can be neutralised by the exercise of discretion by the person from revealing his or her sexual orientation or

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[150] *Ibid* at p.420.

[151] *Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007.

[152] UNHCR *Guidance note on refugee claims relating to sexual orientation and gender identity* 21 November 2008.

[153] See eg *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31; *X, Y and Z v Minister voor Immigratie (Cases C-199/12, 200/12 and 201/12)* Court of Justice of the European Union, 7 November 2013; *MA v Minister for Justice* [2010] IEHC 519. The recognition of sexual orientation within the particular social group under Irish law is further considered in chapter 3.

[154] "Article 10(1)(d) of the Directive must be interpreted as meaning that ... those persons must be regarded as forming a particular social group": paras.46-49.

gender identity. Such reasoning has been roundly criticised on numerous grounds, from a human rights basis[155] to a more basic human experience perspective,[156] and recent decisions have also disapproved of such approach.[157] However, the application of this principle in the past is certainly indicative of a "protection gap"; Millbank has also documented concerns that in some cases, where discretion reasoning is no longer permissible, the focus shifts to denying the credibility of the core claim, leading to the same result, namely denial of refugee status.[158]

Conclusion

The formulation of "who is a refugee" in Article 1A(2) of the Convention appears at first glance to be straightforward. However, as the above analysis demonstrates, many of the constituent elements in the refugee definition are the subject of ongoing uncertainty and debate,

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[155] Millbank "From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom" (2009) 13 International Journal of Human Rights 391.

[156] For example, the *Fleeing Homophobia* report pointed out that "the closet is a very unsafe place. The sexualorientation or gender identity of LGBTIs may be made public against their will, and there is a permanent risk that this will happen": Vrije Universiteit Amsterdam *Fleeing Homophobia, Asylum Claims Related to Sexual Orientation and Gender Identity in Europe* September 2011 at p.2.

[157] See eg *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31; *X, Y and Z v Minister voor Immigratie (Cases C-199/12, 200/12 and 201/12)* Court of Justice of the European Union, 7 November 2013.

[158] Discretion based reasoning was disapproved by the High Court of Australia in *Appellants S395/2002 and S396/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473, in the cases of two Bangladeshi refugee applicants whose sexual orientation was accepted by the Refugee Review Tribunal but whose claims were refused on the basis that they could be discreet upon their return to Bangladesh. That decision was quashed by the High Court of Australia on the basis that discretion based reasoning was impermissible. Millbank notes that when the appeals were remitted to the Tribunal for fresh determination, the Tribunal found that in fact neither applicant was gay and therefore again refused the refugee claims. A subsequent application for judicial review of this finding was rejected on the basis that findings of fact in respect of sexual orientation were not subject to judicial review.

such as the precise scope of the term persecution, the threshold for conduct amounting to persecution and the identity and motives of those committing acts alleged to be persecutory. Lack of clarity in the conceptual framework underpinning some aspects of the Convention grounds, in particular the particular social group, also gives rise to potential for protection gaps which may arise through disparities in state practice. However, as the discussion of discretion based reasoning in the context of LGBTI refugee claims notes, protection gaps can arise not only as a result of gap in the conceptual framework but also as a result of deficiencies in the refugee status determination process. It is to that process that the discussion now turns, with a specific focus on the Irish system, in order to determine whether Irish refugee law offers not only substantive but also procedural protection to refugees.

Chapter 3 The Refugee in Irish law

Introduction

This chapter introduces the refugee in Irish law. The chapter begins with a brief history of refugees in Ireland, from a socio-historical perspective, noting the move from small groups of refugees arriving on a pre-arranged, "programme" basis to the dramatic shift in the 1990s to a large influx of asylum seekers whose arrival was not anticipated, and the important implications of this shift on both the institutional and administrative frameworks concerning refugees in Irish law. The early, non-statutory arrangements for processing of refugee applications are considered (namely the von Arnim procedure and the Hope Hanlan procedure) before the discussion turns to the Refugee Act 1996, the first and, to date, only statutory regime governing the refugee process in Ireland. This chapter then analyses the constituent elements in the substantive definition of a refugee in Irish law, both under the Refugee Act 1996 and more recently the statutory instruments implementing the EU Qualification Directive. From the rule of law perspective, much of the focus in this chapter is on the principle of certainty, and the extent to which the provisions of Irish law concerning the definition of a refugee comply with this requirement. The crucial role played by the judiciary in the interpretation of core norms is also assessed, with an emphasis on the extent to which the rights of refugees are properly respected.

A brief history of refugees in Ireland

Historically, Ireland was not a destination for refugees;[1] indeed, it is often said that Ireland is a country of emigrants, not immigrants.[2] There are, however, some isolated instances of people fleeing persecution being accepted in Ireland. One of the earliest records of refugees seeking asylum in Ireland is a reference to a small group of Jewish refugees from the Canary Islands fleeing the Spanish Inquisition in the 1660s.[3] While most fled to England, a small group French Huguenots fleeing religious persecution in the 17th century also settled in Ireland, a reminder of which is the Huguenot Cemetery on Merrion Row in Dublin, dating from 1693, which is the burial place of some of those refugees and their descendants. Ireland's response to the Jewish population fleeing Nazi Germany some two hundred and fifty years later was reprehensible, and Keogh convincingly demonstrates the impact of the "staunchly restrictive Jewish refugee policy from the 1930s onwards" which resulted in a "lost chance" to save many lives during the key period between 1938 and 1941.[4]

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[1] The influence of the Huguenot refugees in Ireland is also still evident today in place names like D'Olier Street and Blackquiere Bridge; descendants of Huguenots are also among the Irish literary greats, including Samuel Beckett and Sheridan Le Fanu. See generally Caldicott, Gough and Pittion (eds) *The Huguenots and Ireland: Anatomy of an Emigration* (Glendale Press 1987).

[2] For example, Weil notes that "Ireland, which until the past decade was the only remaining country of emigration in western Europe, has recently received increasing numbers of immigrants": Weil "Access to citizenship: a comparison of twenty five nationality laws" in Aleinikoff and Klusmeyer (eds) *Citizenship Today: Global Perspectives and Practices* (Carnegie Endowment for International Peace 2001). See also generally Mac Einri *Immigration into Ireland: Trends, Policy Responses, Outlook* (2001).

[3] See Cohen "Ireland" in *The American Jewish Yearbook* (1964) at p.201.

[4] See Keogh *Jews in Twentieth-Century Ireland: Refugees, Anti-Semitism and the Holocaust* (Cork University Press 1998). Moreo notes that Ireland "notoriously admitted only 60 Jewish refugees while Europe's Jewish population was being annihilated by the Nazis": Moreo "The Horn of Africa People's Aid" in Lentin and

During the twentieth century there were a number of examples of resettlement programmes for people fleeing persecution, beginning with an invitation to a group of Hungarians fleeing the uprising in 1956, issued shortly after Ireland signed the Refugee Convention.[5] The tale of the Hungarian refugees is perhaps a cautionary one; despite the well-motivated offer by De Valera's government to resettle five hundred and forty one Hungarian refugees, appropriate facilities and services were not in place to deal with the needs of those who availed of the offer. Housed in temporary wooden army billets at Knockalisheen camp in Co. Limerick, the refugees soon expressed their dissatisfaction at the conditions (as well as the grim Irish weather), leading to protests and ultimately a threat of hunger strike. The majority of those refugees eventually requested to be resettled elsewhere, and most subsequently left for Canada and the United States. [6] Subsequent resettlement programmes were offered to Chileans fleeing the coup d'état in 1973 and 1974, Vietnamese boat people in 1979, Iranian Baha'i in the 1980s as

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Moreo (eds) *Migrant Activism and Integration from Below in Ireland* (Palgrave Macmillan 2012) at p.161.

[5] See Fraser and Harvey *Sanctuary in Ireland: Perspectives on Asylum Law and Policy* (IPA 2003) at p.1 and Ward "'A Big Show-Off to Show What We Could Do': Ireland and the Hungarian Refugee Crisis of 1956" (1996) 7 Irish Studies in International Affairs 131.

[6] See Pálmai Bánki *Crossing Borders from Hungary to Ireland: The Cross-Cultural Adaptation of Hungarian Refugees from the 1940s and their Compatriots from the 1956 Hungarian Revolution* (PhD thesis submitted at Dublin City University 2009). Pálmai Bánki quotes from a letter sent by a representative of the Hungarian refugees to the US Congress, stating "We have to be excused for disturbing you in your great and responsible work…We are being kept in unheatable wooden huts, on unhealthy food, without the possibility of schooling. The Irish are a very poor and unfortunate people…there are 90,000 unemployed here at present. To find employment is accordingly impossible, as the Irish Trade Unions most understandably protest against our employment…you have promised us life and not concentration camp" (at pp.139-140).

well as Bosnians in the early 1990s and Kosovars in 1999.[7] As Fraser and Harvey note, "the arrival of these groups caused little controversy because of the controlled and orchestrated manner with which their arrival was handled."[8]

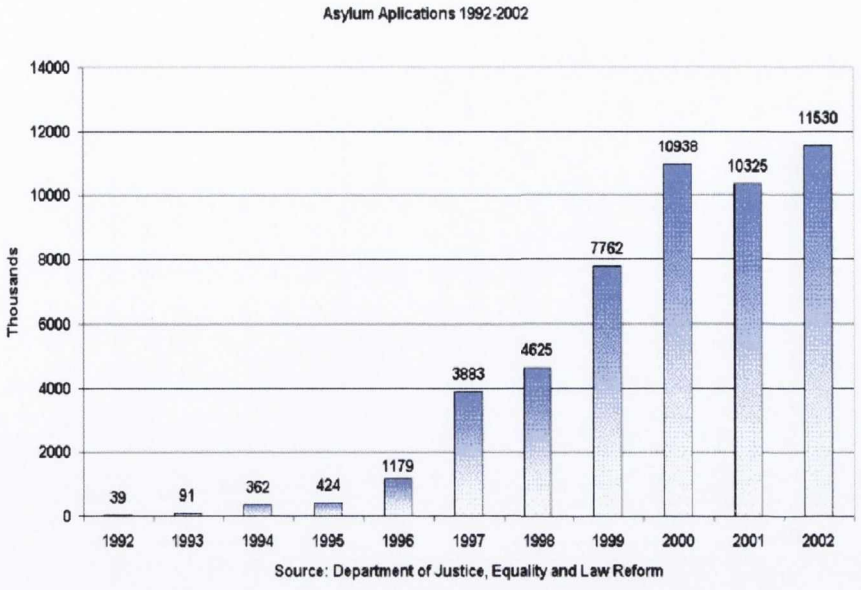
Spontaneous arrivals of asylum seekers were a rarity; indeed, there was no formal legal infrastructure in place to deal with such cases.[9] The numbers of such arrivals, originally a trickle, very quickly became steady stream, or what some would occasionally refer to as a "flood"; from 39 asylum applications in 1992, to a peak of 11,530 in 2002, as the following table graphically illustrates:

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[7] See generally Ward "Ireland's Refugee Policies: A Critical Historical Overview" in O'Driscoll (ed) *Irish Human Rights Review 2000* (Round Hall Sweet & Maxwell 2000) at pp.157-165.

[8] *Op cit* at pp.1-2.

[9] Delaney gives an interesting account of the interactions between the Department of Foreign Affairs and the Department of Justice in relation to decisions on refugee applications during this period: "The asylum drill was relatively straightforward. An immigration official would interview them and send us a report. We would consult with the relevant international body, the UNHCR and then give a political instruction to the Department of Justice who were ultimately responsible for immigration. Happily, on asylum cases, Justice almost always abided by our direction. This was just as well, for they themselves usually took a narrow, unsympathetic approach. Also – without being snobbish about it – decisions were taken by some very low-level officials who would freely give their opinions in dismissive, disparaging tones: 'You can't have these people coming in here, making their curries'; 'Oh, they look like a lot of troublemakers, alright'... I have to admit I pushed through a few borderline cases, especially when there was a clear humanitarian case ... On many cases, you might have to argue with the Justice officials to bring them around. It often depended on what official you were talking to. As the file went up the line, some refugee's future might be entirely dependent on each officer, swinging one way or the other.": Delaney *The Accidental Diplomat* (New Island Books 2001) at pp.72-73.



This rapid and exponential increase in the numbers of asylum applications gave rise to an urgent requirement to establish a formal structure within which refugee applications could be received and processed. The first attempt to put in place an administrative procedure to process asylum claims in Ireland came about as a result of a meeting between Ruprecht von Arnim, UNHCR representative in London and Cathal Crowley, assistant secretary at the Department of Justice on 5 February 1985 which led to the agreement of a set of procedures to be applied, as set out in a letter dated 13 December 1985 (commonly referred to as the "von Arnim letter").[10] This letter provided inter alia that asylum seekers would have an opportunity to present their case fully and that facilities would be provided to enable such applications to be made; that the application would be considered in accordance with the 1951 Convention and the 1967 Protocol; that the Department of Justice would consult fully with UNHCR before issuing a final decision to refuse an application; and that an unsuccessful applicant would be entitled to a written decision setting out the reasons for the refusal.

[10] The origins and contents of the von Arnim letter are set out in the judgment of O'Hanlon J in *Fakih v Minister for Justice* [1993] 2 IR 406 at 416-417.

It would appear that difficulties arose in the application of these procedures, at least insofar as the decision in *Fakih v Minister for Justice*[11] is concerned. The applicants were Lebanese nationals who applied for asylum in the State but whose applications were refused by the Minister for Justice on the basis that they had failed to seek asylum in the first safe country through which they had passed after leaving Lebanon. The applicants sought injunctive relief from the High Court restraining their removal from the State and also sought orders compelling the Minister for Justice to consider their asylum applications in accordance with the procedure set out in the von Arnim letter. It is notable in this regard that there was no provision in the von Arnim letter which allowed for the refusal to accept an application for asylum on the basis of the "safe first country" principle.

O'Hanlon J granted injunctions restraining the removal of the applicants and effectively held that the Department of Justice was legally obliged to comply with the terms of the von Arnim letter. In so doing, O'Hanlon J came to the view that the applicants had an entitlement to oblige the Minister to follow fair procedures in dealing with the question of their removal from the jurisdiction, and that more specifically, the mode of procedure to the adopted ought to have had regard to the assurances given by the Minister in the von Arnim letter. Given the contents of the letter, O'Hanlon J considered that "once a claim to asylum is put forward on behalf of aliens coming to this country, the person or persons concerned should be given an adequate opportunity to put forward representations to show why such application should be acceded to."[12] A similar conclusion was reached by the Supreme Court in *Gutrani v Minister for Justice*,[13] where McCarthy J held that having established such a scheme, however informally, the Minister was bound as consequence to "apply it in appropriate cases, and his decision would be

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[11] [1993] 2 IR 406.

[12] *Gutrani v Minister for Justice* [1993] 2 IR 427 at p.436.

[13] *Ibid.*

subject to judicial review. It does not appear to me to depend on any principle of legitimate or reasonable expectation; it is, simply, the procedure which the Minister has undertaken to enforce".

In this regard, both *Fakih* and *Gutrani* are fully consistent with the principles of fair procedures and access to the asylum process, demonstrating the willingness of the court, at least on this occasion, to vindicate the rights of the refugee.[14]

The von Arnim letter governed the refugee decision-making process in Ireland between 1985 and 1997, but as the numbers of asylum applications began to grow steadily in the 1990s, concerns grew that "the simplified procedures set out in the von Arnim letter were no longer sufficient", for example the absence of any formal right of appeal against a negative decision and the failure to provide for any scheme of legal aid for asylum seekers.[15]

Against this background, the Refugee Act 1996 was passed, setting out for the first time both substantive and procedural frameworks in respect of refugee law in Ireland. However, the Act was not fully implemented until 2000.[16] Various suggestions have been given for this interim step, from the need to put in place measures to protect the common travel area[17] to legal proceedings challenging the appointment of the Refugee Applications Commissioner who was intended to be the first instance

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[14] See further chapters 4 and 5.

[15] Amnesty International *Asylum Law and Policy in Ireland: A Critical Guide* (2000) at p.6.

[16] Egan suggests that "the failure to bring the Refugee Act into force stems, it appears, from a change of governmental heart promoted by the sizeable increase in the numbers seeking asylum in the State since its enactment": "The Refugee Act 1996" in Driscoll (ed) *Irish Human Rights Review 2000* (Round Hall Sweet & Maxwell 2000) at p.42.

[17] Amnesty International *op cit* at p.7, noting that it had been discovered during this period that many non-Irish and non-UK nationals were travelling between the UK and Ireland without undergoing immigration checks which led to concerns about possible abuse of the asylum systems in both countries.

decision-maker under the 1996 Act.[18] From a reading of an affidavit filed on behalf of the Minister in *Dascalu v Minister for Justice*, it would appear that the lack of an accelerated procedure for claims deemed to be manifestly unfounded would also seem to have been a factor.[19] As an interim measure, between 1997 and 2000, a new administrative procedure was put in place following consultation with UNHCR, known as the "Hope Hanlan" letter.[20] The Hope Hanlan procedures offered more extensive safeguards for refugee applicants, replacing the von Arnim procedures which had previously applied. The key features of the Hope Hanlan procedure included the availability for the first time of a formal appeal against a decision refusing refugee status, together with a guarantee that the appeals body would be independent of the Minister for

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[18] Egan *op cit* at p.8, although Egan notes that this explanation is not entirely accurate insofar as the 1996 Act had laid idle on the statute book for a number of years prior to this challenge being brought.

[19] The affidavit filed on behalf of the Minister in *Dascalu v Minister for Justice* unreported, High Court, O'Sullivan J, 4 November 1999 stated "The Hope Hanlon procedures were adopted further to the conclusion being reached on the part of the UNHCR and the Minister that the von Arnim procedures, involving formal consultation with the UNHCR in most cases were no longer workable due to the increase in the number of persons applying for refugee status. A new approach was necessary to deal with the several thousand files then on hand. Extensive consultations with the UNHCR representative for Ireland, Ms Hope Hanlon, resulted in a new arrangement being put in place establishing a procedure to deal with the application for asylum. The von Arnim procedures were therefore superseded by the Hope Hanlon procedures and set out in a letter addressed to Ms Hope Hanlon, UNHCR Representative in London on behalf of the Minister.... I beg to refer to paragraphs 12 to 14 inclusive of the said procedures which set out the accelerated procedure to be followed in manifestly unfounded cases."

[20] However, it is notable that UNHCR itself expressed concern at the failure of the Department of Justice to incorporate some of UNHCR's proposals into this letter; as Phiri notes, "Although the branch office in the United Kingdom had been consulted on the letter before it was officially received, various comments by the office were not incorporated and this gave rise to concerns": Phiri "UNHCR, International Refugee Protection and Ireland" in Fraser and Harvey (eds) *op cit* at p.117. Similarly, Egan refers to the Hope Hanlan procedure as a "retrograde step" insofar as it did not contain many of the protective measures set out in the 1996 Act: *op cit* at p.43.

Justice.[21] The Hope Hanlan procedure also involved the introduction of a "manifestly unfounded" procedure, which allowed an asylum application to be subject to an accelerated process on one of twelve grounds.[22] Thus, while elements of the Hope Hanlan procedure evinced greater respect for the procedural rights of refugees, such as the introduction of a right of appeal to an independent body, other aspects were intended to restrict the rights of refugees to full access to the asylum system.

The Hope Hanlan procedures were also the source of a number of judicial review applications. In *Dascalu v Minister for Justice* the High Court held that the Minister was not entitled to treat an application submitted under the von Arnim procedures as an application under the Hope Hanlan procedures without having first formally notified the applicant of the possibility that his claim could now be subject to the

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[21] Minimum requirements were also stipulated to be a member of the appeals authority, namely at least ten years' practice as a solicitor or barrister. This will be further considered in Chapter 4.

[22] Among the grounds of application of the accelerated procedure were that the application on its face did not show any grounds for the contention that the applicant was a refugee; that the applicant had given insufficient details or evidence of substantiate the application; that the applicant's reason for leaving or not returning to his or her country of origin was not related to a fear of persecution; failure to reveal that the applicant had travelled on false identity documents without reasonable cause; that the applicant made false or misleading representations of a material or substantial nature in relation to the application; that the applicant deliberately and in bad faith destroyed identity documents, withheld relevant information or otherwise deliberately obstructed the investigation of the application; failure to reveal a prior application for asylum in another country; application for asylum made for the sole purpose of avoiding removal from the State; failure to adduce evidence of persecution in respect of the country of origin where that state was a party to the Refugee Convention; the applicant was a national or had a right of residence in another state party to the Refugee Convention in respect of which he or she failed to adduce evidence of persecution; if the applicant had left the state without permission subsequent to the making of the application or failure to reply to communication from the Refugee Applications Commissioner; or the applicant had previously been recognised as a refugee in another state party to the Refugee Convention and the reason for leaving or not returning to that state is not related to a fear of persecution in that State.

manifestly unfounded procedure which had not previously applied to asylum claims.[23]

The case of *Stefan v Minister for Justice* demonstrated a worrying lapse in procedural fairness at the first instance decision-making process under the Hope Hanlan procedures. As part of his asylum application, the applicant had furnished a personal statement of some length. It transpired that the first instance decision-maker had failed or neglected to translate most of that statement, and the decision to refuse his application for refugee status was therefore made without reference to this information. The applicant sought judicial review of this decision, and the Minister opposed this application on the basis that he had a right of appeal under the Hope Hanlan procedures which he should have availed of instead of seeking judicial review. Both the High Court and Supreme Court rejected this submission, holding that the Hope Hanlan procedures envisaged a bifurcated process and that the principle of fair procedures and constitutional justice applied at both stages. McGuinness J held:

> "In this case the decision of the first respondent ... was a decision made in breach of fair procedures in that evidence, which was not immaterial, was not before the decision maker because of the section omitted from the translation. The application was not considered fully as a result of the omissions in the translated questionnaire. This was a breach of fair procedures. It cannot be said that the omitted information was immaterial both because of the nature of the decision made on the information and because of the determination as to the credibility of the applicant....

[23] High Court, O'Sullivan J, 4 November 1999. While O'Sullivan J held that the Minister was entitled to apply the new Hope Hanlan procedures to applications for refugee status which were initiated while the von Arnim procedures were in place, it was held that there was a procedural duty on the Minister to notify the applicant of the changed procedures.

> The original decision was made in circumstances which were in breach of fair procedures and which resulted in a decision against the appellant on information which was incomplete. The appeals authority process would not be appropriate or adequate so as to withhold certiorari. The applicant is entitled to a primary decision in accordance with fair procedures and an appeal from that decision. A fair appeal does not cure an unfair hearing."[24]

Other deficiencies in the Hope Hanlan procedures included a failure to have any special arrangements for unaccompanied minors seeking asylum, which was criticised by McGuinness J in *Berisha v Minister for Justice.*[25] While noting that a relevant UNHCR position and resolution of the Council of the European Communities were not legally binding, there was nonetheless said to be a "moral obligation on the State to take notice of these positions". McGuinness J expressly called upon the State to take on board the necessity to put in place special procedures for dealing with unaccompanied minors, notwithstanding the "large increase in applications for asylum" of which the court was mindful.

In a somewhat disturbing example of a failure to learn lessons from previous decisions, in *Sarfaraz v Minister for Justice*[26] the High Court quashed a decision to refuse the applicant's application for judicial review on the basis that the application had been made under the Hope Hanlan procedures and should therefore have been determined under those procedures, notwithstanding the introduction of the Refugee Act 1996 in the interim. Given that this was essentially the same issue addressed in *Gutrani* it is surprising that the Minister sought to impose the new procedures under the Refugee Act 1996 to an application which had been made under the Hope Hanlan process; once again, the respect

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[24] [2001] 4 IR 203 at 217-218.

[25] Unreported, High Court, November 24, 2009.

[26] Unreported, High Court, Finnegan J, July 3, 2001.

for the rights of refugees were required to be enforced by the courts in the face of administrative failures.

From the foregoing analysis, it is clear therefore that there were difficulties in the operation of the Hope Hanlan procedures, at least in some cases. The decisions in *Dascalu, Stefan* and *Sarfaraz* are indicative of a willingness of the courts to ensure, by way of judicial review, respect for the minimum procedural rights of refugees. Other developments at this time also increased pressure on the need for a legislative framework governing the refugee process in Ireland, not least of which were ongoing developments at European level which required implementation. [27] Indeed, it would appear that the delay in fully commencing the 1996 Act was, at least in part, attributable to these ongoing European developments. The Immigration Act 1999, which amended the Refugee Act 1996 before it had even been commenced, made provision for the taking of asylum seekers' fingerprints, [28] an essential element in the operation of the Dublin Convention system which assigned responsibility for determination of asylum applications to the first member state in which the applicant claimed asylum.

The Refugee Act 1996

Speaking at the introduction of the Refugee Bill to the Oireachtas, the then Minister of State at the Department of Justice, Joan Burton, stated that the primary purpose of the Bill was to:

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[27] See further Egan *op cit* at pp.46-47.

[28] Section 11 of the Immigration Act 1999 inserted a new section 9A into the Refugee Act 1996 which authorised the taking of fingerprints from asylum seekers over 14 years of age by authorised persons or immigration officers. Failure or refusal by an asylum seeker to permit fingerprints be taken would be taken as failure to take reasonable steps to establish his or her identity which could render the person liable for detention, and could furthermore result in the application of the "manifestly unfounded" procedure on the basis of deliberate obstruction of the investigation of the asylum claim.

> "to safeguard the rights of applicants and to ensure that no valid application is rejected. The State and the government have an obligation to ensure that all applicants are fairly treated. However, we also have a duty to make sure that the interests and safety of Irish citizens are not jeopardised. In addition, as a member state of the European Union, we have obligations to other member states. The Bill has to take all these matters into account ... and must ensure that the refugee determination process is not abused."[29]

It is interesting to note the differing motivations underlying this statement. On the one hand, the acknowledgment of the rights of refugees, including a right to fair treatment, is an important affirmation of the procedural entitlement of those seeking asylum in this State. However, there are also echoes of Pufendorf's humanitarian or discretionary conception of the grant of asylum. The final comment is particularly worthy of note; as the numbers seeking asylum in the State increased, it became a familiar refrain that many applications were fraudulent and were made by people seeking to abuse the system. It has been commented, therefore, that the evolution of Ireland's official response to growing asylum claims was:

> "epitomised by the move from the paternalistic discourses of the deserving, right-bearing refugee emanating from the Department of Foreign Affairs until the early 1990s, to discourses of the undeserving, fraudulent and criminal asylum seekers as expressed by the Department of Justice only a few years later.... Since the mid-1990s, asylum seekers have been seen not merely as 'unnecessary' in terms of filling labour shortages created by Ireland's economic boom, they were also deemed both a drain on

[29] 457(3) Dail Debates Cols 710-711, October 19, 1995.

resources and a group of people the state had to manage through a series of technologies of control and containment."[30]

The Refugee Act 1996 was commenced incrementally between 1996 and 2000, with the final commencement order bringing the remainder of the Act into force on 7 November 2000.[31] It has been rightly noted by Byrne that the 1996 Act was significant not least because under the (non-statutory) von Arnim and Hope Hanlan procedures, compliance with the Refugee Convention was not justiciable in Irish courts, with the result that there was not a "single judicial or administrative case which interprets the substantive criteria of who may qualify as a refugee as defined by Article 1 of the 1951 Convention". [32] The substantive provisions of the 1996 Act, and their interpretation by the courts, will now be critically considered with a view to examining compliance with the Refugee Convention and respect for the rights of refugees. The discussion will focus on the extent to which the substantive elements in the definition of a refugee under Irish law comply with Ireland's international and European obligations, insofar as divergences may

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[30] Moreo *op cit* at p.162. The policies of dispersal and direct provision are considered further in chapter 5.

[31] The Refugee Act, 1996 (Section 24(1)) (Commencement) Order 1996 (SI No.290 of 1996) fixed 1 October 1996 as the date on which section 24(1) of the Refugee Act 1996 came into force. The Refugee Act 1996 (Sections 1, 2, 5, 22 and 25) (Commencement) Order 1997 (SI No.359 of 1997) stipulated that sections 1, 2, 5, 22 and 25 of the 1996 Act would come into force on 29 August 1997. The Refugee Act 1996 (Section 6 and First Schedule) (Commencement) Order 2000 (SI No.8 of 2000) designated 20 January 2000 as the date on which section 6 of the first schedule to the 1996 Act would come into force. The Refugee Act 1996 (Sections 14 and 15 and Second Schedule) (Commencement) (No.2) Order 2000 (SI No.308 of 2000) provided that sections 14 and 15 as well as the second schedule to the Act would come into force on 4 October 2000. Section 23 of the Act was commenced on 26 October 2000 by virtue of the Refugee Act 1996 (Section 23) (Commencement) (No.3) Order 2000 (SI No.341 of 2000). The remaining provisions of the 1996 Act were commenced on 20 November 2000 by the Refugee Act 1996 (Commencement) Order 2000 (SI No.365 of 2000).

[32] Byrne "At the Cross-roads: Refugee Protection in Ireland" in O'Driscoll (ed) *Irish Human Rights Review 2000* (Round Hall Sweet & Maxwell 2000) at p.3.

result in protection gaps and ultimately expose refugees to refoulement through wrongful denial of recognition. This discussion will be informed by the key principles incorporated within the notion of the rule of law as previously outlined, in particular the requires of clarity, certainty and predictability in the law. The procedural framework governing determination of refugee status in Ireland will be addressed in Chapter 4.

Refugee Act 1996 – Definition of a refugee

As noted in Chapter 2, the definition of a refugee within the meaning of the 1951 Convention is set out in Article 1A(2), which stipulates that a refugee is a person who is outside of his or her country of origin and has a well-founded fear of persecution there for one of five reasons, namely race, religion, nationality, membership of a particular social group and political opinion. Section 2 of the Refugee Act 1996 largely replicates this definition, providing that a "refugee" within the meaning of the Act means:

> "a person who, owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country; or who, not having a nationality and being outside the country of his or her former habitual residence, is unable or, owing to such fear, is unwilling to return to it, but does not include a person who—
> (a) is receiving from organs or agencies of the United Nations (other than the High Commissioner) protection or assistance,
> (b) is recognised by the competent authorities of the country in which he or she has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country,

(c) has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes,
(d) has committed a serious non-political crime outside the State prior to his or her arrival in the State, or
(e) has been guilty of acts contrary to the purposes and principles of the United Nations."[33]

It has rightly been said that by defining in its interpretative section (section 1), a "particular social group" as including membership of a trade union as well as membership of a group of persons whose "defining characteristic is their belonging to the female or the male sex or having a particular sexual orientation", the Refugee Act "pioneers a more expansive interpretation of the 1951 Convention".[34]

Thus, three separate grounds are specifically enumerated as constituting a particular social group for the purposes of the Refugee Act in Ireland, namely trade union membership, gender and sexual orientation. Whilst it could be said that these grounds would in any event be included within the scope of the UNHCR general guidance on the particular social group,[35] the express recognition of these groups is undoubtedly a welcome statement of Ireland's recognition of the protection needs which may arise for members of these particular groups. To the extent that this represents a clear statutory statement on the scope of the particular group in Irish law, this provision can be welcomed from the perspective of the rule of law. However, Byrne makes the important

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[33] The conflation of the definition of a refugee from Article 1A(2) and the cessation and exclusion clauses in Articles 1C, D, E and F of the Refugee Convention are considered in Chapter 6 below.

[34] Byrne "At the Cross-roads: Refugee Protection in Ireland" in O'Driscoll (ed) *Irish Human Rights Review 2000* (Round Hall Sweet & Maxwell 2000) at pp.3-4.

[35] See eg UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (Reedited, Geneva, January 1992) at paras.77-79.

point that the application and extent of this enhanced interpretive provision depends in an important part on the guidance given to asylum decision-makers, particularly in the context of gender-based claims, in order to heighten the skills and sensitivities of both interviewers and decision-makers to this class of claims. [36]

The only substantive amendment made to the definition of a refugee for the purposes of Irish law took place in 2006 with the transposition of the Qualification Directive into Irish law by the European Communities (Eligibility for Protection) Regulations.[37] Regulation 10 deals with the "reasons for persecution", giving effect to Article 10 of the Directive by providing that a protection decision-maker shall take the following into account when assessing the reasons for persecution:

> "(a) the concept of race shall in particular include considerations of colour, descent, or membership of a particular ethnic group;
> (b) the concept of religion shall in particular include the holding of theistic, nontheistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief;
> (c) the concept of nationality shall not be confined to citizenship or lack thereof but shall in particular include membership of a group determined by its cultural, ethnic, or linguistic identity, common geographical or political origins or its relationship with the population of another State;
> (d) a group shall be considered to form a particular social group where in particular—

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[36] Byrne "At the Cross-roads: Refugee Protection in Ireland" in O'Driscoll (ed) *Irish Human Rights Review 2000* (Round Hall Sweet & Maxwell 2000) at p.5. The relationship between the substantive and procedural rights of refugees is further considered in chapter 4.

[37] SI No.518 of 2006.

(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;
and, depending on the circumstances in the country of origin, a particular social group may include a group based on a common characteristic of sexual orientation. Sexual orientation shall not include acts considered to be criminal in the State: gender related aspects may be taken into account, without by themselves alone creating a presumption for the applicability of this Regulation."

Given the express recognition of gender and sexual-orientation based claims by the 1996 Act, it is clear that the final paragraph of regulation 10 was largely unnecessary, albeit that the statement that "sexual orientation shall not include acts considered to be criminal in the State" had no equivalent in the Irish legislation.[38]

Well-founded fear

As noted in chapter 2, there has been considerable debate, at least in academic circles, as to whether the establishment of a "well-founded fear" for the purposes of a refugee application should focus solely on objective evidence as to conditions in the country of origin or whether it should incorporate also an assessment of the subjective fear held by each particular refugee claimant. The Refugee Act 1996 is silent on this issue, but a review of the jurisprudence of the Irish courts makes clear that the hybrid objective/subjective test is applied in this jurisdiction. Thus, for example, in *Kramarenko v Refugee Appeals Tribunal* Finlay Geoghegan J considered it to be well established that the determination as to whether

[38] See further below the discussion of the particular social group.

a person is a refugee within the meaning of s.2 of the Act, and the similar definition in the 1951 Geneva Convention, contained both a subjective and objective element. Finlay Geoghegan J proceeded to elaborated that:

> "The subjective element requires the applicant to establish that he or she has a fear of persecution for a Convention reason if returned to his/her own country. An assessment as to whether an applicant has such a fear will normally involve an assessment of credibility. The objective element involves the assessment as to whether the subjective fear is well-founded or, as sometimes put, objectively justifiable. Often, and as appears to have been the position in this case, the objective element requires an assessment of objective facts relied upon by the applicant to establish that the fear is well-founded."[39]

In respect of the assessment of the objective element of the well-founded fear, Finlay Geoghegan J endorsed the approach adopted in *Horvath v Secretary of State for the Home Department*, where it was held that:

> "credibility findings can only really be made on the basis of a complete understanding of the entire picture. It is our view that one cannot assess a claim without placing that claim into the context of the background information of the country of origin. In other words, the probative value of the evidence must be evaluated in the light of what is known about the conditions in the claimant's country of origin."[40]

Numerous decisions of the High Court note that the objective well-foundedness of a fear should be assessed with reference to country of

[39] [2004] 2 ILRM 550 at 554-555.

[40] At para.21. This statement was adopted and applied by David Pannick QC in *R v Immigration Appeals Tribunal ex parte Sardar Ahmed* [1999] INLR 473, which decision was also approved by Finlay Geoghegan J in *Kramarenko.*

origin information,[41] albeit there appears to be some divergence as to the precise parameters of the duty in this regard. For example, in *Zhuckova v Refugee Applications Commissioner* Clarke J held that selective reliance on country of origin information was not acceptable,[42] although in *KO v Refugee Appeals Tribunal* it was held that there was no duty on the decision-maker to address, in order to distinguish, every piece of country of origin information relied upon by a refugee applicant.[43] It is submitted that the approach of Clarke J in *Zhuckova* is to be preferred insofar as it imposes a higher duty on refugee decision-makers in the procedural context, in order to ensure respect for the substantive rights of refugees.

It is undoubtedly the case that the vast majority of Irish judicial decisions concerning the well-founded fear element of the refugee definition concern credibility.[44] Indeed, it has been suggested that refugee decision-making in Ireland in some instances is informed by a "culture of disbelief", characterised by decisions denying the subjective credibility of a refugee applicant's account.[45]

The standard of proof is also an aspect of the well-founded fear requirement which has not been addressed in substantive law in this jurisdiction but has been the subject of some judicial consideration. In *FA v Minister for Justice*[46] the applicant challenged the Refugee Appeals

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[41] See eg *Kramarenko v Refugee Appeals Tribunal* [2004] 2 ILRM 550 per Finlay Geoghegan J; *DK v Refugee Appeals Tribunal* [2006] IEHC 132 per Herbert J.

[42] Unreported, Clarke J, 26 November 2004.

[43] [2008] IEHC 343 per Hedigan J.

[44] See, eg, *Carciu v Refugee Appeals Tribunal* [2003] IEHC 41, *Bujari v Refugee Appeals Tribunal* [2003] IEHC 18, *AMT v Refugee Appeals Tribunal* [2004] 2 IR 607, *Da Silveira v Refugee Appeals Tribunal* [2004] IEHC 436, *Imafu v Refugee Appeals Tribunal* [2005] IEHC 416, *Idiakheua v Refugee Appeals Tribunal* [2005] IEHC 150, *Banzuzi v Refugee Appeals Tribunal* [2007] IEHC 2, *IR v Refugee Appeals Tribunal* [2009] IEHC 353.

[45] See, generally, Irish Refugee Council *Difficult to Believe: The Assessment of Asylum Claims in Ireland* (2012). This issue will be further explored in Chapter 4.

[46] Unreported, High Court, O Caoimh J, December 21, 2001.

Authority's statement that the appropriate test to be applied in assessing his claim of a well-founded fear of persecution in Sierra Leone was whether there was a "reasonable likelihood of persecution". The applicant contended that this set the threshold too high, an argument which would seem to have some merit when assessed with reference to the standard adopted in the US by *INS v Cardoza-Fonseca.*[47] However, Ó Caoimh J rejected the applicant's arguments in this regard, citing the decision of the House of Lords in *Sivakumaran* in support of the "reasonable likelihood" test:

> "In the first instance in regard to the standard of proof applied by the Appeals Authority of a well founded fear of persecution, I am satisfied, having regard to the decision of the High Court of Australia in the *Chan* case, that no essential difference exists between the standard as applied in the US case of *Cardoza Fonseca* and that applied by the Australian courts or the courts in England as reflected in the decisions of *Chan* or *R v Secretary of State ex parte Sivakumaran* .... I am further satisfied that in considering the applicant's case it has not been sought to apply a standard in excess of that applied in other jurisdictions in the application of the UN Convention. I am further satisfied that the respondent had regard to the fact that the assessment of the applicant's fear was an assessment of a subjective matter. With regard to the test applied by the Appeals Authority in the instant case that there must be a 'reasonable likelihood' of persecution, I am satisfied that this accords with the test applied by the House of Lords in the *Sivakumaran* case where Lord Keith of Kinkel spoke of the need for an applicant to demonstrate 'a reasonable degree of likelihood that he would be persecuted for a Convention reason if returned to his own country.'"[48]

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[47] Considered in chapter 2.

[48] Unreported, High Court, O Caoimh J, December 21, 2001 at pp.32-33.

Ó Caoimh J referred in the course of his judgment to the submission on behalf of the respondents that in *Cardoza-Fonseca* the US Supreme Court had "considered the argument advanced that the appropriate standard was one of a clear probability."[49] It is difficult to reconcile this submission with the determination in *Cardoza-Fonseca* that a one in ten risk was sufficient to warrant a finding of a well-founded fear of persecution.[50] Furthermore, the finding by Ó Caoimh J that there was no material difference between the standards adopted in *Cardoza-Fonseca* and *Sivakumaran* is highly questionable, given that Stevens J in *Cardoza-Fonseca* expressly disapproved of the BIA's requirement of "facts that demonstrate a realistic likelihood of persecution actually occurring."[51]

It would appear, however, that to date the Irish courts have not been willing to revisit the important question of the appropriate standard of proof in refugee decision-making. In *BP v Minister for Justice*, for instance, Gilligan J granted the applicant leave to seek judicial review of a decision refusing his refugee appeal on a number of grounds including findings in relation to internal relocation but refused to grant permission to challenge the decision of the Refugee Appeals Tribunal on the ground that it had erred in law or misdirected itself in applying a standard of a "reasonable degree of likelihood" of persecution instead of a "reasonable possibility."[52] Gilligan J referred to the decision of Ó Caoimh J in *FA* and held that the Refugee Appeals Tribunal had not acted unlawfully or ultra vires in imposing a "reasonable degree of likelihood" standard.[53]

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[49] At p.24.

[50] See further chapter 2.

[51] As noted in Chapter 2 infra, in *Cardoza-Fonseca* Stevens J expressly rejected the language of probability in favour of a "reasonable possibility" of persecution: 467 US 407 (1987) at 453. See further Anker and Blum "New Trends in Asylum Jurisprudence: The Aftermath of the US Supreme Court Decision in *INS v Cardozo-Fonseca* (Notes)" (1989) 1 International Journal of Refugee Law 67.

[52] [2003] 4 IR 200.

[53] At pp.220-221.

There can be little doubt but that the adoption of the *Sivakumaran* "reasonable degree of likelihood" test in Irish law sets the bar higher for refugee applicants than the lower threshold of "reasonable possibility" adopted in *Cardoza-Fonseca.* However, it may ultimately be said that the fault here lies with the absence of any clear direction from the Refugee Convention, or indeed the Qualification Directive, on this important issue. Insofar as the higher threshold might give rise to wrongful refusal of refugee status, the decision in *FA* is disappointing. This demonstrates the importance of mutual respect for the principle of the rule of law at both international and domestic levels, giving rise to considerations of subsidiarity and complementarity. From the perspective the rule of law, the failure of the international regime to provide clarity around these core concepts can lead to deficiencies in refugee protection at the national level.

Persecution

The Refugee Act 1996 as enacted offered no guidance on what was meant by the term "persecution."[54] However, Regulation 9(1) of the European Communities (Eligibility for Protection) Regulations 2006 provides that acts of persecution for the purposes of section 2 of the Act must:

> "(a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or

[54] However, it is of interest to note that the prohibition of refoulement in s.5 of the Act which prohibits expulsion or return of a person to the frontiers of territories where the life or freedom of that person would be threatened for one of the Convention reasons, expressly states in s.5(2) that "a person's freedom shall be regarded as being threatened if, inter alia, in the opinion of the Minister, the person is likely to be subject to a serious assault (including a serious assault of a sexual nature)."

(b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in subparagraph (a).

Regulation 9(2) further provides that acts of persecution as qualified in paragraph (1) can, inter alia, take the form of:

"(a) acts of physical or mental violence, including acts of sexual violence;
(b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;
(c) prosecution or punishment, which is disproportionate or discriminatory;
(d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;
(e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling under the exclusion clauses as set out in section 2(c) of the 1996 Act;
(f) acts of a gender-specific or child-specific nature." [55]

This provision is a faithful transposition of the provisions of Article 9 of the Qualification Directive, and thus incorporates both positive and negative aspects of the Directive from the perspective of the rights of refugees and the rule of law.[56]

One of the earliest decisions of the High Court on the issue of persecution is *Rostas v Refugee Appeals Tribunal*, where Gilligan J held that the test for persecution is a forward looking one, but that past persecution "may indicate a reasonable likelihood of present or

[55] SI No.518 of 2006.

[56] See further chapter 2.

prospective persecution unless there has been a major change in circumstances in the country of origin."[57] Gilligan J furthermore quoted with approval Hathaway's statement to the effect that:

> "Persecution exists where there is a fear of serious harm which the Government cannot or will not prevent, including specific hostile acts or an accumulation of adverse circumstances such as discrimination existing in an atmosphere of insecurity and fear."[58]

Hathaway's formulation of a "sustained or systemic risk" was considered by the High Court in *MK v Refugee Appeals Tribunal.*[59] In defending its decision, reference was made on behalf of the Tribunal to the need to demonstrate the existence of "persistent or constant infliction of some mental or physical cruelty", to the fact that the "equation of persecution with harassment, highlights the need to show a sustained or systematic risk, rather than just an isolated incident of harm", and that the criterion to establish persecution in such a context was "harassment that is so constant and unrelenting that the victim feels deprived of all hope of recourse short of flight from government by oppression". In finding that there was no error of law in the Tribunal's approach, McCarthy J, having referred to Hathaway's formulation, reasoned as follows:

> "It seems to me that of most significance is the fact that, accepting the applicant's version of events, one has, at most, a once-off incident and that element of persistence or constant wrongdoing does not exist. This appears to be the primary basis of the conclusion. It appears from para. 6:

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[57] Unreported, High Court, 31 July, 2003.

[58] *Ibid.*

[59] [2008] IEHC 294.

'...the incidences of past persecution are not, to the mind of this Tribunal, so serious or systematic as to give rise to any inference of a reasonable degree of likelihood that his fear of future persecution will come to pass...'

It seems to me that there is no basis for saying that the first named respondent was erroneous in point of law as to the principles to be applied to the facts and, on his finding of fact, his decision was not such as to invite intervention in accordance with what I might shortly term the *O'Keeffe* principles."[60]

The decision of McCarthy J is problematic for a number of reasons. Neither Hathaway's formulation, nor indeed the Protection Regulations, require an "element of persistence or constant wrongdoing" in order to give rise to persecution. At most, Hathaway speaks of "sustained or systemic risk" while the Protection Regulations speak of acts which must "be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights". It is submitted that under Hathaway's formulation, a single act of persecution could be reflective of a systemic risk, particularly where country of origin information supports such a claim. Furthermore, under the Protection Regulations, a single act of persecution may be sufficient where it amounts to a "severe violation of basic human rights". In *MK* the applicant claimed to have been arrested and ill-treated in detention for reasons of political opinion and it appears that at least some country of origin information in this regard was before the Tribunal. McCarthy J noted tersely in his conclusion that:

"Reference has been made to the legitimacy of the actions of the Ethiopian police, on behalf of the first named respondent, and having regard to the nature of the Oromo Liberation Front, and in particular, the legitimacy of the arrest of the applicant in and about an investigation for the purpose, apparently, of

[60] Paras.22-23.

> apprehending his father due to his membership of that organisation, something which it is contended could never be persecution. The country of origin information indicates that the Oromo Liberation Front (as one might suppose from its name) is an organisation in armed opposition to the government which, inter alia, campaigns for boycotts of elections. The first named respondent did not address this issue and accordingly I do not propose to consider it in adjudicating upon this matter."[61]

It is regrettable that the High Court did not extend its enquiry into the nature of the country of origin information which was before the Tribunal in order to determine whether, either by the severity of the acts complained of, or by reason of a systemic risk, the Tribunal's finding that there was no persecution was sustainable.

As noted in Chapter 2, the threshold in order for discrimination to amount to persecution has been the subject of considerable debate. This issue was touched upon by Ryan J in *GV v Refugee Appeals Tribunal* when he stated that,

> "a measure of discretion will inevitably lie with the decision maker – in this case the Tribunal – to determine whether certain discriminatory measures, taken cumulatively, amount to persecution in any given case. It is not possible to identify when a precise threshold has been reached so that the discrimination is of such a degree that it constitutes persecution."[62]

The issue was revisited in further detail by the High Court in *ED (A minor) v Refugee Appeals Tribunal.*[63] The applicant was a child born in the State to Serbian parents of Ashkali ethnicity. An application for

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[61] At para.24.

[62] [2011] IEHC 262 at para.15.

[63] [2011] 3 IR 736.

asylum was made on the child's behalf by his parents, which application was ultimately refused by the Refugee Appeals Tribunal. The key aspect to the applicant's asylum claim was the contention that he was likely to face pervasive discrimination if returned to Serbia, such as would impair his right to receive a basic education. The Refugee Appeals Tribunal accepted that the applicant would "in all likelihood face discrimination if sent to his country of nationality" but found that even though this meant that the applicant might not receive a full, or even a basic education, this was not sufficient to meet the threshold for persecution.

Hogan J accepted that "not all infringements of even basic civil liberties or even acts of discrimination will amount to persecution within the meaning of s.2 of the Refugee Act 1996", holding that, to constitute persecution for this purpose, "absent an immediate and serious threat to life and limb, something in the nature of systematic and pervasive infringements of a basic human right is generally required."[64]

Hogan J reviewed the relevant authorities including the decision of Ryan J in *GV v Refugee Appeal Tribunal* and Article 9 of the Qualification Directive, as well as the country of origin information which attested to the fact that Ashkali and Roma children were likely to face widespread, pervasive discrimination with regard to access to even basic education. The court referred to the decision of the US Supreme Court in *Brown v Board of Education of Topeka*[65] as supporting the contention that segregated schooling is a general hallmark of a society where a disadvantaged group will be subjected to pervasive discrimination and exclusion which, in some circumstances, at least, can amount to persecution.

Noting that it was somewhat curious that the issue of "whether official indifference to the entitlement of a member of a disadvantaged group to

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[64] At p.740.

[65] 347 US 483 (1954).

secure even a basic education can amount to persecution in this sense" had not received judicial examination in this jurisdiction or elsewhere, Hogan J approached the issue from first principles, noting that the right to education (and especially the right to basic education) is widely regarded as fundamental, citing Article 42 of the Constitution, Article 2 of the First Protocol of the ECHR, Article14 of the EU Charter of Fundamental Rights and Article 28 of the UN Convention on the Rights of the Child. The court was satisfied that if the applicant was denied the right to even a basic education, "he will effectively be excluded from any meaningful participation in Serbian society and, echoing the words of Warren CJ in *Brown*, he will carry the brand of inferiority and stigma with him for the rest of his life." Accordingly, Hogan J held that:

> "While the present case certainly falls outside the classic types of persecution envisaged by the Geneva Convention involving violence and threats of violence, it nonetheless seems impossible to avoid the conclusion that the denial of even basic education amounts to a severe violation of basic human rights (to adapt the language of Article 9(1) of the Qualification Directive). In that respect, therefore, the finding that the denial of basic education in such circumstances amounts to persecution within the meaning of the s.2 of the Refugee Act 1996."[66]

The High Court subsequently granted a certificate of leave to appeal on the application of the respondents; the Supreme Court has granted priority to that appeal which is expected to be heard in the coming months. It would appear that this will be the first time the Supreme Court has had an opportunity to address the threshold for discrimination to amount to persecution, and it remains to be seen whether the decision of Hogan J is upheld. The decision of the High Court is fully consistent with the approach advocated by UNHCR and indeed by the academic literature. Hogan J was clearly informed by a human rights approach to

[66] At p.746.

the question, by locating the right to education within the sphere of fundamental rights, and it is submitted that the Supreme Court ought to endorse the conclusion reached.

The Convention grounds in Irish law

As noted above,[67] in order to qualify as a refugee for the purposes of the 1951 Convention, it is not sufficient merely to demonstrate the existence of a well-founded fear of persecution; it must also be demonstrated that this fear is related to one of the five Convention reasons of race, religion, nationality, political opinion or membership of a particular social group. Section 2 of the Refugee Act 1996 adopts the Convention formula in this regard, with the additional element of the express recognition of gender and trade union membership as falling within the concept of a particular social group.

A review of the jurisprudence of the Irish courts demonstrates that there has been relatively little engagement with the substantive concepts inherent in the Convention nexus; one possible explanation for the dearth of consideration of the constituent grounds for refugee recognition is that the emphasis in the Irish refugee process is often on the personal credibility of the refugee applicant.[68]

This is reflected in the fact that there do not appear to be any decisions of either the High Court or Supreme Court engaging with the scope of the race ground. Of the limited decisions which touch on the concept, the most that can be said is that there does not appear to be any disagreement that the concept of race is to be interpreted broadly, encompassing differentiation based on identifiable ethnicity, which is in line with the approach urged by UNHCR[69] and is furthermore consistent with the

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[67] See chapter 2.

[68] See further chapter 4.

[69] UNHCR Handbook *op cit* at para.68. See further chapter 2.

understanding of the concept of racial discrimination as set out in Article 1 of the CERD. Thus, in *GV v Refugee Appeals Tribunal*[70] the Refugee Appeals Tribunal, and indeed the High Court on review, proceeded on the basis that ethnic Serbs living in Croatia were in principle entitled to invoke the race ground in their applications for refugee status.[71] Similarly, in *ED v Refugee Appeals Tribunal*[72] the application for asylum which was based on a fear of persecution in Serbia on the grounds of Ashkali/Roma ethnicity was not queried insofar as the applicability of the race ground was concerned. The issue in both cases was rather the standard for discrimination on grounds of ethnicity to amount to persecution, as discussed above. However, other cases appear to offer support for the proposition that persecution on grounds of ethnicity may also be regarded as falling under the "particular social group" ground.[73] In any event, it can also be said that the relative dearth of judicial engagement with the race ground is entirely consistent with the international experience, as noted by Zimmermann and Mahler.[74]

It would appear that the nationality ground has also received little judicial attention in this jurisdiction. However, the issue has arisen for consideration in a number of claims involving stateless applicants for refugee status. In *TBK v Refugee Appeals Tribunal*[75] the applicant's refugee application was based on his claim that he was of Bhutanese nationality but had been rendered stateless by citizenship laws in the 1980s in that country which stripped him of his citizenship. The applicant thereafter left Bhutan and lived in a refugee camp in Nepal

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[70] [2011] IEHC 262.

[71] See, eg, para.7 where Ryan J commented "7. The focus of the appeal was very much on the risks facing the husband if returned to Croatia as an ethnic Serb…"

[72] [2011] 3 IR 736.

[73] See, eg, *AAAD v Refugee Appeals Tribunal* [2010] 1 IR 213 where the claim for asylum by a Kuwaiti of Bidoon ethnicity was assessed under the particular social group ground.

[74] *Op cit* at p.377. See further chapter 2.

[75] [2010] IEHC 438.

before ultimately travelling to Ireland and seeking asylum. The applicant's refugee claim was assessed by the Refugee Appeals Tribunal on the basis that he was stateless and with reference to his country of habitual residence which was Nepal. The applicant contended in judicial review proceedings that this was an error of law and that his claim should have been assessed on the basis that he was a Bhutanese citizen who had been stripped of citizenship, therefore entitling him to refugee status on the nationality ground. However, Cooke J rejected this challenge primarily on factual grounds, namely that the case which had been made on the applicant's behalf at the appeal stage had conceded that his claim should be assessed as a stateless applicant with Nepal as the country of habitual former residence.[76] The decision of *TBK* was followed in *SB v Refugee Appeals Tribunal*[77] and *RBB v Refugee Appeals Tribunal.*[78] However, it may be queried whether this approach is correct; it was recognised by the English Court of Appeal in *EB (Ethiopia) v Secretary of State for the Home Department*[79] that denial of citizenship may amount to persecution, which may thus entitle an individual subject to such measures to refugee status on the basis of nationality. In *DT v Refugee Appeals Tribunal*[80] O'Keeffe J granted a certificate of leave to appeal to the Supreme Court on the following question:

> "Where the executive agencies of a State arbitrarily deny a person his or her citizenship, is it correct to assess that person's claim to refugee status on the basis that that State is his or her 'country of nationality' for the purposes of Article 2 of Directive 2004/83/EC and Article 1A(2) of the 1951 Geneva Convention

[76] See paras.20-22.

[77] Unreported, High Court, Feeney J, 18 June 2009.

[78] Unreported, High Court, O'Keeffe J, 7 February 2012.

[79] [2009] 1 QB 1.

[80] [2012] IEHC 562.

> relating to the Status of Refugees and its 1967 Protocol, or is it correct to regard that person as 'stateless'?"[81]

This appeal has not yet been heard, but it is eagerly anticipated, not only in respect of the necessary clarification of the interaction between statelessness and nationality for the purposes of a refugee application, but also insofar as it will afford the Supreme Court the first opportunity to date to engage with these concepts.

Persecution for reasons of religion has been considered by the High Court in a number of recent decisions concerning Pakistani nationals who sought refugee status based on a fear of persecution arising from their adherence to the Ahmadi faith.[82] In each case, the court has accepted that members of the Ahmadi faith in Pakistan fall within the scope of the religious ground for the purposes of the Refugee Convention.[83] As Clark J held in *HK v Refugee Appeals Tribunal*:

> "In cases made by Pakistani applicants seeking asylum on the basis of their membership of the Ahmadi religion, the important task for the protection decision maker is to establish whether they are in fact who they claim to be as it is well established that Ahmadi are subject to extreme discrimination supported by specific anti-Ahmadi laws in Pakistan. The acts of discrimination which are documented in COI reach the level of persecution in areas where Khatam-e-Nabuwat operates and all recent and

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[81] At paragraph 6(c).

[82] It will be recalled that persecution of Ahmaddiya in Pakistan also gave rise to the ruling of the Court of Justice in *Bundesrepublik Deutschland v Y and Z (Joined Cases (C-71/11 and C-99/11)* unreported, judgment of 5 September 2012, discussed in Chapter 2.

[83] See, eg, *MAUH v Minister for Justice* [2012] IEHC 572; *SR v Refugee Appeals Tribunal* [2013] IEHC 26; *HK v Refugee Appeals Tribunal* [2013] IEHC 479.

> relevant COI reports on Pakistan indicate a high level of anti-Ahmadi activity"[84]

There is no indication in any of these decisions that decision-makers in the refugee process in this jurisdiction operated a distinction between the "forum internum" and "forum externum" in respect of religious persecution, which in any event has now been eschewed by the Court of Justice in *Y and Z.*[85] Indeed, the approach adopted by the High Court in such cases anticipated the findings of the CJEU in *Y and Z,* insofar as Clark J held in *MAUH* that:

> "the concept of religious freedom cannot be confined to private conscience to the exclusion of public manifestation of religion. Requiring persons to avoid persecution by refraining from practising their religion in public upon return to their country of origin is not compatible with human rights guarantees."[86]

As with the race and nationality grounds, the scope of the political opinion ground has received little judicial consideration in this jurisdiction. In *SM v Refugee Appeals Tribunal*[87] Edwards J considered the concept of imputed political opinion, in the context of a claim by a Cameroonian national whose asylum application who claimed to fear persecution *inter alia* on the basis of imputed political opinion arising from the fact that a prisoner who had been undergoing treatment at the hospital where she worked had escaped while under her care. The applicant claimed that she feared this meant she would be targeted on the basis that the Cameroonian authorities might impute political opinions to her insofar as she might be suspected of facilitating the suspect's escape. Edwards J emphatically rejected this contention, saying:

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[84] [2013] IEHC 479 at para.14.

[85] See Chapter 2.

[86] At para.26.

[87] [2009] IEHC 462.

> "The applicant also claims to fear persecution, if returned, on the grounds of political opinions that may be imputed to her. There is not a scintilla of evidence to support that in my view. There is no suggestion that this prisoner was in any sense a political prisoner. He may have simply been a thief or a murderer or a rapist, and if, and I am expressing no view on this whatever, but if it were the case that this applicant did facilitate the release of a prisoner who was an ordinary criminal as opposed to a political prisoner there would be no basis whatever for imputing political beliefs to the applicant. If it was the case that the prisoner was a supporter of, say, a government opposition party and the applicant facilitated his release then there might be the basis for making the case that she could be labelled as a political fellow traveller of that prisoner and accordingly an opponent of the government. However, there is as I have said no evidence in this case that this prisoner was anything other than a person suspected of an ordinary crime."[88]

It is respectfully submitted that Edwards J fundamentally misunderstood the concept and scope of the political opinion ground in this finding. Hathaway has argued that "any action which is perceived to be a challenge to governmental authority is … appropriately considered to be the expression of political opinion"[89] and further suggests that the focus should be on "the existence of a de facto political attribution by the state of origin, notwithstanding the objective unimportance of the claimant's political acts…".[90] Viewed from this perspective, the applicant's account in *SM* could conceivably have brought her within the scope of the imputed political opinion ground, and it is submitted that Edwards J erred in adopting an overly narrow approach to the scope of this ground.

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[88] At p.11.

[89] *Op cit* at p.154.

[90] *Ibid* at pp.155-156.

A number of decisions of the High Court have considered whether a risk of persecution to failed asylum seekers on return to their country of origin falls within the scope of the Refugee Convention, either on the basis of political opinion (insofar as the act of applying for asylum may be characterised as political) or alternatively under the particular social group category. In *YL v Refugee Appeals Tribunal*[91] Clark J appeared to characterise such cases under the political opinion ground, noting that there were countries in respect of which "several objective authorities have advised that the very fact of seeking asylum abroad is deemed an act of treason and disloyalty to the ruling regime, and that failed asylum seekers are imprisoned if repatriated."[92]

Similarly, in *FV v Refugee Applications Commissioner*,[93] Irvine J acknowledged that a failed asylum seeker may, by the very fact of leaving his country of origin, find that a political opinion is imputed to him, while in *Gidey v Refugee Appeals Tribunal* it was held that young Eritrean men who left that State in order to avoid forced military service were at risk of persecution on return insofar as "their status as former asylum seekers meant that a particular political opinion was imputed to them which meant that a Convention nexus was present."[94] Worryingly, there is evidence that some refugee decision-makers in the past took the view that such claims did not properly fall within the scope of a refugee application but rather were to be dealt with at the deportation stage under the concept of non-refoulement.[95] However, the decision of Cooke J in *AO v Refugee Appeals Tribunal* definitively rejected this approach, holding:

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[91] [2009] IEHC 433.

[92] At para.39.

[93] [2009] IEHC 268.

[94] Unreported, Clark J, 26 February 2008 at para.34.

[95] See, eg, *MDA v Refugee Appeals Tribunal* [2009] IEHC 328 and *AO v Refugee Appeals Tribunal* [2009] IEHC 501.

> "It is clear that cases can arise in which return as a failed asylum seeker is the occasion or pretext for the treatment of such persons as falling into some political or other category which attracts discrimination or persecution at the hands of a particular regime. An example of that is to be found in the unreported judgment of Clark J. of 26 February 2008 on a leave application in *Gidey v Refugee Appeals Tribunal* where the asylum seeker had a fear of persecution if returned to Eritrea because returning asylum seekers who were young men of military age were treated as having evaded military service and were imprisoned on return for that reason. Thus, their classification as failed asylum seekers coincided with their being attributed the particular political opinion of refusing military service thereby providing the Convention nexus which brought that status within the definition of 'refugee'.
>
> It follows, accordingly, that if the statement in the present decision to the effect that it is the responsibility of the Minister to deal with the outcome of any decision is to be understood as meaning that a fear of persecution as a returned asylum seeker can never come within the definition of 'refugee' and thus within the jurisdiction of the Tribunal, the decision is clearly wrong in law."[96]

The decision in *AO* is fully consistent with the substantive conception of the rights of refugees and is furthermore welcome insofar as it conclusively rejects the narrow approach espoused in *FV* and *Gidey,* given the clear risk of refoulement inherent in returning refugees to countries where they face persecution because the act of applying for asylum may be construed as a political one.

[96] [2009] IEHC 501 at paras.20-21.

The concept of the particular social group also appears to be somewhat under-developed in Irish law. Although many asylum claims appear to be made on the basis of fear of persecution related to membership of a particular social group, to date the Irish courts have failed to engage with the theoretical framework which underpins the concept. One of the earliest decisions which appears to have engaged with this ground is *EMS v Minister for Justice,*[97] which concerned an application for permission to make a second application for asylum on the new ground that the applicant had a well founded fear of persecution in South Africa arising from her membership of a particular social group, defined as people suffering from HIV/AIDS in South Africa. The Minister for Justice refused permission on the basis that the applicant's medical condition did not relate to persecution for a Convention reason, a finding in respect of which the applicant sought judicial review.

Clarke J considered the extent to which a "health care" based claim might fall within the scope of the Refugee Convention, considering the Australian decision of *Kuthyar v Minister for Immigration and Multicultural Affairs,*[98] before concluding that the fact that a person may be subjected to a lower level of care in a different country did not, of itself, amount to discrimination. Significantly, however, Clarke J proceeded to observe that this did not necessarily mean that the standard of health care provided in such a country might not lead, in an appropriate case, to a conclusion that there was a degree of discrimination against a particularly effected social group such that it amounted to a sufficient level of discrimination to amount to persecution. Thus, in circumstances where there was,

> "an inappropriately low level of health care given within that country to a group who form a social group for the purposes of refugee law and where, having regard to the level of health care

[97] [2004] IEHC 398.

[98] (2000) FCA 110.

provided within that country, the treatment of that group from a health perspective may be regarded as discriminatory to a significant degree, it seems to me to be arguable that same amounts to a sufficient level of discrimination to give rise to a claim for persecution."[99]

A similar conclusion was reached in *Msengi v Refugee Appeals Tribunal*[100] where it was submitted that the applicant belonged to a potential social group, capable of being defined as either (a) women in general and/or vulnerable women in South Africa respect of rape; (b) women who have been the subject of sexual violence in the past in South Africa and/or (c) women in South Africa who are HIV positive. MacMenamin J reviewed a limited number of authorities on the scope of the particular social group ground, including *Skenderaj v Secretary of State for the Home Department,*[101] before concluding that there were substantial grounds for the applicant's contention that "there were materials before the Tribunal that placed the Tribunal itself on inquiry as to whether the applicant would be the victim of discrimination as a HIV positive woman in South Africa which the South African authorities would not only be unwilling to counteract but [would] be instrumental in perpetuating."[102]

It is striking that neither in *EMS* or *Msengi*, nor indeed in any subsequent decisions which are available, have the Irish courts engaged in any significant analysis of the different theoretical frameworks which can be applied to the identification of the particular social group.[103] As noted by

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[99] At p.11.

[100] [2006] IEHC 241.

[101] [2002] EWCA Civ 567.

[102] At p.8.

[103] Namely the protected characteristics approach adopted by the US decision of *Matter of Acosta* 20 Immigration & Nationality Decisions 211 (BIA 1985) and the social perception approach adopted by the Australian courts in *A v Minister for Immigration and Ethnic Affairs* [1997] HCA 4 as discussed in Chapter 2.

Cooke J in *AO v Refugee Appeals Tribunal*, while the precise scope of the concept is an issue which has exercised the courts of many jurisdictions such as the United States (*In re Toboso – Alfonso*, *In re Acosta*, *Gatimi v AG*), Canada (*AG of Canada v Ward*) and the United Kingdom (*R. v Immigration Appeal Tribunal ex parte Shah*, *Fornah v Secretary of State for Home Department*) the question does not appear to have been considered in detail in any Irish judgment to date.[104]

Cooke J quoted with approval from the UNHCR guidelines on membership of a particular social group,[105] which adopt a "middle ground" approach to the definition of a social group incorporating elements from both the protected characteristics approach as well as the social perception approach,[106] before concluding:

> "It is therefore arguable that, independently of any element of imputed political opinion, a group comprised of young men of military age liable for military service could, on the basis of

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[104] [2009] IEHC 501 at paras 27-28. Although Cooke J cited some of the leading decisions on the scope of the particular social group such as *Acosta* and *Ward* there is no substantive discussion of the approaches adopted in these decisions.

[105] The passage quoted was as follows: "This definition includes characteristics which are historical and therefore cannot be changed and those which, though it is possible to change them, ought not to be required to be changed because they are so closely linked to the identity of the person or are an expression of fundamental human rights.... If a claimant alleges a social group that is based on a characteristic determined to be neither unalterable nor fundamental, further analysis should be undertaken to determine whether the group is nonetheless perceived as a cognisable group in that society. So, for example, if it were determined that owning a shop or participating in a certain occupation in a particular society is neither unchangeable nor a fundamental aspect of human identity, a shopkeeper or members of a particular profession might nonetheless constitute a particular social group if in the society they are recognised as a group which sets them apart": UNHCR *Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees* (7 May 2002, HCR/GIP/02/02) at paras 12-13.

[106] See further chapter 2.

> appropriate evidence, be demonstrated to be regarded in a particular society as a recognised social group which sets them apart. Similarly, there does not appear to be any reason of principle why, again on the basis of appropriate evidence, it might not be established that in a particular society, returning failed asylum seekers were regarded as a distinct group. Furthermore, having applied for asylum abroad and failed, that characteristic of their status would obviously be incapable of change in the sense that it is an historical fact of their lives just as a person could not undo the fact of having been married and divorced or having fought in a foreign war."[107]

The approach adopted by Cooke J reflects elements of both the protected characteristics approach as well as the social perception approach, and to this extent it can be said to be fully consistent with the approach advocated by UNHCR. However, the decision in *AO* was in respect of the application for leave to seek judicial review only, which may explain the relatively limited discussion of the concept; as Cooke J stated, "the court would emphasise that this is, of course, only an application for leave. The issues thus raised require more extensive consideration upon the hearing of the substantive application."[108] No decision in respect of the substantive application for judicial review in *AO* is available and the precise scope of the particular social group in Irish law thus awaits definitive consideration in a future case.

While the decisions of the Irish courts to date have not fully engaged with the theoretical framework underpinning the concept of the particular social group, it is instructive to consider case law where the courts have recognised the existence of a particular social group. As noted above, in both *EMS* and *Msengi* the High Court accepted that gender-based claims can fall within the scope of the particular social

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[107] At para.31.

[108] At para.32.

group (albeit that s.1 of the Refugee Act 1996 expressly recognises gender as a particular social group in any event).[109] Similarly, while the 1996 Act also provides that sexual orientation falls within the social group category, this has been confirmed by such decisions as *MA v Refugee Appeals Tribunal*,[110], *E v Refugee Appeal Tribunal*[111] and *SA v Refugee Appeals Tribunal*. In the latter case, Hogan J stated:

> "[I]t is not seriously disputed but that homosexuals form part of a social group for this purpose. ... Sexual orientation is moreover an intrinsic and essentially immutable feature of human identity ... It is not simply a question of performing physical sexual acts with a member of the same sex as distinct from a member of the opposite sex: it is rather a defining feature of that very identity."[112]

Hogan J went on to reject the discretion based requirement in respect of refugee claims based on sexual orientation, stating "a homosexual cannot, therefore, be expected to sublimate or conceal their very identity in order to escape the wrath of a state or societal forces condoned by the state",[113] citing with approval the decision of the UK Supreme Court in

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[109] As noted above, section 1 of the 1996 Act provides that "'membership of a particul.ar social group' includes membership of a trade union and also includes membership of a group of persons whose defining characteristic is their belonging to the female or the male sex or having a particular sexual orientation". Other gender-based claims which have been recognised as coming within the concept of a "particular social group" include young women who fear being subjected to female genital mutilation: *BO v Refugee Appeals Tribunal* [2006] IEHC 162 and *TI v Refugee Applications Commissioner* [2007] IEHC 239, women at risk of rape and sexual violence: *CB v Refugee Appeals Tribunal* [2012] IEHC 487 and women who have been subjected to trafficking and/or forced prostitution: *EFI v Refugee Appeals Tribunal* [2009] IEHC 94 and *GO v Refugee Appeals Tribunal* [2013] IEHC 89.

[110] [2010] IEHC 519.

[111] [2011] IEHC 149.

[112] [2012] IEHC 78 at paras 12-13.

[113] At para.15.

HJ (Iran) and HT (Cameroon).[114] It is concerning to note that the discretion based requirement appears to have been applied by at least some refugee decision-makers in Ireland prior to this. For example, in *MA v Minister for Justice* the decision-maker referred to country of origin information which indicated that "if Nigerian homosexuals are discreet, they are unlikely to run foul of the law" notwithstanding the applicant's express reliance on the UNHCR guidance note which emphatically rejected such reasoning. However, the decisions of Ryan J in *MA,* Hogan J in *SA* and most recently MacEochaidh J in *EPA v Refugee Appeals Tribunal*[115] and McDermott J in *SQ v Refugee Appeals Tribunal*[116] roundly condemned the use of such reasoning and put it beyond doubt that refugee decision-makers are not entitled to rely on such grounds to refuse a refugee claim.[117]

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[114] Hogan J stated "This was the very point made so eloquently by the various members of the UK Supreme Court in their seminal judgments in *HJ (Iran) v Home Secretary* [2010] UKSC 31, a case where the asylum claimants were homosexual males from Iran and Cameroon respectively. No words of mine could adequately summarise these powerful judgments. A brief extract from the judgment of Lord Hope must suffice for present purposes: 'The question is how each applicant, looked at individually, will conduct himself if returned and how others will react to what he does. Those others will include everyone with whom he will come in contact, in private as well as in public. The way he conducts himself may vary from one situation to another, with varying degrees of risk. But he cannot and must not be expected to conceal aspects of his sexual orientation which he is unwilling to conceal, even from those whom he knows may disapprove of it. If he fears persecution as a result and that fear is well-founded, he will be entitled to asylum however unreasonable his refusal to resort to concealment may be. The question what is reasonably tolerable has no part in this inquiry'": at paras 15-16.

[115] [2013] IEHC 85.

[116] [2013] IEHC 94.

[117] In this regard, the decisions in *MA, SA, EPA* and *SQ* are entirely consistent with the decision of the CJEU in *X, Y and Z v Minister voor Immigratie (Cases C-199/12, 200/12 and 201/12)* Court of Justice of the European Union, 7 November 2013 discussed in chapter 2.

Non-Refoulement in Irish Law

Section 5 of the Refugee Act 1996 gives effect to Article 33 of the Refugee Convention in the following terms:

> "5(1) A person shall not be expelled from the State or returned in any manner whatsoever to the frontiers of territories where, in the opinion of the Minister, the life or freedom of that person would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion.
>
> (2) Without prejudice to the generality of subsection (1), a person's freedom shall be regarded as being threatened if, inter alia, in the opinion of the Minister, the person is likely to be subject to a serious assault (including a serious assault of a sexual nature)."

This provision is consistent with the provisions of Article 33, and is further noteworthy insofar as it expressly recognises sexual assault as amounting to a threat to a person's freedom.

The interaction between the prohibition on refoulement in Irish law and the refugee process was considered in *Kouaype v Minister for Justice, Equality and Law Reform,*[118] where Clarke J held that in issuing a deportation order, the Minister is entitled to rely on fact that the individual concerned is a failed asylum seeker in reaching his decision that there was no risk of refoulement. This clearly demonstrates the importance of an appropriate procedural framework which identifies refugees who are entitled to recognition; failure to do so within the refugee process may ultimately give rise to a risk of refoulement insofar as decisions made in the refugee context are relied upon at the removal stage.

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[118] [2005] IEHC 380.

A further issue which has been the cause of some controversy before the Irish courts was the appropriate standard for review in cases where it was sought to challenge a deportation order on reasonableness grounds in cases where it was alleged that removal would breach the prohibition on refoulement. Although for many years the courts adhered to the narrow, traditional conception of the scope of review on such grounds,[119] more recently in *Meadows v Minister for Justice, Equality and Law Reform*[120] the Supreme Court adopted a more liberal approach by allowing the court to apply a proportionality test.[121]

The following dictum of Murray J is also of interest in the context of the nature of the obligations on a decision maker to ensure respect for the prohibition on refoulement:

> "Where an applicant relied on factual material expressly relevant to the prohibition on refoulement, the first respondent was required to consider and specifically address whether there were grounds which prevented him making a deportation order and he had to ensure that his decision was in terms which would enable at the very least the rationale underlying the decision to be discerned expressly or by inference. There was a fundamental defect in the conclusion of the respondent in relation to the issue of refoulement as the decision in the terms couched was so vague and opaque that its underlying rationale could not be properly or reasonably deduced. This was open to multiple interpretations and it was not possible to properly discern from the decision the

[119] See, eg, *FP v Minister for Justice* [2002] 1 IR 164.

[120] [2010] 2 IR 701.

[121] See generally, Brady "Proportionality, Deference and Fundamental Rights in Irish Administrative Law: The Aftermath of *Meadows*" (2010) 17(1) Dublin University Law Journal 136 and Biehler "Curial Deference in the Context of Judicial Review of Administrative Action Post *Meadows*" (2013) 48 (1) Irish Jurist 28.

actual rationale on foot of which the first respondent decided that section 5 of the Refugee Act 1996 had been complied with."[122]

The jurisprudence on the scope of non-refoulement, and in particular the nature of the obligations imposed on decision-makers in order to ensure compliance with this fundamental principle, are broadly reflective of two competing trends. Older cases, based on the traditional, narrow conception of the judicial role in judicial review, extended considerable defence to decision makers even in the context of allegations of potential refoulement; however, more recent decisions, of which *Meadows* is the exemplar, could be said to be indicative of a more substantive, rights based approach by the judiciary. To the extent that this approach is informed by a concern to vindicate the rights of refugees by ensuring that no person is returned to a country where he or she would face persecution, the substantive approach is undoubtedly to be preferred.

Immigration, Residence and Protection Bill

As noted above, until the Refugee Act 1996 was enacted there was no statutory framework governing the refugee process in Irish law. With the rapid increase in refugee applications received in this State from the early 1990s onwards, there was a growing recognition of the need to formalise the existing framework by way of legislation. However, even before the 1996 Act was fully commenced, it was the subject of further legislative reform by way of the Immigration Act 1999 and the Illegal Immigrants (Trafficking) Act 2000, and further amendments were effected by the Immigration Acts 2003 and 2004. The legislative framework has also been supplemented by a number of statutory instruments giving effect to obligations arising under EU law, such as the European Communities (Eligibility for Protection) Regulations 2006[123] which transposed the Qualification Directive into Irish law, as

[122] *Ibid* at p.702.

[123] SI No.518 of 2006.

well as the Asylum Procedures Regulations 2011 which gave effect to certain obligations under the Procedures Directive.[124] It is beyond doubt that the legal framework governing the refugee process in Ireland is fragmented; this is of concern insofar as the overall coherence and accessibility of the framework is concerned.[125] In recognition of such concerns, since 2005 the government has indicated its intention to undertake a radical reform of the entire refugee and immigration system, by way of a single statutory code governing all aspects of the migration system in Ireland.

In April 2005 the Department of Justice published a discussion document on immigration and residence in Ireland, outlining policy proposals for the proposed Immigration and Residence Bill, inviting submissions from interested parties.[126] The scheme of the Immigration, Residence and Protection Bill was subsequently published in September 2006. The Irish Human Rights Commission welcomed the proposal to put in place a comprehensive and coherent immigration code but expressed concern that the Bill sought to "mix asylum and protection issues with general provisions on the immigration of foreign nationals", noting that there was an "inherent tension" in placing these two systems together in a single legislative scheme with the risk of creating legal uncertainty for the status of protection applicants.[127]

It was not until January 2008 that the full text of the Immigration, Residence and Protection Bill was published. Notwithstanding the

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[124] The European Communities (Asylum Procedures) Regulations 2011 (SI No.51 of 2011) and the Refugee Act 1996 (Asylum Procedures) Regulations 2011 (SI No.52 of 2011).

[125] For a compelling discussion of fragmentation and its effects, see Nollkaemper *National Courts and the International Rule of Law* (Oxford University Press 2012) at pp.220-221.

[126] Department of Justice *Immigration and residence in Ireland: Outline policy proposals for an Immigration and Residence Bill* (April 2005).

[127] Irish Human Rights Commission *Observations on the scheme of the Immigration, Residence and Protection Bill 2006* (December 2006).

lengthy consultation period between publication of the general scheme in September 2006 and the Bill in January 2008, it appears that the submissions made had little impact on the text of the Bill. In particular, the 2008 Bill retained the "amalgamation of immigration, protection and trafficking issues" which had been criticised by the Irish Human Rights Commission in their comments on the general scheme of the Bill in 2006.[128] Other concerns raised by the IHRC included the possible restriction of access to the protection system under the 2008 Bill, the procedure for designation of "safe countries of origin" and "safe third countries", as well as restrictions on the availability of judicial review in the asylum context.[129] The IHRC also recommended improvements to the provisions on the burden of proof and credibility assessments, as well as recommendations in respect of the proposals in the Bill to regarding the accelerated appeals procedure.[130] However, there were also positive elements in the 2008 Bill, in particular the proposal to reform the asylum procedures in the State to introduce a "single procedure" allowing for

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[128] See Irish Human Rights Commission *Observations of the Immigration, Residence and Protection Bill 2008* (March 2008) at p.5.

[129] In relation to access to the procedure, the IHRC expressed concern regarding the possible use of exclusion orders to prevent a person making an application for asylum, which could lead to a breach of the principle of non-refoulement (at pp.8-9); in relation to designation of "safe countries of origin" and "safe third countries" the IRHC was of the view that the 2008 Bill did not contain sufficient safeguards to ensure that the assessment of whether a person could reasonably have relocated to a safe part of their country of origin was carried out in a manner which fully complied with the principle of non-refoulement: pp.10-13); and in respect of judicial review the Commission was concerned that the restrictive time limits for institution of judicial review proceedings, with limited provision for extension, could impede access to the courts: pp.12-14. The IHRC followed up its concerns regarding the safe country of origin/safe third country issue with a further paper in July 2008, *Further Submission on the Immigration, Residence and Protection Bill 2008 "Safe Countries of Origin" and "Safe Third Countries"* (July 2008).

[130] The IHRC recommendations on credibility emphasised the need to guide decision-makers to focus on the core elements of the refugee claim and not on peripheral issues such as method and mode of travel to the State (pp.14-16), and also called for the accelerated procedure to be applied only in exceptional cases (at p.17).

assessment of all aspects of a protection claim with the intention that this streamlined procedure would allow for a more efficient asylum process.[131]

The progress of the Immigration, Residence and Protection Bill 2008 through the Dail was fraught from the outset; the Bill was debated over fifteen days between February and November 2008 with over seven hundred amendments being tabled at committee stage, including over two hundred amendments tabled by the government itself.[132] The Bill was ultimately withdrawn by the Minister for Justice in May 2010 on the basis that the legislative process had become too unwieldy, and that it would be better to withdraw the Bill and later republish it having incorporated "as many of the amendments as possible".[133] The Bill was subsequently republished on 2 July 2010 and perhaps unsurprisingly, quickly became bogged down in the legislative process once more.[134] As of 16 November 2011, over two hundred new amendments had been proposed, and no further progress was made with the Bill before the Dáil was dissolved on 1 February 2011. The new government quickly indicated its intention to proceed with the Bill in its previous form when

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[131] See eg Irish Refugee Council *The Right to Protection: Submission to the Oireachtas Joint Committee on Justice, Equality, Defence and Women's Rights on the protection aspects of the Immigration, Residence and Protection Bill, 2008* (March 2008) at p.2 and UNHCR *Comments on the Immigration, Residence and Protection Bill 2008* (March 2008) at p.2.

[132] See Dáil Éireann *Immigration Residence and Protection Bill 2008: Committee Amendments* (16 April 2008) which contained some 707 proposed amendments.

[133] Statement of Minister for Justice, Equality and Law Reform Dermot Ahern TD on the launch of the second stage of the Immigration, Residence and Protection Bill 2010, 6 October 2010.

[134] The failure of the government to heed calls to separate the issue of protection from general migration may well have contributed to difficulties in securing the smooth passage of the Bill through the Dáil; Minister for Justice Dermot Ahern previously referred to the Bill as having become "a tome", and as the legislation is subjected to parliamentary scrutiny it is likely that the scope for additional reforms to be sought merely compounds the difficulties in this regard.

the Bill was restored to the committee stage on 23 March 2011.[135] However, notwithstanding the restoration of the Bill to committee stage in March 2011, no further progress has been achieved and the Bill has remained languishing at that stage in the intervening three years.[136] More recently, the Minister for Justice has indicated his intention to publish a revised "new and enhanced" draft of the Bill, "instead of engaging in an extremely cumbersome process of tabling hundreds of amendments" at committee stage.[137] Notwithstanding general agreement that this legislation is long overdue, the current estimate for when publication of the revised draft Bill can be expected is no more specific than "later this year".[138] Furthermore, given the fact that this will now be the second occasion on which the Bill has been withdrawn to allow further revisions be undertaken, having regard to the large number of amendments which arise at committee stage, it must be questioned whether the Immigration, Residence and Protection Bill is doomed to repeat this path again; the viability of the government's proposals, and in particular the insistence that all aspects of the immigration and asylum process be addressed

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[135] See Dáil Éireann *Restoration of Bills to Order Paper: Motion* 23 March 2011 when Minister of State at the Department of the Taoiseach Paul Kehoe moved a motion providing that, notwithstanding anything in Standing Orders, the Bills which lapsed on the dissolution of the 30th Dáil, including the Immigration, Residence and Protection Bill, should be "proceeded with at commencement of the stage each Bill had reached prior to dissolution…".

[136] It must be acknowledged that the financial crisis which engulfed the country in the intervening period, and the critical need to pass for related legislation, has undoubtedly impacted on the passage of other legislative proposals during that time, including no doubt the Immigration, Residence and Protection Bill. For example, on 2 July 2013 in response to a parliamentary question concerning the date on which the Bill would be reintroduced, Minister for Justice Alan Shatter stated "Subject to having to deal with the competing legislative demands of our EU/IMF/ECB Programme commitments, I hope to be in a position to bring a revised Bill to Government for approval and publication before the end of the year."

[137] Parliamentary questions 445 and 446, 11 February 2014. The Minister for Justice noted that work was underway in this regard, and stated that he expected to be able to publish the "new and enhanced version of the Bill later this year."

[138] *Ibid.*

within a single piece of legislation, must surely be questioned at this stage. At all events, the most that can be said at present is that the current state of the proposals for reform of the Bill are uncertain, insofar as the nature and extent of the revisions currently being undertaken by the government are unclear.

Conclusions

As this chapter has demonstrated, the Irish framework governing refugees was originally unsophisticated and undeveloped, a reflection of the minimal numbers of persons seeking asylum in this State. As the numbers of refugee applicants grew exponentially in the 1990s, there was general recognition of the need to place the refugee framework on a statutory footing, which was ultimately done via the Refugee Act 1996. However, the government's attempts to put in place a comprehensive statutory scheme in relation to refugees can broadly be characterised as reactive rather than proactive; the 1996 Act itself did not fully commence until the year 2000, and as early as 2001 the government indicated its intention to introduce a new comprehensive statutory code governing not just asylum but also general migration matters. In the intervening periods, the need to give effect to obligations arising under EU law has led to the statutory scheme being supplemented by a number of statutory instruments, further fragmenting the existing legal framework. There is broad agreement that there is a need to introduce a coherent, comprehensive legal framework governing the refugee process in Ireland. Indeed, the government has indicated its commitment to doing so, but unfortunately the method chosen to do so, as part of a much boarder package of immigration reform, has given rise to significant difficulties and delays. The general scheme of the Immigration, Residence and Protection Bill was published in 2006, and some eight years later the legislation has still not been passed.

In terms of substantive refugee law, the only major change effected since the enactment of the 1996 Act occurred with the transposition of the

Qualification Directive in 2006. There is no evidence that this transposition resulted in a "levelling down" of refugee protection in Ireland, as feared by some critics of the Directive.[139] However, this would appear to be the case in circumstances where the focus of much of the Irish jurisprudence is not on substantive concepts in the refugee domain, but rather on the procedures surrounding determination of refugee status. In broad terms, it can be said that the provisions of the Irish legal framework regarding the substantive definition of a refugee broadly comply with the requirements of the Refugee Convention, and are furthermore consistent with the rule of law, such as the definition of the particular social group in sections 1 and 2 of the Refugee Act 1996 and the definition of persecution in Regulation 9(1) of the European Communities (Eligibility for Protection) Regulations 2006. It is now well recognised that substantive rights may, in some instances, be negatively impacted or even frustrated by the procedural framework for the exercise of such rights. The interaction between the substantive and the procedural rights of refugees under Irish law, and the implications for the rule of law, will therefore be explored in chapter 4.

[139] Lambert "The EU Asylum Qualification Directive, Its Impact on the Jurisprudence of the United Kingdom and International Law" (2006) 55(1) International and Comparative Law Quarterly 161 at 173-174.

Chapter 4 Procedures for the Determination of Refugee Status in Ireland

Introduction

Having considered the substantive definition of the refugee in Irish law, the focus now turns to the procedural framework for the determination of refugee applications in Ireland. The path of an asylum application is traced from the initial application through to first instance decisions at the Refugee Applications Commissioner and rights of appeal to the Refugee Appeals Tribunal. This incorporates a discussion of the concepts of safe first countries, safe third countries and the manifestly unfounded procedure, not just from the statutory perspective but also as addressed by decisions of both the Irish superior courts and the Court of Justice of the European Union. Drawing on the common themes to the rule of law of certainty, consistency, independence and transparency, this chapter highlights a number of grounds for significant concern in the Irish procedural framework governing refugee applications. Given the emphasis on credibility findings within the process, a number of decisions of the High Court are critiqued, not just to enable a consideration of the role of the judiciary in the protection of refugee rights but also to demonstrate that the nature and extent of the reliance on credibility findings by some refugee decision-makers in this jurisdiction pose a real threat to the rule of law.

The initial application for asylum

As the pre-statutory framework for determination of refugee status is set out in Chapter 3 (namely the von Arnim and Hope Hanlan procedures) it is not proposed to revisit those issues here. The focus instead is on the statutory framework for determination of applications for refugee status in this State pursuant to the Refugee Act 1996. It should be noted that while Ireland opted in to the Procedures Directive, the procedural framework set out therein has had little impact on the Irish refugee status determination procedure. [1] This is largely because the Procedures Directive prescribed "minimum standards" to be observed in the refugee status determination procedure, and required only that member states' existing frameworks did not go below those minimum standards, but reserved the right of member states to depart from the Directive in so far as more liberal procedures might be adopted.[2] Furthermore, in the light of Ireland's recent decision to opt out of the Recast Procedures Directive, the focus in this chapter is largely on procedures as prescribed by domestic law.

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[1] In fact, the Irish authorities took the view that no steps were required to transpose the Procedures Directive as it was deemed that Irish law already complied with the minimum requirements of that Directive. Only on foot of threatened infringement proceedings from the Commission were two minor amendments effected to the procedural framework. The European Communities (Asylum Procedures) Regulations 2011 (SI No.51 of 2011) and Refugee Act 1996 (Asylum Procedures) Regulations 2011 (SI No.52 of 2011) contained minor amendments in respect of the conduct of interviews by the Commissioner and more significant amendments to the procedure for designation of safe countries of origin and safe third countries, as discussed below.

[2] See generally Costello "The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection" (2005) 7(1) European Journal of Migration and Law 35, Byrne "Remedies of Limited Effect: Appeals under the Forthcoming Directive on EU Minimum Standards on Procedures" (2005) 7(1) European Journal of Migration and Law 71 and Mullally "Asylum Procedures: Recent Developments in EU law" (2006) 11 (6) Bar Review 212.

In providing for the making of an application for refugee status by a person arriving at the frontiers of the State, section 8(1)(a) of the Refugee Act 1996 prescribes that such a person seeking asylum in the State or seeking the protection of the State against persecution, or requesting not to be returned or removed to a particular country or otherwise indicating an unwillingness to leave the State for fear of persecution, (i) shall be interviewed by an immigration officer as soon as practicable after such arrival, and (ii) may apply to the Minister for Justice for a declaration.

Certain procedural safeguards are set out in the following subsection; section 8(1)(b) provides that the immigration officer concerned shall inform a person arriving at the frontiers seeking asylum, "where possible in a language that the person understands", that he or she may apply for a declaration of refugee status, as well as the right to consult a solicitor and the UNHCR. The caveat regarding language is of concern; there is little point in informing a person of their right to seek asylum in a language the person does not understand. The failure of the legislation to specify an obligation to ensure that this basic information is provided in a language understood by the individual, if necessary by obtaining the assistance of an interpreter, has the potential to result in a breach of the refugee's rights, including ultimately the right to non-refoulement.[3]

Concerns have also been expressed in this context about the lack of independent monitoring mechanisms at the frontiers of the State; section 5 of the Immigration Act 2003 contains a power of detention in respect of inter alia persons refused leave to land in the State. There have been reports of instances where persons arriving at the frontiers of the State are denied the opportunity to make an application for asylum, in respect of whom the powers of detention pursuant to section 5 of the Immigration Act 2003 are invoked and the summary removal of the

[3] See further Chapter 5.

person thereafter arranged.[4] Although the powers of detention and removal in section 5 of the 2003 Act are expressly stated to be "subject to the provisions of section 5 of the Refugee Act 1996", *ie* the prohibition on refoulement, there are credible reports that in at least some instances this fundamental requirement has been ignored.[5] The refusal of the State to agree to a proposed scheme of independent monitoring at Dublin airport in this regard has also been criticised, with Connolly and Roddy, for example, rightly pointing out that:

> "Confidence in the transparency and impartiality of immigration and asylum procedures is not enhanced when the authorities refuse to permit independent monitoring at arrival points. An example of this is the refusal of the Irish authorities to permit an NGO monitoring and reception project in Dublin Airport, even though the EU among other sources had already agreed to finance it."[6]

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[4] See, *eg*, Kelly *Immigration Related Detention: A Research Report for the Irish Refugee Council, Irish Penal Reform Trust and Immigrant Council of Ireland* (November 2005).

[5] For example, in December 2000 the Irish Catholic Bishops' Conference (ICBC) issued a statement titled "Pre-Emptive Exclusion of Asylum seekers? Disturbing evidence of a New Policy", which noted the stark drop in numbers of asylum seekers arriving at Rosslare port. It was noted that up to November 19, 2000 the numbers of asylum seekers arriving at the port averaged 150-200 per month, but that upon the commencement of the Refugee Act 1996 the numbers "fell to zero following the deployment of Irish immigration officials and gardaí during that month on the Cherbourg to Rosslare ferry, and at Cherbourg itself": see Connolly and Roddy "A Half Century of Refugee Rights: Assessing the Past and Future Contribution of the 1951 Geneva Convention Relating to the Status of Refugees" (2001) Trocaire Development Review 89 at 93.

[6] *Ibid* at p.92.

More recent reports echoing the call for independent monitoring at air and sea ports have also gone unheeded.[7] The potential for breaches of the fundamental obligation not to return refugees to a country where they may face persecution is clearly of serious concern insofar as respect for the rule of law is concerned.[8]

The vast majority of applications for refugee status are made from within the State.[9] Such applications are provided for by section 8(1)(c) of the Refugee Act 1996, which provides:

> "A person who at any time is in the State (whether lawfully or unlawfully) and is seeking the status of a refugee in the State may apply to the Minister for a declaration and, if he or she does so, shall be interviewed by an authorised officer or an immigration officer at such times as may be specified by the authorised officer or the immigration officer, as the case may be, who shall also inform the person that he or she is entitled to consult a solicitor and the High Commissioner and the person shall make himself or herself available for such interview at the times so specified."

Section 8(2) clarifies that the purpose of an interview held under subsection (1) is to establish whether the person wishes to make an application for a declaration and, if he or she does so wish, the general grounds upon which the application is based, and basic biographical

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[7] See, *eg*, Kelly *Immigration Related Detention: A research Report for the Irish Refugee Council, Irish Penal Reform Trust and Immigrant Council of Ireland* (November 2005).

[8] As Mullally stated in a 2001 report in this regard, "Although the 1996 Refugee Act gives effect to the Geneva Convention in domestic law, there is little to suggest that the spirit of the Convention has entered into the refugee determination procedure": Mullally *Manifestly Unjust: A Report on the Fairness and Sustainability of Accelerated Procedures for Asylum Determinations* (Irish Refugee Council 2001) at p.18.

[9] It may be speculated that such applications are made "in-State" by applicants who choose deliberately not to identify themselves at the frontiers for fear of detention and summary removal.

information such as the identity of the person, the nationality and country of origin of the person, and the reason why the person is seeking asylum.[10] Importantly, section 8(3) of the Act provides that the Refugee Applications Commissioner must notify UNHCR in writing of the making of all applications for asylum, including the name and country of origin of the applicant; this allows UNHCR to collate and monitor, at least at a basic level, the numbers of applications for asylum received in the State as part of its oversight functions.[11]

The first instance decision on refugee status

The Refugee Applications Commissioner is the body charged with responsibility for the investigation and first instance decision on refugee applications.[12] Investigation of asylum applications by the Refugee Applications Commissioner is provided for by section 11 of the Refugee Act 1996; an authorised officer of the Commissioner conducts an interview with the applicant and furnishes a report of such interview to the Commissioner on foot of which a decision on the application is made. Certain minimum information must be provided in writing to a refugee applicant by the Refugee Applications Commissioner, including the procedures which will be followed in the investigation of the asylum application, the entitlement of the applicant to consult a solicitor and/or the UNHCR, as well as the duty of the applicant to co-operate with the Commissioner and to furnish information relevant to his or her application and the possible consequences of non-compliance with that obligation including the possibility that the application for asylum may be deemed to be withdrawn.[13] Whilst the provision of such information is generally consistent with the principle of accessibility, probably the most concerning feature of the procedure here is that notwithstanding the reference to the right to consult a lawyer, an applicant for asylum in

[10] Section 8(2)(a) to (f) of the Refugee Act 1996.

[11] See further Chapter 1.

[12] Established by section 6 of the Refugee Act 1996.

[13] Section 11(8) of the Refugee Act 1996.

Ireland is not legally represented at first instance.[14] Legal representation may be provided on appeal, but not in respect of the first instance process. This is concerning because, as Kelly succinctly states, "[g]etting the decision right first time, at ORAC stage, can avoid a protracted asylum application process that is both highly detrimental to individual applicants and hugely expensive to the State. The early identification of people in need of international protection allows Ireland to meet its obligations under international law in a timely manner."[15] Moreover, it is argued that the availability of early legal advice may in fact *reinforce* the overall integrity of the asylum process, such as for example preventing the making of unnecessary applications, and it is difficult to see how such an argument may be countered.[16] Whilst albeit in the very different context of criminal law, the recent judgment delivered by the Supreme Court in *DPP v Gormley* on the right to consult with a lawyer prior to questioning, and the subsequent directive issued by the Director of Public Prosecutions on 9 May, 2014 changing the longstanding policy in this regard, would seem only to support an argument such as that made by Kelly.[17]

Section 11A of the Refugee Act 1996 concerns the burden of proof in the investigation of asylum applications by the Refugee Applications Commissioner.[18] Under section 11A(1), where, at any time during the investigation of an application by the Commissioner under section 11, it appears to him or her that an applicant (a) is a national of, or has a right of residence in, a country standing designated by order under section

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[14] An asylum seeker may receive legal advice from the Refugee Legal Service in the context of the first instance application for refugee status but is not generally entitled to representation before the Refugee Applications Commissioner (with the exception of unaccompanied minors).

[15] Kelly "Early Recognition of People in Need of International Protection: The Irish Refugee Council Independent Law Centre's Early Legal Advice & Representation Project" (2013) 8(2) The Researcher 2 at p.2.

[16] *Ibid.*

[17] [2014] 1 ILRM 377.

[18] As inserted by section 7(f) of the Immigration Act 2003.

12(4) as a safe country of origin, or (b) had lodged a prior application for asylum in another state party to the Refugee Convention, then that applicant shall be presumed not to be a refugee unless he or she shows reasonable grounds for the contention to the contrary.

The procedure for designation of safe countries of origin is addressed below; for present purposes, it suffices to comment that section 11A of the Refugee Act 1996 seems intended to limit access to refugee protection by reversing the burden of proof and thus raising the bar for asylum applicants.

Section 11B of the Refugee Act 1996 concerns assessment of credibility,[19] setting out some thirteen factors to be taken into account in the assessment of credibility by both the Refugee Applications Commissioner and the Refugee Appeals Tribunal on appeal. The section is expressed in mandatory terms (the decision-maker "*shall* have regard to...") and although the consequences of findings pursuant to section 11B are not expressly addressed, it seems clear they are intended to ground negative inferences in respect of credibility. Amongst the matters to be considered are:

> "(a) whether the applicant possesses identity documents, and, if not, whether he or she has provided a reasonable explanation for the absence of such documents;
> (b) whether the applicant has provided a reasonable explanation to substantiate his or her claim that the State is the first safe country in which he or she has arrived since departing from his or her country of origin or habitual residence;
> (c) whether the applicant has provided a full and true explanation of how he or she travelled to and arrived in the State;

[19] Credibility is a key feature of the refugee status determination procedure at all stages of the Irish procedure and is further addressed below.

(d) where the application was made other than at the frontiers of the State, whether the applicant has provided a reasonable explanation to show why he or she did not claim asylum immediately on arriving at the frontiers of the State unless the application is grounded on events which have taken place since his or her arrival in the State;

(e) where the applicant has forged, destroyed or disposed of any identity or other documents relevant to his or her application, whether he or she has a reasonable explanation for so doing..."

As noted above in respect of section 11A, it would appear that the legislative intent behind section 11B is to limit access to asylum, in some instances by reference to matters which are extraneous at best to the existence of a well founded fear of persecution.[20] Furthermore, as Hathaway has commented:

> "Laws that subject refugees who arrive without valid documents or by passage through non-persecutory states to truncated status assessment procedures – including those in Europe and the United States – may also result in the failure to identify and protect genuine refugees. To the extent such practices expose persons who are in fact refugees (whether or not recognized as such) to the risk of return to persecution, they violate the duty of non-refoulement."[21]

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[20] For example, in relation to the issue of false identity documents or the destruction of identity documents, it is instructive to consider the comments of Simon Brown LJ in *R v Uxbridge Magistrates, ex parte Adimi* [1999] 4 All ER 520 where he stated "Although under the Convention subscribing states must give sanctuary to any refugee who seeks asylum (subject only to removal to a safe third country), they are by no means bound to facilitate his arrival. Rather they strive increasingly to prevent it. The combined effect of visa requirements and carrier's liability has made it well high impossible for refugees to travel to countries of refuge without false documents ..."

[21] Hathaway *The Rights of Refugees under International Law* (Cambridge University Press 2005) at p.387.

Prioritisation of refugee applications is provided for by section 12 of the Refugee Act 1996.[22] This allows the Minister for Justice to direct either the Refugee Applications Commissioner or Refugee Appeals Tribunal to prioritise particular classes of refugee applications on fourteen separate grounds, including the grounds of the applications, the country of origin or habitual residence of the applicants, any family relationship between applicants, the ages of applicants (and in particular, persons under the age of 18), considerations of national security or public policy, the likelihood that the applications are well-founded, if there are special circumstances regarding the welfare of applicants or the welfare of family members of applicants, whether applications do not show on their face grounds for the contention that the applicant is a refugee, whether applicants have made false or misleading representations in relation to their applications, whether applicants had lodged prior applications for asylum in another country, whether the application for asylum was made at the earliest opportunity after arrival in the State, and whether the applicants are nationals of or have a right of residence in a country designated as a safe country of origin. While some of the grounds for prioritisation may be said to promote refugee protection and the rights of refugees (such as prioritisation of applications likely to be well-founded), others seem clearly designed to fast-track refugee applications with a view to refusal (such as the manifestly unfounded ground).[23]

The procedure for designation of a "safe country of origin" is set out in section 11(4) of the Refugee Act 1996, which provides that, following consultations with the Minister for Foreign Affairs and Trade, the Minister for Justice may make an order designating a country as a safe country of origin.[24] In order to do so, however, the Minister for Justice must be satisfied that "on the basis of the legal situation, the application of the law within a democratic system and the general political

[22] As inserted by section 7(g) of the Immigration Act 2003.

[23] Discussed further below.

[24] As amended by Regulation 5 of the European Communities (Asylum Procedures) Regulations 2011.

circumstances, it can be shown that, in the country concerned, there is generally and consistently no persecution, construed in accordance with section 2 and Regulation 9 of the Regulations of 2006, no torture or inhuman or degrading treatment or punishment and no threat by reason of indiscriminate violence in situations of international or internal armed conflict."[25]

Designation of a safe country of origin renders a refugee application subject to the manifestly unfounded procedures set out in section 13(6) of the Refugee Act 1996, along with four other classes of applications. The manifestly unfounded procedure arises where the Refugee Applications Commissioner, in refusing a refugee application, includes in that decision one of the following findings:

> "(a) that the application showed either no basis or a minimal basis for the contention that the applicant is a refugee;
> (b) that the applicant made statements or provided information in support of the application of such a false, contradictory, misleading or incomplete nature as to lead to the conclusion that the application is manifestly unfounded;
> (c) that the applicant, without reasonable cause, failed to make an application as soon as reasonably practicable after arrival in the State;

[25] Two statutory instruments were issued in 2003 and 2004, designating a total of fourteen countries as safe countries of origin: the Refugee Act 1996 (Safe Countries of Origin) Order 2003 (SI No.422 of 2003) designated Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia as safe countries of origin, while the Refugee Act 1996 (Safe Countries of Origin) Order 2004 (SI No.714 of 2004) designated Croatia and South Africa as safe countries of origin. However, as a result of the subsequent accession of thirteen of those countries to the EU, and their subsequent exclusion from the definition of a refugee pursuant to Article 2 of the Qualification Directive, only South Africa remains as a designated safe country of origin.

(d) the applicant had lodged a prior application for asylum in another state party to the Geneva Convention (whether or not that application had been determined, granted or rejected); or
(e) the applicant is a national of, or has a right of residence in, a safe country of origin for the time being so designated by order under section 12(4)."[26]

The consequences of the application of the manifestly unfounded procedure are set out in section 13(8) of the Refugee Act 1996: the applicant has a very limited period of time within which to appeal the Refugee Applications Commissioner's decision (namely "ten working days from the sending of the notice"), and the appeal will be determined without the benefit of an oral hearing.[27]

Manifestly unfounded procedures are a common tool deployed by states seeking to limit or restrict access to the asylum system,[28] which may not

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[26] The manifestly unfounded procedure as originally set out in section 13 of the Refugee Act 1996 contained twelve grounds on which a claim could be subjected to such procedures; following trenchant criticism that this procedure went far beyond the approach recommended by UNCHR ExCom, the procedure was amended by section 7(h) of the Immigration Act 2003. See generally Mullally *Manifestly Unjust: A Report on the Fairness and Sustainability of Accelerated Procedures for Asylum Determinations* (Irish Refugee Council 2001).

[27] This is in contrast to a negative decision which is not subject to the manifestly unfounded procedure, in respect of which the time for appealing is specified as fifteen working days from the sending of the notice; such appeals are also entitled to an oral hearing before the Refugee Appeals Tribunal, if requested: section 13(4)(b) of the Refugee Act 1996 (as amended).

[28] See generally Harvey "The right to seek asylum in the United Kingdom and 'safe countries'" (1996) Public Law 196, Mullally *Manifestly Unjust: A Report on the Fairness and Sustainability of Accelerated Procedures for Asylum Determinations* (Irish Refugee Council 2001) and Byrne, Noll and Vedsted-Hansen (eds) "Future Perspectives: Accession and Asylum in an Expanded European Union – Manifestly Unfounded Claims" in *New Asylum Countries? Migration Control and Refugee Protection in an Enlarged European Union* (Kluwer Law 2002), Chapter 8 at pp. 403-408.

only compromise the refugee's access to a neutral hearing but may ultimately place the refugee at risk of refoulement.[29] The manifestly unfounded procedure set out in the Refugee Act 1996 has been the subject of considerable litigation, and it is instructive to consider the approach adopted by the judiciary both in this jurisdiction and elsewhere from the perspective of the rule of law.

As noted in Chapter 3, prior to the enactment and commencement of the Refugee Act 1996, the Hope Hanlan procedures which governed the refugee status determination procedure in Ireland included a manifestly unfounded procedure.[30] In *Zgnatev v Minister for Justice* the applicant sought to challenge the application of the manifestly unfounded procedure to his refugee claim, contending that the consequent denial of an oral hearing of his refugee appeal was in breach of the constitutional

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[29] See O'Sullivan "The Intersection between the International, the Regional and the Domestic: Seeking Asylum in the UK" in Kneebone (ed) *Refugees, Asylum Seekers and the Rule of Law* (Cambridge University Press 2009) at p.257.

[30] Including that the application on its face did not show any grounds for the contention that the applicant was a refugee; that the applicant had given insufficient details or evidence of substantiate the application; that the applicant's reason for leaving or not returning to his or her country of origin was not related to a fear of persecution; failure to reveal that the applicant had travelled on false identity documents without reasonable cause; that the applicant made false or misleading representations of a material or substantial nature in relation to the application; that the applicant deliberately and in bad faith destroyed identity documents, withheld relevant information or otherwise deliberately obstructed the investigation of the application; failure to reveal a prior application for asylum in another country; application for asylum made for the sole purpose of avoiding removal from the State; failure to adduce evidence of persecution in respect of the country of origin where that state was a party to the Refugee Convention; the applicant was a national or had a right of residence in another state party to the Refugee Convention in respect of which he or she failed to adduce evidence of persecution; if the applicant had left the state without permission subsequent to the making of the application or failure to reply to communication from the Refugee Applications Commissioner; or the applicant had previously been recognised as a refugee in another state party to the Refugee Convention and the reason for leaving or not returning to that state is not related to a fear of persecution in that State.

principles of natural and procedural justice. The applicant was a Russian national who sought asylum on the basis of his Jewish ethnicity and political opinion; his claim was rejected as manifestly unfounded for three reasons, namely that his application on its face did not show any grounds for the contention that the applicant was a refugee; that the applicant had given insufficient details or evidence to substantiate the application; and that the applicant's reason for leaving or not returning to his or her country of origin was not related to a fear of persecution.

Both the High Court and Supreme Court rejected the applicant's challenge. The judgment of McGuinness J contains some important comments on the nature and scope of refugee protection in Irish law. Accepting the general proposition that the State has a sovereign right to regulate the entry, presence and expulsion of migrants in the State, McGuinness J nonetheless stated:

> "[The] 'inherent element of State sovereignty over national territory' should, however, be held in balance against the domestic and international obligations which the State has accepted in its role as a signatory to the Geneva Convention. The international community has accepted that the problem of refugees is a world-wide one. *The obligation to provide a system of fair procedures to identify and protect refugees reaching our shores is one which we share both with other members of the European Union and with the wider international community.* This obligation has now been recognised in domestic law by the enactment and bringing into operation of the Refugee Act, 1996. Prior to the coming into force of that Act, during the period relevant to the applicant in the present case, that obligation was met by the procedures agreed between this State and the UNHCR in first the Von Arnim letter and subsequently the Hope Hanlan letter. In general terms, I would accept the submission of counsel for the applicant that *the State is obliged under international law to ensure that refugees presenting themselves in the State seeking*

protection are identified and their status recognised." [31]
[Emphasis added]

This approach is clearly consistent with a substantive conception of the rights of refugees, incorporating the fundamental right to fair procedures within the refugee process, and further demonstrates the willingness of the courts to uphold those rights, when necessary.

However, McGuinness J also noted that pursuant to the Hope Hanlan letter, the State was entitled to operate "an accelerated procedure where claims to refugee status appear on proper investigation to be manifestly unfounded."[32] Reviewing the criticisms made by the applicant of the decision-making process in his case, McGuinness J agreed that the decision-maker was not entitled to find that the applicant had failed to demonstrate any grounds for the contention that he was a refugee. However, considering the information the applicant had furnished at first instance, McGuinness J was satisfied that the applicant had given insufficient details or evidence to substantiate his refugee application; and that his reason for leaving or not returning to his or her country of origin was not related to a fear of persecution.[33] Although reference was

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[31] [2002] 1 IR 135 at 156.

[32] *Ibid.*

[33] In this regard, McGuinness J commented "The burden of proof of establishing refugee status is on the applicant and it was open to the applicant whether at his interview, by additional submissions after his interview, or in submissions at the time of his appeal, to bring forward detailed evidence of his persecution on either of these (clearly convention) grounds. He did not do so and in my view this largely justifies the criticism of his claim made in this court by counsel for the respondents. To an extent his difficulties in Chechnya may be ascribed to the fortunes of war rather than to persecution, or to failure of protection by his own State. Again, he gave no account of seeking the protection of the authorities from the Chechnyan paramilitaries once he had escaped from their clutches": at p.159.

made to the "shared burden of proof",[34] McGuinness J noted that this could not relieve the applicant of the primary burden of proving the subjective element of his claim, namely that he had a well founded fear of persecution by reason of his political opinion or ethnicity. McGuinness J was also satisfied that the applicant was not entitled to an oral hearing of his appeal, having had the benefit of an oral hearing at first instance, noting that "he may certainly wish to expand on either his own evidence or independent evidence concerning the conditions prevailing in his country of origin but it is open to him to provide this information in writing."[35] The fact that UNHCR itself did not consider such an oral appeal necessary, as evidenced by the Hope Hanlan procedures themselves, seems to have influenced the decision of the court in this regard.[36]

A further aspect of the *Zgnatev* decision which is of interest insofar as the rule of law and the protection of refugee rights is concerned is the consideration given to the scope of the court's jurisdiction on judicial review. McGuinness J noted the traditionally deferential approach to the question of reasonableness as set out in *State (Keegan) v Stardust Victims' Compensation Tribunal*, where it was held:

> "... in most cases a decision falls to be quashed for unreasonableness, not because of the extent to which it has departed from accepted moral standards (or positive morality) but because it is indefensible for being in the teeth of plain reason and common sense.... the test of unreasonableness or

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[34] This principle derives from the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992) at paras 195-196.

[35] *Op cit* at p.161.

[36] See p.162 where McGuinness J commented "The Hope Hanlan letter itself deals with the matter of appeals in the context of the accelerated procedure and provides for an appeal in writing. An oral appeal is, therefore, not considered necessary in the system set up by agreement between the UNHCR and the first respondent."

> irrationality in judicial review lies in considering whether the impugned decision plainly and unambiguously flies in the face of fundamental reason and common sense. If it does, then the decision-maker should be held to have acted ultra vires, for the necessarily implied constitutional limitation of jurisdiction in all decision-making which affects rights or duties requires, inter alia, that the decision-maker must not flagrantly reject or disregard fundamental reason or common sense in reaching his decision."[37]

McGuinness J accepted that "the outcome of judicial review proceedings in many cases and in many contexts is of crucial importance to applicants",[38] and referred to an emerging line of jurisprudence from the English courts suggesting that decisions in the refugee context might require a higher standard of review.[39] However, while McGuinness J accepted that "from a humane point of view it is clear that any court will most carefully consider a case where basic human rights are in question", even applying such "careful scrutiny" in this case she was satisfied that "there was sufficient material, or lack of material, before the decision-makers to render the decisions reasonable, and therefore intra vires."[40]

While the decision in *Zgnatev* demonstrated some concern for the protection of the rights of refugees, it nonetheless was ultimately decided on somewhat traditional, deferential grounds – provided there was *some*

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[37] [1986] IR 642 at 658 per Henchy J.

[38] [2002] 1 IR 135 at 158.

[39] Referring to the "anxious scrutiny" test, citing such cases as *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514, *R v Secretary of State for the Home Department, ex p.Canbolat* [1997] 1 WLR 1569 and *R v Ministry of Defence, ex p.Smith* [1996] QB 517.

[40] At p.161.

material before the decision maker justifying the decision, the courts were unwilling to intervene.[41]

Subsequent case law in the context of the manifestly unfounded procedure has demonstrated perhaps more concern for the rights of refugees. For example, in *Moyosola v Refugee Applications Commissioner* Clarke J noted that it was a feature of the manifestly unfounded procedure that an asylum seeker might have his or her refugee application refused by the Refugee Applications Commissioner on credibility grounds without having been alerted to the issues giving rise to such findings; and that the application of the manifestly unfounded procedure in such cases, which deprived the applicant of an oral hearing, would mean that the applicant was deprived of an opportunity at any stage of the process from addressing those findings. Clarke J held:

> "[This] sequence of events demonstrates clearly that the procedures followed are in breach of the fundamental principle set out in *Re Haughey* to the effect that a person is entitled to know the case against them. ... where a report of the RAC contains a finding in relation to one of the matters specified in s.13(6) so as to deprive the applicant concerned of an oral appeal in circumstances where that finding is at least in material part influenced by a finding of lack of credibility on the part of the applicant concerned, it is necessary, in accordance with the principles of constitutional justice, that prior to the making of any such recommendation including any such finding the RAC will have afforded the applicant concerned the opportunity to deal

[41] The decision in *Zgnatev* gave rise to a series of subsequent cases challenging the restrictive "reasonableness" ground in judicial review, which ultimately lead to the decision of the Supreme Court in *Meadows v Minister for Justice, Equality and Law Reform* [2010] 2 IR 701; [2011] 2 ILRM 157, discussed above.

with any matters which might influence such adverse credibility finding."[42]

Neatly sidestepping the issue of whether the procedures in the Refugee Act 1996 were unconstitutional, Clarke J resolved the issue by holding:

> "there may be situations where a decision maker in an inquisitorial process is obliged to bring matters to the attention of a party whose rights may be affected even after the ordinary course of the inquisitorial process has, apparently, come to an end where some matter comes to the inquisitors attention (or indeed where a matter which was tangentially referred to during the process looms larger in the mind of the decision maker as he or she contemplates making the decision concerned). Fair procedures may require that the person whose rights may be affected by the decision should be given an opportunity to deal with the matter concerned."[43]

Thus, Clarke J held that where the Refugee Applications Commissioner proposed refusing a refugee application with a finding that would give rise to the application of the manifestly unfounded procedure arising from material which had not previously been put to the applicant, there was an obligation on the Commissioner to reconvene the interview with the applicant in order to afford the applicant an opportunity of addressing such material. The decision in *Moyosola* demonstrates genuine concern for the participation of the refugee in the decision making process, and operated in such a way as to place relatively significant obligations on the Refugee Applications Commissioner in the manifestly unfounded procedure in order to comply with constitutional fair procedures. The decision is therefore also significant to the extent that refugee rights are protected under constitutional norms.

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[42] [2005] IEHC 218 at pp.15-16.

[43] *Ibid* at p.16.

The most recent decision of the Irish courts concerning the manifestly unfounded procedure might similarly be characterised. In *SUN v Refugee Applications Commissioner* the applicant sought to challenge the designation of South Africa as a safe country of origin pursuant to section 12(4) of the Refugee Act 1996 and the consequent application of the manifestly unfounded procedure to his refugee appeal.[44] Regarding the scope of the appeal pursuant to the manifestly unfounded procedure, Cooke J noted:

> "Where, as in the present case, a claim for asylum has been rejected in a s.13 report upon the basis that the applicant has been found not to be telling the truth, the issue of personal credibility is clearly fundamental to the appeal and, accordingly, to the character of the appeal procedure as providing a remedy which is effective to rectify the basis upon which the claim has been rejected. Where, as here, the events and facts described by an applicant are of a kind that could have taken place (as opposed to matters which are demonstrated to be impossible or contradicted by independent evidence), but have been rejected purely because the applicant has been disbelieved when recounting them, it is, in the judgment of the Court, clear that the effectiveness of the appeal remedy as a matter of law is dependent upon the availability to the applicant of an opportunity of persuading the deciding authority on appeal that he or she is personally credible in the matter.
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> This is all the more obvious where the removal of the opportunity to avail of an oral re-hearing is the result of a factor which has no necessary or logical connection with the issue to be raised on appeal. Where personal credibility is the sole or primary ground for rejection of an application it is usually only in the s.13 report that the applicant realises that his credibility is in issue and

[44] [2012] IEHC 338. The safe country of origin procedure is discussed above.

> crucial to his claim. The adverse presumption combined with the removal of his opportunity to rectify the personal impression he makes on the decision-maker tips the balance of proof against him in a way which is unfair in the sense that it results from a consideration which has no necessary connection with his conduct, testimony or the inherent nature of his claim namely the fact of his nationality."[45]

Cooke J noted that the effect of a designation that a country is a safe country is that an applicant is presumed not to be a refugee unless reasonable grounds for the contention are shown to exist, pursuant to section 11A(1) of the Refugee Act 1996, and went on to refer to the relevant provisions of the Procedures Directive,[46] recital 21 of which provides:

> "The designation of a third country as a safe country of origin for the purposes of this Directive cannot establish an absolute guarantee of safety for nationals of that country. By its very nature, the assessment underlying the designation can only take into account the general civil, legal and political circumstances in that country and whether actors of persecution, torture or inhuman or degrading treatment or punishment are subject to sanction in practice when found liable in the country concerned. For this reason, it is important that, where an applicant shows

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[45] *Ibid* at paras.40-41.

[46] As Cooke J noted at para.12 "The Procedures Directive was not, as such, transposed into Irish law by statutory instrument under the European Communities Act 1973 in the way that the Qualifications Directive has been implemented by the European Communities (Eligibility for Protection) Regulations 2006. Until it became necessary to implement certain provisions (not relevant to the present case) by the European Communities (Asylum Procedures) Regulations 2011 and Refugee Act 1996 (Asylum Procedures) Regulations 2011, (S.I. Nos. 51 and 52 of 2011,) it appears to have been accepted that, with the availability of the interpretative provision of Annex 1, the requirements of the Procedures Directive were already met by the existing provisions of the Act of 1996."

> that there are serious reasons to consider the country not to be safe in his/her particular circumstances, the designation of the country as safe can no longer be considered relevant for him/her."

Cooke J concluded that in order to comply with the obligation to ensure that an applicant has access to an effective remedy by way of appeal under section 16 to the Tribunal, there was a duty on the Refugee Applications Commissioner not to make findings which would invoke the manifestly unfounded procedure "when the effect will be to deprive the applicant of an oral hearing in an appeal against a negative recommendation which is based exclusively or predominantly upon lack of personal credibility."[47] Significantly, Cooke J went on to find:

> "The denial of an oral hearing which is otherwise available to asylum seekers as part of a statutory appeal remedy in a case where assessment of personal credibility is the sole or central issue challenged in the s.13 report, by reason only of a factor (nationality,) which has no rational connection to role of a hearing in the appeal, renders the procedure, in the judgment of the Court, unfair to a degree which is incompatible with the guarantee in Article 40.3 of the Constitution....
>
> Although the asylum-seeker knows from the s.13 report the issues that must be addressed in the appeal, in the judgment of the court, there is a clear failure to afford an adequate opportunity of dealing with the issue of personal credibility when an oral hearing which is otherwise accepted as being an appropriate element of the statutory procedure is denied by reason only of the happenstance of the appellant's nationality. As already observed above, where the key issue in the appeal is the fact that an account of facts given personally at first instance has been

[47] At para.45.

> disbelieved, the primary if not the exclusive possibility of successfully reversing that result lies in the appellant's prospect of persuading a second decision-maker that he can and should be believed. To remove that possibility when it is not rationally necessary to do so having regard to the fact that the appellant already faces the procedural disadvantage of the s.11A(1)(a) presumption is to render the appeal procedure unfair in the sense of the constitutional guarantee."[48]

As with *Moyosola,* the decision in *SUN* places primacy on the right of the refugee to articulate his or her claim not only at first instance but also on appeal, relying on principles of both European and constitutional law to bolster this conclusion. The decision in *SUN* may also be located within a broader tradition of jurisprudence from the High Court which whittles away at the applicability of the manifestly unfounded procedure in the interests of ensuring respect for refugee rights.[49]

Refugee appeals in Irish law

As has previously been noted, the initial von Arnim procedure did not involve a formal right of appeal; such a right was introduced by the Hope Hanlan procedure,[50] and this right of appeal was carried over by the Refugee Act 1996, which created a new appellate body for this purpose: the Refugee Appeals Tribunal.[51] The establishment of the Refugee Appeals Tribunal was provided for by section 15 of the Refugee

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[48] Paras 47-48.

[49] However, it should also be acknowledged that there are numerous examples of decisions where the High Court has declined to interfere with the application of the manifestly unfounded procedure notwithstanding the applicant's complaints; see, eg, *Ojelabi v Refugee Appeals Tribunal* [2005] IEHC 42 and *MOOS v Refugee Applications Commissioner* [2008] IEHC 399.

[50] See generally Farrell "Law and Practice relating to the Interim Refugee Appeals Authority" (1997) 3(2) Bar Review 50.

[51] See generally Farrell and Gallagher "Refugee Law and Procedure" (2001) 6(7) Bar Review 431.

Act 1996,[52] subsection (2) of which expressly states: "The Tribunal shall be independent in the performance of its functions."

The procedure to be applied by the Refugee Appeals Tribunal in hearing refugee appeals is set out in broad terms in section 16 of the Refugee Act 1996.[53] The Tribunal has the power to request additional enquiries be made by the Refugee Applications Commissioner,[54] call witnesses and direct production of documents or other evidence,[55] and must ensure that the applicant and a representative of the Commissioner is present at the hearing and in a position to present their case to the Tribunal in person or through a legal representative.[56] Other than cases to which the manifestly unfounded procedure applies, there is a right to an oral hearing of an appeal before the Refugee Appeals Tribunal; significantly, however, such hearings are required to be held in private, pursuant to s.16(14) of the 1996 Act.[57]

The Second Schedule to the Refugee Act 1996 governs the staffing, functions and operation of the Refugee Appeals Tribunal[58]. Paragraph 1 of the Second Schedule provides that the Tribunal shall consist of a chairperson and "such ordinary members as the Minister [for Justice]... considers necessary for the expeditious dispatch of the business of the Tribunal", each of whom has at least five years' experience as a

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[52] As substituted by section 11(1)(j) of the Immigration Act 1999.

[53] As amended by section 11 of the Immigration Act 1999 and section 7 of the Immigration Act 2003.

[54] Section 16(6) of the Refugee Act 1996 as amended.

[55] Section 16(11)(a) of the Refugee Act 1996 as amended.

[56] Section 16(11)(c) of the Refugee Act 1996 as amended.

[57] Section 16(14) provides "An oral hearing under this section shall be held in private." The provision is thus stated in mandatory terms and admits of no exceptions or derogations other than the provision in subsection (15) which allows a representative of the UNHCR to attend any oral hearing "for the purpose of observing the proceedings."

[58] As substituted by section 11(1)(t) of the Immigration Act 1999.

practising barrister or solicitor.[59] Paragraph 2 of the Second Schedule states that members of the Tribunal "shall be appointed by the Minister"; each Tribunal Member holds the position on a part-time basis for a term of three years "on such terms and conditions as the Minister may ... determine."[60] While the chairperson holds office under a contract of service in writing, ordinary Tribunal Members are paid "such remuneration and allowances and expenses as the Minister ... may from time to time determine."[61] In practice, Tribunal Members are paid on a "case by case" basis. An ordinary member of the Tribunal "may be removed from office by the Minister for stated reasons"[62] and the Minister has the power to replace any Tribunal Member who dies, resigns, becomes disqualified or is removed from office.[63] Assignment of appeals is at the discretion of the chairperson of the Tribunal,[64] which is significant given that this determines the income of each individual Tribunal Member. Although the chairperson is given the power "to issue guidelines or guidance notes generally on the practical application and operation of the provisions ... of this Act and on developments in the law relating to refugees",[65] until very recently only one such guidance note has issued concerning the practice of Tribunal Members regarding adjournment of hearings.[66]

A number of the features of establishment and operation of the Refugee Appeals Tribunal are troubling from the perspective of the rule of law,

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[59] The schedule originally required a minimum of ten years experience as a practising barrister or solicitor, but this was reduced to five years by section 9(d)(i) of the Illegal Immigrants (Trafficking) Act 2000. The reasons for this reduction are unclear.

[60] Paragraph 4 of the Second Schedule to the Refugee Act 1996.

[61] Paragraph 5 of the Second Schedule to the Refugee Act 1996.

[62] Paragraph 7 of the Second Schedule to the Refugee Act 1996.

[63] Paragraph 8 of the Second Schedule to the Refugee Act 1996.

[64] Paragraph 13 of the Second Schedule to the Refugee Act 1996, as inserted by section 7(p)(ii) of the Refugee Act 1996.

[65] Paragraph 17 of the Second Schedule to the Refugee Act 1996.

[66] Refugee Appeals Tribunal *Postponements and Adjournments Guidelines* (2004). The more recent guidance notes are discussed below.

and in particular from the point of view of independence, transparency and consistency. These issues have generated significant litigation, both at the domestic level and also more recently at the European level, and it is proposed to address each aspect in turn.

Transparency in the refugee status determination procedure in Ireland

It is clear from the structure of the decision-making process, both at first instance and appeal, that there is a lack of transparency in the refugee status determination procedure in Ireland. While the 1996 Act contains no express provisions concerning privacy before the Refugee Applications Commissioner, in practice interviews conducted by the Commissioner pursuant to section 8 and 11 of the 1996 Act are held in private, although the UNHCR may attend such interviews on request.[67] Decisions of the Commissioner on a first instance application for refugee status are communicated to the applicant and the UNHCR, but are not published. [68] Although the Refugee Applications Commissioner publishes an annual report, this report largely sets out general information regarding the operation of the Commissioner during the year, and in particular, lacks any detailed information regarding the type of refugee claims received beyond merely noting the profiles of countries of origin.[69]

Section 16(14) of the Refugee Act 1996 expressly provides that all hearings heard by the Refugee Appeals Tribunal "shall be heard in private" with the only derogation from this requirement being the entitlement of the UNHCR to attend any hearings "for the purpose of observing the proceedings." [70] Decisions of the Refugee Appeals

[67] Section 11(3)(b) of the Refugee Act 1996 as substituted by section 7(e)(iii) of the Immigration Act 1999.

[68] Section 13 of the Refugee Act 1996.

[69] See, *eg*, Refugee Applications Commissioner *Annual Report 2012* (ORAC 2013) (this is the most recent annual report available as of May 2014).

[70] Section 16(14) of the Refugee Act 1996.

Tribunal are also communicated to the applicant and the UNHCR, and until relatively recently were not published, notwithstanding the provisions of section 19(4A) of the Refugee Act 1996 as follows:

> "(a) The chairperson of the Tribunal may, at his or her discretion, decide not to publish (other than to the persons referred to in section 16(17)) a decision of the Tribunal which in his or her opinion is not of legal importance.
>
> (b) Any decision published shall exclude any matters which would tend to identify a person as an applicant under the Act or otherwise breach the requirement that the identity of applicants be kept confidential."[71]

The failure of the chairperson of the Refugee Appeals Tribunal to publish decisions notwithstanding the provisions of section 19(4A) of was the subject of litigation in *Atanasov v Refugee Appeals Tribunal*.[72] Each of the applicants for judicial review sought, in advance of the holding of their refugee appeals before the Refugee Appeals Tribunal, access to previous relevant decisions of the Tribunal. It was submitted by the applicants that the presenting officers who act as advocates on the appeals on behalf of the Refugee Applications Commissioner were granted access to the Tribunal's "master file" in respect of applicants and could therefore in practice share decisions with each other. It was submitted on behalf of the applicants that, in those circumstances, failure to afford the applicants access to those decisions was a breach of the applicants' rights to fair procedures and/or natural justice. The Tribunal declined to make available the decisions as requested.

In the High Court, MacMenamin J granted the applicants a declaration that the refusal of the Tribunal to make available relevant Tribunal decisions as requested or identified and as sought by the applicants was

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[71] As inserted by section 7(k)(ii) of the Immigration Act 2003.

[72] [2007] 1 ILRM 288.

in breach of the applicants' rights to fair procedures and natural and constitutional justice pursuant to the provisions of Article 40.3 of the Constitution. The respondents appealed this decision to the Supreme Court. Geoghegan J delivered the decision of the court on the appeal and, after reviewing the factual background of each case, considered the procedures which apply in the conduct of refugee appeals in this jurisdiction:

> "It is of the nature of refugee cases that the problem for the appellant back in his or her country of origin which is leading him or her to seek refugee status is of a kind generic to that country or the conditions in that country. Thus, as in these appeals, it may be a problem of gross or official discrimination against homosexuals or it may be a problem of enforced female circumcision or it may be a problem of some concrete form of discrimination against a particular tribe. Where there are such problems it is blindingly obvious, in my view, that fair procedures require some reasonable mechanisms for achieving consistency in both the interpretation and the application of the law in cases like this of a similar category. Yet, if relevant previous decisions are not available to an appellant, he or she has no way of knowing whether there is such consistency."[73]

Having determined that the Tribunal was obliged to make available relevant previous decisions in certain cases, Geoghegan J went on to consider the role which such disclosed decisions would play in the conduct of the appeal, saying that "[i]t is not that a member of a tribunal is actually bound by a previous decision but consistency of decisions based on the same objective facts may, in appropriate circumstances, be a significant element in ensuring that a decision is objectively fair rather than arbitrary."[74] Geoghegan J cited with approval the decision of Lord

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[73] At p.298.

[74] *Ibid.*

Woolf MR in *Manzeke v Secretary of State for the Home Department*[75] on the usefulness of previous relevant decisions when he said the following:

> "It will be beneficial to the general administration of asylum appeals for special adjudicators to have the benefit of the views of a tribunal in other cases of a general situation in a particular part of the world, as long as that situation has not changed in the meantime. Consistency in the treatment of asylum seekers is important in so far as objective considerations, not directly affected by the circumstances of the individual asylum seeker, are involved."

Geoghegan J reiterated that "[p]revious decisions of the Tribunal may be ones which if applied in the appellant's case would benefit the appellant but if there is no access he has no knowledge of them and indeed he has no guarantee that the member of the tribunal has any personal knowledge of the previous decisions made by different colleagues." He concluded that "such a secret system is manifestly unfair."[76]

Turning to the proper construction of section 19(4A) of the 1996 Act, Geoghegan J held that the section authorised the chairperson not to publish decisions which, in his or her opinion, were not of legal importance. In this respect, Geoghegan J cautioned that the term "legal importance" must not be given too narrow a definition, holding that it "does not have to be some narrow point of law in the technical sense." As against this, the learned judge accepted that there may be many cases that are based on particular facts that do not put the applicant into some particular category and would be of no legal relevance to any other applicant's case; it was held that the chairperson is entitled not to publish that type of decision. It is significant that the jurisprudential basis for the

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[75] [1997] Imm. AR 524.

[76] At p.299.

obligation to provide access to previous relevant decisions was identified by Geoghegan J as the constitutional entitlement to fair procedures, and not simply the applicable statutory provisions.

Having thus determined the appeal in favour of the applicants, the Supreme Court clarified the impact of its decision in relation to the entitlement of access to previous decisions:

> "It would be wrong for this court, certainly in these proceedings, to hold that there was any statutory or constitutional obligation to provide some open library containing redacted previous decisions. That may well be the system adopted for the purposes of affording access if the chairman of the tribunal considers it appropriate. But I do not think that it would be the function of this court or of any other court to direct the establishment of systems of that kind. What this court is concerned with is the personal rights of the particular applicants before it. Provided each of those applicants is given reasonable access in whatever form the tribunal considers fit to previous decisions which are being reasonably required for legal relevance within the meaning which I have indicated, that aspect of the duty to provide fair procedures is complied with."[77]

The Supreme Court made clear in *Atanasov* that its decision related only to the Refugee Appeals Tribunal, and also emphasised that it was a matter for the Tribunal to give effect to the decision. The manner in which the Tribunal chose to implement the decision in *Atanasov* offered little comfort to advocates of transparency; access to previous decisions was limited to legal representatives who could review previous decisions only in the course of preparing submissions for a live appeal, and who

[77] At p.302.

were specifically restricted from making any use of such decisions outside of the context of that appeal.[78]

The implementation of the principle in *Atanasov* has also given rise to concerns regarding the practice of some members of the Refugee Appeals Tribunal insofar as the rule of law is concerned. In *L v Refugee Appeals Tribunal*[79] the applicant sought judicial review of the Refugee Appeals Tribunal's decision refusing his refugee appeal on a number of grounds, including failure to have proper regard to the previous decisions of the Tribunal which had been submitted in support of his appeal. Clark J noted that the decision of the Tribunal in relation to these decisions:

> "has appeared verbatim in other decisions of the RAT and is suggestive of a blanket rejection of previous RAT decisions without further consideration or evaluation. This element of the decision, together with the rejection of the contents of the medical report without reference to reasons, is suggestive of a want of fair process."[80]

Accordingly, Clark J granted leave to seek judicial review of the Tribunal's decision, inter alia on the basis that the Tribunal Member "erred in failing to give individual consideration to each of the six previous Tribunal decisions submitted by the applicant, and for failing to give reasons for why the decisions were not deemed relevant, and by adopting what appears to be a fixed and rigid policy in the consideration of previous Tribunal decisions by the use of a formulaic paragraph."[81]

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[78] However, see further below for the recently published guidance note which radically alters the Tribunal's stance on this issue.

[79] [2009] IEHC 26.

[80] *Ibid* at para.57. A similar complaint was raised by the applicant in *FEI v Refugee Appeals Tribunal* [2009] IEHC 94.

[81] At para.58.

There have been continued calls for reform of the refugee decision-making process at all levels to increase transparency and allow for greater public scrutiny of refugee decisions. For example, the Irish Refugee Council has highlighted that:

> "The consequences of an error in the asylum adjudication process may threaten the liberty, security and even the life of an asylum applicant. It is to be hoped that this Report will lead to urgent and much needed reforms within the asylum process. A first step, and one that will be critical to sustaining reform, will be greater transparency and public scrutiny of the asylum process at all levels. Such transparency and scrutiny has been lacking to date, and it is a gap that raises serious questions of accountability in the asylum process. It is also a gap that undermines the quality of decision-making and may significantly increase the potential for error."[82]

These cases demonstrate significant concerns in respect of transparency and the functioning of the Refugee Appeals Tribunal, which may also impact on the quality and consistency of the decisions made in that context with negative implications for the rule of law. This is particularly so when the refugee process in Ireland does not appear to include any formal measures aimed at ensuring consistency, in contrast to the procedures in other jurisdictions. For example, O'Sullivan notes that in the United Kingdom, detailed "asylum policy instructions" and "asylum policy guidance" as well as a "country specific asylum policy team" and a country of origin information service which provides case workers with guidance and reports on country of origin information represent "a welcome initiative in terms of the rule of law, as it has introduced some transparency into the process of asylum decision making in the UK."[83]

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[82] See, eg, Irish Refugee Council *Difficult to Believe: The Assessment of Asylum Claims in Ireland* (2012) at p.(ii).

[83] As Burnton J stated in *R (Salih) v SSHD* [2003] EWHC 2273 at para.45, it is "a fundamental requirement of the rule of law that the law should be made known." See

However, a recent significant change in practice at the Refugee Appeals Tribunal gives rise to cautious grounds for optimism. Following on from the appointment of a new chairperson in August 2013, three new guidance notes have been published by the Tribunal. The first concerned the UNHCR Eligibility Guidelines on Afghanistan, [84] in which the chairperson directed that all Tribunal members take account of when considering Afghan appeals. [85] As this guidance note has been operational for only nine months, and the Refugee Appeals Tribunal did not hear appeals for several months during this period,[86] it is too soon to assess the impact of the guidance but it is to be hoped that it will assist in bringing a necessary measure of both transparency and consistency to decisions of the Tribunal in respect of refugees from Afghanistan, and that this approach will be replicated in respect of other country guidances. The second guidance note published by the chairperson concerns assignment of appeals, a critical issue which will be addressed below in the discussion on independence and the refugee status determination procedure.[87]

The most recent guidance note published by the chairperson of the Tribunal is undoubtedly the most significant insofar as transparency and

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O'Sullivan "The Intersection Between the International, the Regional and the Domestic: Seeking Asylum in the UK" in Kneebone (ed) *op cit.*

[84] UNHCR *Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan* (August 6, 2013).

[85] Refugee Appeals Tribunal *Guidance Note No.2013/1: UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Afghanistan* (August 29, 2013).

[86] During 2013 the membership of the Refugee Appeals Tribunal underwent significant change; a number of long-standing members of the Tribunal whose contracts expired were not renewed and simultaneously the Tribunal undertook a public appointments process for new Tribunal Members. Six new Tribunal Members were appointed in November 2013, and a further four members were appointed in March 2014. Of the total of eleven Tribunal Members (including the chairperson), seven represented new appointments while four members had previously served as Tribunal Members.

[87] Refugee Appeals Tribunal *Guidance Note No.2013/2: Assigning Appeals to Members of the Tribunal* (October 9. 2013).

the rule of law is concerned. In March 2014 the chairperson announced that as and from that date, "any person may access the database [of previous decisions of the Tribunal] for any lawful purpose."[88] This radical change in policy will, for the first time, allow for full and open scrutiny of the decisions of the Tribunal, albeit that decisions on the database will be redacted in order to protect the privacy of applicants and that the chairperson has reserved the right to refuse to publish decisions where it is not possible to sufficiently protect the identity of the applicant by redaction.[89]

The above discussion of the historical controversy surrounding the lack of transparency at the Refugee Appeals Tribunal underlines the importance of this new policy. However, while this apparent commitment to openness by the chairperson is to be applauded and acknowledged for its adherence to rule of law principles, it is submitted that such an approach should be underpinned by rigorous legislative guarantees in order to copperfasten this approach on a permanent basis. It remains to be seen whether such guarantees will be contained in the forthcoming Immigration, Residence and Protection Bill.

Independence and the refugee status determination procedure in Ireland

The cumulative effect of the potential for political patronage in the appointment of Tribunal members, the limited nature and duration of the role and the provisions concerning assignment, and remuneration in respect of appeals, has long been a cause of concern.[90] These concerns

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[88] Refugee Appeals Tribunal *Guidance Note No.2014/1: Access to Previous Decisions of the Tribunal* (March 11, 2014).

[89] *Ibid* at para.4.

[90] See, *eg*, McGuinness "Replace Refugee Tribunal" The Irish Times, February 21, 2011; Conlan "Asylum Appeals Process in Need of Reform" The Irish Times, February 4, 2013; Irish Refugee Council *Difficult to Believe: The Assessment of Asylum Claims in Ireland* (2012); Waters "Déjà Vu All Over Again: The Proposed Protection Review Tribunal" (2013) 31 Irish Law Times 57.

have led to litigation in a number of different contexts, which themselves demonstrate a level of dysfunction at times within the Refugee Appeals Tribunal which gives rise to substantial concerns from the perspective of the rule of law and the protection of refugee rights.

One of the earliest such proceedings arose in the cases of *Edobar & Messaoudi v Refugee Appeals Tribunal.*[91] The chairperson of the Tribunal assigned the appeals of both applicants to a particular Tribunal Member to hear their appeals pursuant to s.16 of the Refugee Act 1996 as amended. The Tribunal Member conducted oral hearings in March and May 2003, but by March 2004 he had not determined either case; the Supreme Court noted that "it was clear that these were not isolated cases",[92] and that the Tribunal Member had also heard a considerable number of other refugee appeals, without pronouncing decisions on them. This delay led to concern on the part of the Refugee Legal Service and, in turn, the chairperson of the Refugee Appeals Tribunal. In March 2004, the chairperson decided to reassign a number of cases to other tribunal members for re-hearing, including the appeals of the applicants. The applicants instituted proceedings by way of judicial review seeking to challenge the purported reassignment, contending that once an appeal had been assigned to a particular Tribunal Member, there was a duty on that member to determine those appeals, and that the chairperson of the Tribunal had no power to reassign an appeal once already assigned. The High Court held that where an appeal was assigned to a member of the Tribunal in which an application for an oral hearing had been made, and that member conducted an oral hearing, then the Tribunal Member had commenced or entered upon a consideration of the appeal and was obliged to determine the appeal.

The Supreme Court upheld the determination of the High Court in respect of the obligation on the Tribunal Member to make a decision in

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[91] [2005] 2 ILRM 113.

[92] *Ibid* at p.115 (per Fennelly J).

respect of each of the applicants, and the finding that there was a breach of duty by reason of delay up to the date of reassignment of the appeals. However, Fennelly J noted that the crucial issue thereafter related to the entitlement of the chairperson of the Tribunal to reassign appeals after an oral hearing has been heard. Reference was made to the power conferred on the chairperson of the Tribunal pursuant to paragraph 13 of the Second Schedule to the Refugee Act 1996 to "assign to each member the business to be transacted", a power which Fennelly J accepted "must be exercised in accordance with the principles of constitutional justice and fair procedures."[93] However, Fennelly J was ultimately satisfied that, notwithstanding the absence of any express authorisation for reassignment of uncompleted appeals, such a power could be implied as a necessary corollary of the Tribunal's obligation to ensure the "expeditious dispatch of [its] business."[94] Thus, the Supreme Court held that the chairperson of the Refugee Appeals Tribunal had a general power to assign and to reassign cases already assigned, and that where circumstances warrant that step, he may remove an appeal from one member and assign it to another. In doing so, the Supreme Court accepted that the chairperson is bound to act fairly and respect the principles of natural and constitutional justice, and held that any capricious or unfair use of this power would be subject to judicial review.[95]

The dissenting judgment of Kearns J is of interest, given the emphasis placed on the rights of refugees in the decision-making process. Citing the maxim "justice delayed is justice denied", Kearns J noted that:

> "in refugee applications where human rights are so essentially at stake, the requirement for speedy adjudication is both self-evident and indeed apparent from the relevant legislation. For

[93] *Ibid* at p.118.

[94] At p.121.

[95] At pp.121-122.

example, judicial review applications challenging a decision of the Refugee Appeal Tribunal under s.16 of the Refugee Act, 1996 must be brought within 14 days of the Tribunal's determination. Whether or not it is specifically provided for by statute (and it is in this case), there is therefore a clear onus on a member/division of a tribunal who is dealing with business of this nature to do so expeditiously and promptly. This the second named respondent has singularly failed to do, and his failure to provide any explanation for his inactivity only adds insult to injury."[96]

Kearns J described the suggestion that a Tribunal Member owed a duty only to the Tribunal and not to an applicant as an "unstateable proposition", in light of the fact that the person whose interests and rights are most at stake in the process is the applicant, and held that where such an interest exists there must be a corresponding duty on the deciding officer to adjudicate:

> "Where a division of the Tribunal has business assigned to it, it is a startling proposition and one that requires some considerable justification to suggest that, without good and sufficient reason, the case sent for determination and actually heard by the member/division can be removed from that member/division. To begin with, it is an affront to the notion that the Tribunal, when acting through one of its divisions, is independent in the performance of its functions."[97]

Whilst it was accepted that no contention had been advanced on behalf of the Tribunal Member in this case that his independence had been interfered with by the purported reassignment, Kearns J nevertheless stated that the court must look beyond the facts of the present case to

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[96] At pp.125-126.

[97] At p.128.

other cases where that consideration might well arise, and noted that "where a member/division of the Tribunal actively resists the withdrawal and reassignment of a case which has been assigned to and perhaps heard by him, one can readily imagine that considerations of independence can and will then be under intense focus."[98] Having regard to the requirement for independence of the tribunal and thus, by extension, any member/division performing the role of the tribunal, Kearns J was concerned that to permit reassignment of the appeals in the present case "would reduce the autonomy and independence of the member/division charged with decision-making in any particular case". The contrast between the majority judgment of Fennelly J and Kearns J is stark, with the dissenting judgment in particular expressing strong concerns for the independence and autonomy of Tribunal Members. However, it is notable that even the majority judgment placed limits on the power of reassignment, clearly warning that any arbitrary or capricious exercises of such power would be subject to judicial review.

From the perspective of the rule of law, probably the greatest cause for concern arises from historical allegations of bias against the Refugee Appeals Tribunal.[99] In both *Popovici v Refugee Appeals Tribunal*[100] and *Nyembo v Refugee Appeals Tribunal*[101] the High Court was faced with applications for discovery of the decision-making record of a particular Tribunal Member, on the basis of sworn evidence by a number of highly experienced solicitors who advised their clients that their appeals had no prospects of success before this Tribunal Member based on his previous

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[98] At p.129.

[99] See generally Mullally "Speaking Across Borders: The Limits and Potential of Transnational Dialogue in Refugee Law in Ireland" in Lambert and Goodwin-Gill (eds) *The Limits of Transnational Dialogue: Refugee Law, Policy Harmonisation and Judicial Dialogue in the European Union* (Cambridge University Press 2010) at pp.156-157.

[100] Unreported, High Court, April 26, 2006.

[101] Unreported, High Court, October 6, 2006; unreported, Supreme Court, June 19, 2007.

record.[102] Allied to the allegations of bias were concerns regarding the manner in which refugee appeals were assigned, to the effect that Tribunal Members with higher refusal rates were "rewarded" with greater numbers of appeals (and thus, higher levels of remuneration).[103] In *Popovici,* De Valera J ordered the Refugee Appeals Tribunal to make discovery of any statistical data held by the Tribunal concerning decision-making record of Tribunal Members, as well as documents relating to the assignment of appeals to Tribunal Members both generally and specifically in relation to the Tribunal Member against whom the bias allegations were made. It should be noted that the allegations of bias were "strenuously denied" by the Refugee Appeals Tribunal, and without admitting that the Tribunal Member concerned had a one hundred percent record of refusals, it was argued in *Nyembo* that even if this were the case, this could not, of itself and without further evidence, constitute a basis for a finding of bias.

In the High Court, Feeney J directed a trial of a preliminary issue on this point, on the basis of the agreed fact that the Tribunal Member concerned "has not during the period from the 1st day of January 2002 to the 30th day of June 2004 set aside any recommendation of the Refugee Applications Commissioner and during that period he heard hundreds of Appeals."[104] On appeal to the Supreme Court, it was held that the trial of a preliminary issue as directed by Feeney J was not appropriate in circumstances where there was "a stark conflict of facts" between the parties on a wide range of issues.[105] The Supreme Court thus remitted

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[102] The judgment of Butler J in *Nyembo* notes that the applicant was advised by his solicitor that he "had never known a positive decision from that particular member. There is uncontested evidence from a number of solicitors that they feel obliged to advise appellants that there is no prospect of success before this particular member."

[103] See, eg, Coulter "Previous Cases Challenged Secrecy and Perceived Unfairness of Tribunal" The Irish Times, April 11, 2012 and Conlan "Political Will Needed for Serious Asylum Reform" The Irish Times, June 1, 2012.

[104] Unreported, High Court, October 6, 2006.

[105] In this regard, Denham J referred to the applicants' argument that the conceded facts by the respondents fell short of the case mounted by the applicant, in that "(i) … their

the proceedings to the High Court for a hearing in which all matters of fact, as well as law, would be canvassed. Shortly after this decision, it was widely reported that the proceedings had settled and that the Tribunal Member who was the subject of the proceedings had resigned.[106] It is even more extraordinary to note reports from this time that at least three other members of the Tribunal (including a former DPP and a former government minister) were preparing to file evidence in the proceedings *in support of the applicant.* It should also be noted that the allegations of bias were not isolated to a single Tribunal Member; since the *Nyembo* case, at least two other Tribunal Members' decision-making records have been called into question.[107] In an editorial on the proceedings, the *Irish Times* scornfully concluded that the "fact that the case was settled rather than going to a full hearing suggests that, once again, the tribunal chose secrecy over transparency in its dealings with asylum seekers."[108]

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concession failed to take account of the applicant's evidence and belief that the second named respondent's decision-making is at great variance to the Tribunal generally; that the second named respondent has determined in the region of 900 to 1,000 cases in the years 2002, 2003 and 2004; and, that solicitors who are experienced in the area of refugee law felt it necessary to warn clients about the second named respondent, and one solicitor felt compelled to advise clients that they had no prospect of success in front of the second named respondent; and that the applicants were informed of these matters by their solicitors; (ii) the conduct of the respondents in the proceedings has added to the applicant's belief of bias on the part of the second named respondent, such that it was necessary to obtain discovery in respect of various averments made on affidavit on behalf of the respondents": at para.6.

[106] See, *eg*, Coulter "Call for review of up to 1000 rejected asylum applications" The Irish Times, March 10, 2008.

[107] See, *eg*, Coulter "Call for review of up to 1000 rejected asylum applications" The Irish Times, March 10, 2008 and Coulter "Child Asylum Seeker Takes Bias Case" The Irish Times, April 11, 2012.

[108] Irish Times editorial "Refugee Appeals Body", March 10, 2008, which stated: "The Refugee Appeals Tribunal is at the centre of controversy again. It has emerged that three of its most senior members were preparing to challenge in court a statement made by its chairman to the Supreme Court. This arose in the context of a court case alleging bias against one tribunal member, James Nicholson, who resigned late last year when the action against him was settled before it could go to a full hearing. In the Supreme

Notwithstanding the fundamental questions raised by this episode in respect of the Refugee Appeals Tribunal's compliance with basic tenets of the rule of law, no public response has ever been made by the Tribunal.[109] Furthermore, in response to political calls for reform of the system, including suggestions that the provisions of the Immigration, Residence and Protection Bill then being debated before the Dáil be amended in order to prevent any recurrence of such issues, the Minister for Justice of the time merely asserted that it was "in nobody's interests, least of all, those who come to this country seeking the sanctuary of the Irish State, that the work of this important and independent body should be so traduced."[110]

The fact that the revelations raised the most serious questions about the independence of the Tribunal in its operations was not acknowledged. The potential implications of the connection between the decision-making records and remuneration of members of the Refugee Appeals Tribunal, when considered alongside available statistics on recognition

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Court judgment requiring the production of statistics, Mrs Justice Susan Denham found that a statement of the chairman of the tribunal, John Ryan, was unsupported by any evidence. The full hearing, had it gone ahead, would have entailed an examination of the record of Mr Nicholson in deciding close to 1,000 appeals, almost all of which he is reported to have rejected. It would have entailed also looking at statistics on the decisions of other tribunal members and examining the basis on which cases are allocated to members by the chairman, Mr Ryan. And, as we now know, Mr Ryan's claim that Mr Nicholson's record was not at variance with that of other members of the tribunal would have been vigorously contested in court by other members of the tribunal, including former director of public prosecutions Eamonn Barnes and former government minister Michael O'Kennedy. The fact that the case was settled rather than going to a full hearing suggests that, once again, the tribunal chose secrecy over transparency in its dealings with asylum seekers and in its accountability to the Irish taxpayer."

[109] See Coulter "Members of refugee appeal body considered taking legal action" The Irish Times, March 4, 2008 noting that in response to correspondence to the Tribunal seeking a statement, the Tribunal merely stated that the chairman "does not propose to make any further comment."

[110] Dáil Debates, 11 March 2008.

rates of refugees in this State, further compounds these concerns. The number of asylum seekers recognised at first instance by the Refugee Applications Commissioner fell from approximately 10% in 2007 to 1.1% in 2010, the lowest first instance recognition rate in the EU.[111] The overall recognition rate in Ireland in 2011 (combining decisions of both the Refugee Applications Commissioner and Refugee Appeals Tribunal) was 5%, in contrast with the EU average of approximately 25%.[112] Indeed, the following table from the most recent annual report of the Tribunal speaks volumes:

Year	Total	Affirmed	% Affirmed
2001	1942	1461	75
2002	4698	3601	77
2003	4486	3658	82
2004	4235	3587	85
2005	2452	2021	82
2006	1594	1354	85
2007	1406	1212	86
2008	1919	1656	86
2009	2672	2422	91
2010	2045	1922	94
2011	872	809	93
2012	446	401	90

Table 6.11.1

Analysis of substantive/15 day decisions:

Recommendations of Commissioner Affirmed[113]

[111] See Smyth "Refugee recognition rate draws concern" The Irish Times, May 25, 2011.

[112] Irish Refugee Council *Difficult to Believe: The Assessment of Asylum Claims in Ireland* (2012) at p.1.

[113] Refugee Appeals Tribunal *Annual Report 2012* (2013) at p.29.

As this table demonstrates, at its most generous, the Tribunal allowed twenty five per cent of appeals while at its least generous in 2010, only six per cent of appeals succeeded. When one places the very low success rate of appeals against the context of an increasingly low recognition rate at first instance by the Refugee Applications Commissioner, the implications for the recognition of the rights of refugees in this jurisdiction are worrying indeed. It might be arguable that in the light of concerns in relation to the very low recognition rate in Ireland, asylum seekers ought not to be returned to this jurisdiction pursuant to the Dublin II Regulation.[114]

The Department of Justice has strongly defended Ireland's refugee status determination framework, and it has been suggested that the reason for the lower rate of recognition in this jurisdiction, when compared to other EU member states, is the different profile of asylum seekers applying for refugee status in Ireland.[115] However, such explanations are called into question by the fact that the most recent data on recognition rates in

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[114] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. It is worth recalling that early concerns about Dublin II returns to Greece included the extremely low recognition rate there, although ultimately in *MSS v Belgium and Greece* (2011) 53 EHRR 2 the ECtHR prohibited returns based on access to the procedure and did not engage with this wider issue. See further Egan and Brazil "The Influence of the ECHR on Irish Asylum Law" in Kilkelly (ed) *ECHR and Irish Law* (Jordans 2008).

[115] Smyth "Refugee recognition rate draws concern" The Irish Times, May 25, 2011 quotes Kevin O'Sullivan, principal officer dealing with immigration at the Department of Justice, who said Ireland's asylum process "is and always has been a fair one", and that "the low recognition rates for refugee status were due to the different profile of asylum seeker attracted to the country when compared to other EU states. He said Ireland was a small, peripheral country, difficult to get to for those fleeing persecution. He said there had been a drop in asylum claims from 'high grant' countries such as Iraq and Afghanistan. He said a large number of the asylum seekers in Ireland (20 per cent) were Nigerians, who were typically not granted asylum in other EU countries."

Ireland show a sharp increase in the number of positive decisions at first instance.[116]

In the light of these concerns raised in the domestic sphere regarding the independence of the Refugee Appeals Tribunal, it is instructive to consider the views of the Court of Justice of the European Union in *HID v Refugee Applications Commissioner*,[117] where the applicants contended that the Refugee Appeals Tribunal did not meet the minimum standards required by EU law. Reference was made in this regard to the fact that the requirements of a "court or tribunal" within the meaning of Article 267 TFEU include that the body must be permanent, established by law, apply rules of law and must be independent. The applicant also relied on Article 8(2) of the Procedures Directive, which requires member states to ensure refugee applications are taken "individually, objectively and impartially, together with the right to an effective remedy provided by Article 39 of the Directive." It was argued by the applicant that the Refugee Appeals Tribunal was not independent as required by Article 39 because "organisational links exist between it, the Refugee Applications Commissioner and the Minister for Justice, and its members are subject to outside pressure."[118] The applicants pointed in particular to the rules regarding "the appointment, length of service and cancellation of the appointments of its members", and the lack of specified grounds for removal of Tribunal Members, which were said to deprive the Tribunal of independence.

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[116] On April 28, 2014 UNHCR Ireland published information on "Irish Asylum Trends in 2013", which noted that of 710 decisions made by the Refugee Applications Commissioner in 2013, 128 resulted in positive recommendations, giving a recognition rate of 18%, a marked increase from the 1.1% recognition rate just three years earlier: see UNHCR "Irish Asylum Trends in 2013" April 28, 2014. It is noteworthy in this regard that the profile of applicants by country of origin appears largely unchanged from previous years.

[117] *Case C-175/11 HID v Refugee Applications Commissioner* unreported, Court of Justice of the European Union, January 31, 2013.

[118] *Ibid* at para.94.

The Court of Justice acknowledged that its previous case law established that "the concept of independence, which is inherent in the task of adjudication, implies above all that the body in question acts as a third party in relation to the authority which adopted the contested decision",[119] and generally required that "the body is protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before them."[120] It was further noted that:

> "The Court has also stated that such guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it. In that regard, in order to consider the condition regarding the independence of the body making the reference as met, the case-law requires, inter alia, that dismissals of members of that body should be determined by express legislative provisions."[121]

Based on these criteria, and in particular the failure of the Refugee Act 1996 to specify the grounds on which Tribunal Members may be removed from office, it might have been expected that the Court of Justice would find the Refugee Appeals Tribunal did not meet all of the essential elements of an independent tribunal. The conclusions the court in fact reached are not only illogical, but also unsatisfactory:

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[119] *Case C-516/99 Schmid* [2002] ECR I-4573, paragraph 36, and *RTL Belgium* [2010] ECR I-14093 at paragraph 38.

[120] Citing *Case C-506/04 Wilson* [2006] ECR I-8613 and *RTL Belgium* [2010] ECR I-14093, paragraph 39.

[121] At para.97.

"as the second sentence of recital 27 in the preamble to Directive 2005/85 states, the effectiveness of the remedy, with regard to the examination of the relevant facts, depends on the administrative and judicial system of each Member State considered as a whole. *It is therefore necessary to assess as a whole the Irish system of granting and withdrawing refugee status* in order to determine whether it is capable of guaranteeing the right to an effective remedy as provided for under Article 39 of that directive.

In the present case, under section 5 of the Illegal Immigrants (Trafficking) Act 2000, applicants for asylum may also question the validity of recommendations of the Refugee Applications Commissioner and decisions of the Refugee Appeals Tribunal before the High Court, the decisions of which may be appealed to the Supreme Court. The existence of these means of obtaining redress appear, in themselves, to be capable of protecting the Refugee Appeals Tribunal against potential temptations to give in to external intervention or pressure liable to jeopardise the independence of its members.

In those circumstances, it must be concluded that the criterion of independence is satisfied by the Irish system for granting and withdrawing refugee status and that that system must therefore be regarded as respecting the right to an effective remedy."[122]

In this passage, the Court of Justice redefined the question it was asked, from "Is the Refugee Appeals Tribunal independent?" to "Does Irish refugee law in general provide an effective remedy?". The court was able to answer the latter question in the affirmative, only by pointing to the role of the High Court on judicial review (notwithstanding the limitations imposed by section 5 of the Illegal Immigrants Act 2000 in

[122] Paras.101-104, emphasis added.

that regard).[123] It is submitted that the Court of Justice was disingenuous in reformulating the question in such a fashion, and by allowing the role of the High Court on judicial review to excuse what were prima facie genuine concerns raised by the applicant regarding the independence of the Refugee Appeals Tribunal. The decision of the Court of Justice in *HID* owes much to a narrow conception of the judicial role, and evinces little concern for the rights of refugees whose claims will be determined by a tribunal with such a controversial history.

It is important to note that it is difficult to draw definitive conclusions from these controversies concerning the alleged lack of independence of the Refugee Appeals Tribunal and its possible impact on the decisions of that body. However, it can be said that the stark disparity in recognition rates in this jurisdiction, when compared with the European average, give grounds for inquiry. It is at this juncture that the critical interplay between independence and transparency become clear; in the absence of transparency, it was not possible to fully investigate such allegations. The net result is a profound unease that the rule of law may not have been fully respected, and a sense that there are many important questions regarding past practices which remain unanswered. However, as noted above there are cautious grounds for optimism in this regard, in the light of the recent publication by the chairperson of the Tribunal concerning assignment of appeals.[124] This guidance note for the first time sets out the basis on which appeals are assigned to individual Tribunal Members for determination, and while they are generally expressed in broad terms,

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[123] The statutory scheme of judicial review prescribed by section 5 of the 2000 Act imposes a higher threshold for the grant of leave than in conventional judicial review ("substantial grounds" as opposed to "arguable grounds") as well as imposing much stricter time limits for the institution of judicial review, requiring such proceedings to be issued within fourteen days from the date of receipt of the decision. See generally Delany "Judicial Review in Cases of Asylum Seekers" (2002) 24 Dublin University Law Journal 1. See further discussion of the judicial review process above.

[124] Refugee Appeals Tribunal *Guidance Note No.2013/2: Assigning Appeals to Members of the Tribunal* (October 9, 2013).

among the criteria listed are "any matters relevant to the disposal of the business of the Tribunal efficiently and as expeditiously as may be consistent with fairness and natural justice."[125] Much depends on the construction and application of this guidance note by the chairperson of the Tribunal, and as the guidance has been operational for only a short period it is not yet possible to assess its impact. However, from the perspective of the rule of law, this new willingness towards openness and transparency has the potential to address longstanding concerns regarding the independence of Tribunal Members in the context of assignment of appeals.

Credibility and the refugee status determination procedure in Ireland

Credibility is an oft-cited issue in refugee decisions in this jurisdiction, generally relied upon by decision-makers as a basis for denying refugee status. The focus on credibility in the refugee context is not unique to this jurisdiction, and many commentators have lamented the increasing emphasis placed by decision-makers on this nebulous concept in order to deny refugee claims.[126] The emphasis on credibility in the refugee status determination procedure in this jurisdiction begins with section 11B of the Refugee Act 1996, which articulates thirteen separate grounds which may be taken into account by refugee decision-makers in reaching

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[125] *Ibid* at para.7.1.8.

[126] See generally Kälin "Troubled Communication: Cross-Cultural Misunderstandings in the Asylum Hearing" (1986) 20 International Migration Review 230, Cohen "Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers" (2001) 13 International Journal of Refugee Law 293, Kagan "Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determinations" (2003) 17 Georgetown Law Journal 367, Sweeney "Credibility, Proof and Refugee Law" (2009) 21(4) International Journal of Refugee Law 700, Cameron "Refugee Status Determinations and the Limits of Memory" (2010) 22(4) International Journal of Refugee Law 469, Herlihy, Gleeson and Taylor "What Assumptions About Human Behaviour Underlie Asylum Judgements?" (2010) 22(3) International Journal of Refugee Law 351-366.

adverse findings about an applicant, many of which have little or no nexus to determination of the core refugee claim.[127]

A substantial proportion of the decisions of the High Court on judicial review in the refugee context concern, either wholly or in part, challenges to the assessment of credibility. Within the large body of decisions in this context, two different approaches can be identified, encapsulating the "thin versus thick" dimension to the role of the judiciary in upholding the rule of law in this regard. Much of the discussion which follows concerns the Refugee Appeals Tribunal; although the Refugee Applications Commissioner also frequently deploys credibility findings as a basis for refusing refugee applications, decisions of the Commissioner have been all but immunised from review as a result of a series of decisions of the High Court in 2008 and 2009.[128] This in itself might be attributed to a more restrictive view of the role of

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[127] *Eg* whether the applicant possesses identity documents, and, if not, whether he or she has provided a reasonable explanation for the absence of such documents; whether the applicant has provided a reasonable explanation to substantiate his or her claim that the State is the first safe country in which he or she has arrived since departing from his or her country of origin or habitual residence; and whether the applicant has provided a full and true explanation of how he or she travelled to and arrived in the State.

[128] The first decision in this line of jurisprudence was that of Hedigan J in *BNN v MJELR* [2008] IEHC 308, which was subsequently endorsed and applied by Cooke J in *Diallo v Refugee Applications Commissioner* unreported, High Court, January 27, 2009, *Akintunde v Refugee Applications Commissioner* unreported, High Court, April 29, 2009 and *RLA v Refugee Applications Commissioner* unreported, High Court, April 30, 2009. These cases established that it is only in "rare and limited circumstances" or a "clear and compelling case" that the court should allow an applicant seek judicial review of a decision of the Refugee Applications Commissioner; it is unclear how such decisions can be reconciled with the decision of the Supreme Court in *Stefan v Minister for Justice, Equality and Law Reform* [2001] 4 IR 203 where the Supreme Court allowed an appeal against refusal of judicial review of a first instance refugee decision, Denham J commenting that "a fair appeal cannot cure an unfair hearing", and held "it is clear that whilst the presence of an alternative remedy, an appeal process, is a factor, the court retains jurisdiction to exercise its discretion to achieve a just solution."

the judiciary with a negative impact on the rights of refugees to a fair procedure at both first instance, and on appeal.

Turning to the jurisprudence on challenges to credibility findings by the Refugee Appeals Tribunal, the more restrictive judicial approach is exemplified by the decision in *Camara v Minister for Justice, Equality and Law Reform.*[129] The applicant was a Guinean national who sought asylum in the State on the basis of a well-founded fear of persecution by reason of his political opinion. His refugee application was refused at first instance, and on appeal; although the decision refusing his appeal acknowledged that the applicant had "quite appalling scars to his upper body which is consistent with the evidence he gave in relation to the alleged torture", the applicant's appeal was nonetheless rejected because other aspects of the applicant's account were deemed to be lacking in credibility. Refusing the applicant's application for judicial review of the decision, Kelly J held:

> "The issue of the applicant's credibility was undoubtedly a relevant matter to be considered by the Authority. There was material before him which could support and justify a decision that the applicant's claim was lacking in credibility. ...
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> In my view the question of the credibility of the applicant was a matter which was relevant for consideration by the Authority who was of course uniquely placed to make an adjudication upon it by virtue of the oral hearing which he conducted and where he had an opportunity to assess the demeanour of the applicant. In these circumstances I have come to the conclusion that the applicant has failed to discharge the onus of proof which rests upon him pursuant to the decisions of the Supreme Court in *State (Keegan) v Stardust Victim's Compensation Tribunal* and *O'Keeffe v An Bord Pleanála.* There was in my view material

[129] Unreported, High Court, July 26, 2000.

> before the Authority upon which he could come to the conclusion which he did, namely, that the applicant had not made out a sufficient case to warrant him being granted refugee status."[130]

This approach, characterised by judicial restraint and curial deference,[131] adopts a very high threshold for judicial intervention, informed by the traditional *Wednesbury* approach to reasonableness. Kneebone rightly notes that "the availability of judicial review is essential to protect refugees and asylum seekers from refoulement, particularly as there are widespread concerns over the quality of administrative decisions" and expresses concern at measures in the United States, United Kingdom, Canada and Australia "which have attempted to limit or restrict access to judicial review by refugees and asylum seekers."[132] It is notable in this regard that while Kneebone was concerned with government attempts to limit access to judicial review, the decision in *Camara* involved self-restraint by the judiciary through the application of a restrictive threshold of review.

However, a more recent line of jurisprudence approaches credibility findings not from the perspective of reasonableness, but rather from the perspective of procedural fairness. Thus, in *AMT v Refugee Appeals Tribunal* Finlay Geoghegan J held:

> "The assessment of the credibility of an applicant and his or her story is often crucial to the determination of his or her entitlement to a declaration of refugee status. … The assessment of the credibility of the applicant is a matter for the relevant decision maker who, in the scheme established by the Refugee Act 1996, is either an official of the Refugee Applications Commissioner or on appeal the tribunal member. This is often a

[130] At p.16.

[131] See also *Mohsen v Minister for Justice* unreported, High Court, Smyth J, March 12, 2002.

[132] Kneebone *op cit* at p.48.

> difficult task, particularly as the story normally relates to what is alleged to have happened in the country of origin. The assessment is required to be carried out in accordance with established legal principles and in accordance with the principles of constitutional justice … The assessment by the decision maker of the credibility of the applicant and his story forms part of the decision-making power conferred by the Refugee Act 1996. Hence, following *East Donegal Co-Operative Livestock Mart Ltd v Attorney General* [1970] IR 317, such assessment must also be carried out in accordance with the principles of constitutional justice."[133]

Subsequent cases sought to build on this approach, placing constraints on the nature and extent of adverse credibility findings which could legitimately be made in the refugee context. Thus, in *MI v Refugee Appeals Tribunal*[134] Clarke J sought to distil a number of core principles regarding the correct approach to the assessment of credibility in the refugee context:

> "(i) The assessment by the Refugee Appeals Tribunal of the credibility of an appellant and his/her story forms part of the decision making power conferred by the Refugee Act 1996 and therefore, in accordance with the principles set out in *East Donegal Co-operative Limited v Attorney-General* such assessment must also be carried out in accordance with the principles of constitutional justice: *AMT v Refugee Appeals Tribunal.*
>
> (ii) Where the assessment of the credibility of an appellant places reliance upon a significant error of fact in a manner adverse to

[133] [2004] 2 IR 607. See also *Carciu v Refugee Appeals Tribunal* unreported, High Court, Finlay Geoghegan J, July 4, 2003 and *Kramarenko v Refugee Appeals Tribunal* [2005] 4 IR 321.

[134] Unreported, High Court, Clarke J, May 27, 2005.

the applicant such error renders the decision invalid: *AMT v Refugee Appeals Tribunal.*

(iii) While the assessment of credibility is a difficult and unenviable task it is not permissible to place reliance "on what one firmly believes is a correct instinct or gut feeling that the truth is not being told". Such a process is an insufficient tool for use by an administrative body such as the Refugee Appeals Tribunal. Conclusions must be based on correct findings of fact. *DS v Refugee Appeals Tribunal.*

(iv) A specific adverse finding as to the appellant's credibility must be based upon reasons which bear a legitimate nexus to the adverse finding: *NK v Refugee Appeals Tribunal* placing reliance on the decision of the United States Court of Appeals for the Ninth Circuit in *Aguilera-Cota v INS.*

(v) A finding of lack of credibility must be based on a rational analysis which explains why, in the view of the deciding officer, the truth has not been told. *Z v Minister for Justice, Equality and Law Reform.*"[135]

Most recently, the decision of Cooke J in *IR v Refugee Appeals Tribunal*[136] might be characterised as an attempt to strike a balance between the two competing approaches. Having reviewed extensive case law cited on behalf of both applicant and respondent on the issue of credibility assessments,[137] Cooke J set out the following ten guiding

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[135] At pp.6-7 (references omitted).

[136] [2009] IEHC 353.

[137] *Memishi v Refugee Appeals Tribunal* unreported, High Court, Peart J, June 25, 2003, *Kramarenko v Refugee Appeals Tribunal* [2004] 2 ILRM 450, *Traore v Refugee Appeals Tribunal* unreported, High Court, Finlay Geoghegan J, May 14, 2004, *Da Silviera v Refugee Appeals Tribunal* unreported, High Court, Peart J, July 9, 2004, *Sango v Minister for Justice, Equality and Law Reform* [2005] IEHC 395, *Imafu v Minister for Justice, Equality and Law Reform* [2005] IEHC 182, *Imafu v Minister for Justice, Equality and Law Reform* [2005] IEHC 416, *Imoh v Refugee Appeals Tribunal* [2007] IEHC 220, *Banzuzi v Refugee Appeals Tribunal* [2007] IEHC 2, *Kikumbi v Minister for Justice, Equality and Law Reform* [2007] IEHC 11, *E v Refugee Appeals*

principles to be observed both by primary decision-makers in the refugee context and judges on judicial review:

> "1) The determination as to whether a claim to a well founded fear of persecution is credible falls to be made under the Refugee Act 1996 by the administrative decision-maker and not by the Court. The High Court on judicial review must not succumb to the temptation or fall into the trap of substituting its own view for that of the primary decision-makers.
> 2) On judicial review the function and jurisdiction of the High Court is confined to ensuring that the process by which the determination is made is legally sound and is not vitiated by any material error of law, infringement of any applicable statutory provision or of any principle of natural or constitutional justice.
> 3) There are two facets to the issue of credibility, one subjective and the other objective. An applicant must first show that he or she has a genuine fear of persecution for a Convention reason. The second element involves assessing whether that subjective fear is objectively justified or reasonable and thus well founded.
> 4) The assessment of credibility must be made by reference to the full picture that emerges from the available evidence and information taken as a whole, when rationally analysed and fairly weighed. It must not be based on a perceived, correct instinct or gut feeling as to whether the truth is or is not being told.
> 5) A finding of lack of credibility must be based on correct facts, untainted by conjecture or speculation and the reasons drawn from such facts must be cogent and bear a legitimate connection to the adverse finding.

Tribunal [2008] IEHC 339, *K v Minister for Justice, Equality and Law Reform* unreported, High Court, Gilligan J, April 19, 2007, *Simo v Refugee Appeals Tribunal* unreported, High Court, Edwards J, July 4, 2007.

6) The reasons must relate to the substantive basis of the claim made and not to minor matters or to facts which are merely incidental in the account given.

7) A mistake as to one or even more facts will not necessarily vitiate a conclusion as to lack of credibility provided the conclusion is tenably sustained by other correct facts. Nevertheless, an adverse finding based on a single fact will not necessarily justify a denial of credibility generally to the claim.

8) When subjected to judicial review, a decision on credibility must be read as a whole and the court should be wary of attempts to deconstruct an overall conclusion by subjecting its individual parts to isolated examination in disregard of the cumulative impression made upon the decision-maker especially where the conclusion takes particular account of the demeanour and reaction of an applicant when testifying in person.

9) Where an adverse finding involves discounting or rejecting documentary evidence or information relied upon in support of a claim and which is prima facie relevant to a fact or event pertinent to a material aspect of the credibility issue, the reasons for that rejection should be stated.

10) Nevertheless, there is no general obligation in all cases to refer in a decision on credibility to every item of evidence and to every argument advanced, provided the reasons stated enable the applicant as addressee, and the court in exercise of its judicial review function, to understand the substantive basis for the conclusion on credibility and the process of analysis or evaluation by which it has been reached."[138]

It is clear from this lengthy passage that Cooke J was seeking to strike a balance between respect for the role of primary decision-makers on judicial review, with respect for the rights of refugees for whom

[138] At para.11.

unlawful credibility findings may result in denial of recognition and ultimately, to refoulement.

Notwithstanding the extensive guidance given by the High Court to refugee decision-makers concerning the correct approach to be adopted to credibility decisions, commentators continue to express concern as the nature and extent of such findings. In a 2012 report titled "Difficult to Believe", the Irish Refugee Council reviewed the files of 86 individuals who had applied for asylum in Ireland and whose applications had been refused. Among the key concerns outlined by the report were that the system puts asylum applicants at a disadvantage from the outset, making it difficult for them to put forward a claim that is more likely to be seen as credible (in particular, through a lack of legal advice and assistance at the early stages of the asylum application); decision-makers adopting an inappropriately high standard of proof in refugee claims; too much emphasis placed by decision-makers on very specific aspects of a case leading to a distortion of the examination and conclusions about the credibility of a claim; an inability or unwillingness to see the oral account of an applicant as evidence in itself and a mis-use of documentary evidence; and a lack of fairness and transparency in the Refugee Appeals Tribunal in particular.[139] As Mullally noted in the foreword to this report:

> "As this Report recognises, many of the challenges that are now faced by asylum applicants bubble beneath the surface, less likely to raise the grand conceptual debates that for so long preoccupied asylum adjudicators. Instead, it is the day to day assessments of credibility or availability of protection that function as the primary gatekeepers in asylum adjudication. Assessing credibility requires adjudicators to cross many barriers - cultural, socio-economic, religious, and geographical. The adjudicator is

[139] Irish Refugee Council *Difficult to Believe: The Assessment of Asylum Claims in Ireland* (2012) at pp.40-44.

> required to position herself or himself in the place of an asylum applicant, with whom very little of life's experiences are shared....
>
> The consequences of an error in the asylum adjudication process may threaten the liberty, security and even the life of an asylum applicant. It is to be hoped that this Report will lead to urgent and much needed reforms within the asylum process. A first step, and one that will be critical to sustaining reform, will be greater transparency and public scrutiny of the asylum process at all levels. Such transparency and scrutiny has been lacking to date, and it is a gap that raises serious questions of accountability in the asylum process. It is also a gap that undermines the quality of decision-making and may significantly increase the potential for error."[140]

One of the most recent decisions of the High Court concerning credibility assessments in the refugee context suggests that some decision-makers have failed to heed calls for improvements in assessment of credibility. In *AAMO v Refugee Appeals Tribunal*[141] Clark J delivered an excoriating judgment detailing multiple failings of the most serious kind in the decision of the Refugee Appeals Tribunal to refuse the asylum appeal on behalf of a Sudanese doctor. In a mark of the strength of the court's views, the judgment begins by stating:

> "Sometimes the court is called upon to review a decision which is so unfair and irrational and contains so many errors that judicial review seems an inadequate remedy to redress the wrong perpetrated on an applicant. This is such a case."[142]

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[140] *Ibid* at p.(ii).

[141] [2014] IEHC 49.

[142] At para.1.

Clark J noted that "the extraordinary feature of this application for asylum was that the applicant's case was documented and supported to an unusual level but was nevertheless refused on credibility grounds" and remarked that given the extent of the evidence, the applicant had been "failed abysmally" not only by the Refugee Appeals Tribunal but also by the Refugee Applications Commissioner at first instance.[143] Among the findings denigrated by Clark J were the Tribunal Member's conclusion that the applicant's engagement with Amnesty International was a "calculated attempt by the applicant to place himself in a different position as a consequence of the altering political position in Sudan" and that he had given "no plausible explanation for creating a public profile for himself and he deliberately sought to put himself in the public eye for the purposes of enhancing his application."[144] The Tribunal Member also found that the applicant could avoid persecution by internally relocating to South Sudan (which had seceded from Sudan and was, by the time of the Tribunal's decision, a separate, sovereign state). Clark J had no hesitation in quashing the decision, remarking:

> "at the hearing of this application the court expressed its deep concern at the fundamental nature of the many errors identified which infect the legality, fairness and constitutionality of the decision as a whole…
>
> While the determination of an applicant's credibility is uniquely within the remit of the protection decision maker, that decision maker must act judicially and within the law. He is not at large to act perversely in disregard of relevant statements and documents capable of supporting an applicant's claim. … The court is satisfied to a very high degree that documents clearly capable of corroborating or confirming the truth of the applicant's account were disregarded in favour of a heavy reliance on the applicant's

[143] At para.6.

[144] At para.18.

> demeanour which the Tribunal Member did not favour. Such reliance was also in the teeth of his evidence that he was contacted by both Frontline and Amnesty International who became aware of his maltreatment and that he had not contrived to put himself in the public eye to advance his claim. For these reasons the court is satisfied that the credibility findings made are unsustainable and provide an additional basis to justify the quashing of the decision."[145]

Concluding that "the decision in this case lacked justice and understanding in breach of the basic criteria identified in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and was also in fundamental breach of sections 11B(i) and 16(16) (d) and (e) of the Refugee Act 1996 and Regulations 5 and 7 of the Protection Regulations", the court quashed the decision of the Tribunal and remitted the appeal for rehearing in the hope that it would be determined "humanely and expeditiously."[146]

Clark J in *AAMO* was incredulous at the decision to refuse refugee status (both at first instance and appeal) given the strength of the evidence available to both the Refugee Applications Commissioner and Refugee Appeals Tribunal. Having regard to some of the more extraordinary findings of the Tribunal Member, the judge concluded that the only possible explanation was that the Tribunal Member "simply did not like the applicant." [147] An alternative construction of the decision in this case

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[145] At paras.35-37.

[146] *Ibid* at para.38.

[147] As the judge stated at para.23: "When reviewing this quite extraordinary decision on the day of the hearing, the only conclusion which the Court could draw for the Tribunal's decision not to recommend that the applicant should be declared a refugee is that the Tribunal Member simply did not like the applicant. This can be the only explanation for doubting the applicant's well-documented name and occupation and rejecting his description of how he was known by his nickname – described in pejorative terms as an alias – and his background in human rights work as a doctor. Once that doubt was expressed, the letters from MSF confirming his employment with

is to understand it as the product of a deep-rooted and ingrained culture of disbelief.[148] While the court had no difficulty in quashing the decision in suit, Clark J herself noted that in this case, "judicial review seems an inadequate remedy to redress the wrong perpetrated on an applicant."[149] This demonstrates the limitations of judicial review as a remedy to a system which is infected with a culture of denial of the truth of refugee claims. The decision in *AAMO* might be remarkable, both in terms of the level of supporting evidence available and the extraordinary reasons advanced by the Tribunal Member for his decision, but it nonetheless gives rise to considerable concern from the perspective of the right to asylum and indeed the rule of law in this jurisdiction.

Conclusions

This chapter has sought to trace the background to the procedural framework for the determination of refugee status in Ireland, a process which it is suggested was influenced by a crisis mentality as a result of the very significant increase in the numbers of applications received in the State over a very short period of time: from a handful of applications per year in the early 1990s, the number of applications exceeded ten thousand just ten years later. It should also be noted that the decline in the numbers of applications since the peak has been equally dramatic; the number of asylum applications received in the State fell to less than

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them in Darfur, the oral evidence of his Sudanese medical colleague, the documentation showing the involvement of a named Embassy official, the photographs of the applicant's damaged medical clinic, the applicant's injuries, the medical reports from three different sources including the Nadim Centre for Psychological Management and Rehabilitation of Victims of Violence in Cairo of the 13th April, 2009, the reports and letters from Amnesty International and the evidence of the deputy director of Frontline were all treated as suspect."

[148] See generally Millbank "'The Ring of Truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations" (2009) 21(1) International Journal of Refugee Law 1 and in the Irish context, Irish Refugee Council *Difficult to Believe: The Assessment of Asylum Claims in Ireland* (2012) at pp.40-44.

[149] *Op cit* at para.1.

one thousand in 2012.[150] The administrative crisis posed as a result contributed in large part to the delayed commencement of the Refugee Act 1996 until 2001, and within three years the government announced proposals for a further radical revision of the statutory framework (albeit that ten years later this proposal has not yet become law).

A review of the operation of the asylum system in Ireland reveals that it has been dogged by controversy throughout its recent past. The failure of the legislative framework to enshrine basic values of independence, transparency and above all to commit to ensuring a full right of access to the asylum procedure gives rise to major concerns from the perspective of the rule of law. While much of the above discussion has focussed on the Refugee Appeals Tribunal, this is not to suggest that the decision-making process at first instance is beyond reproach.[151] Rather, because the High Court in recent years has severely restricted the availability of judicial review of first instance decisions, requiring an applicant instead to exhaust the appeal mechanism to the Refugee Appeals Tribunal save in very limited respects,[152] the available corpus of jurisprudence is largely directed at decisions on appeal.

The phenomenon of a "culture of disbelief" is not unique to this jurisdiction; similar criticisms have been levelled at the refugee determination process in the United Kingdom and Australia. While bare statistics can only allow for crude comparisons, the rate of refugee recognition in this jurisdiction has at times been far lower than either of these two jurisdictions. So entrenched has the culture of disbelief become that one report suggested the Irish system in fact embodied a

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[150] UNHCR "Irish Asylum Trends in 2013" April 28, 2014 noted that 946 new applications for refugee status were received in Ireland in 2013.

[151] As noted above, the fact that the recognition rate at first instance has fallen to less than two per cent gives rise to grave concerns.

[152] Such as the application of the manifestly unfounded procedure, because of its implications for the appeal mechanism; as discussed above.

"culture of contempt" towards refugee applicants.[153] Decisions such as *AAMO* lend weight to such concerns, and it is suggested that the credibility of the refugee determination process itself has been called into question as a result.

While it is impossible to understate the significance of some of the concerns arising in the procedural framework, it is important also to note that there are some grounds for optimism. The recent change in practice at the Refugee Appeals Tribunal, including the publication of guidance notes concerning assignment of appeals and access to previous decisions, may be regarded as a groundbreaking commitment to meeting the minimum requirements of consistency, transparency and above all fairness. However, as suggested above, it is important that such principles are reflected at all levels of the decision-making process, and should in principle be derived from the statutory framework which governs the process. It is to be hoped that such principles will be reflected in the amended provisions of the Immigration, Residence and Protection Bill whose publication continues to be eagerly awaited.

[153] Irish Refugee Council *Difficult to Believe: The Assessment of Asylum Claims in Ireland* (2012) at pp.40-44.

Chapter 5 The Rights of Refugees

Introduction

The 1951 Refugee Convention makes provision for the enjoyment by refugees of a range of substantive rights. Many of these provisions were derived from the Convention's predecessor in 1933, which had a significant influence on the shape and content of the 1951 Convention.[1] However, as Hathaway notes, the 1948 Universal Declaration of Human Rights was "a key secondary source [which] influenced the redrafting of the content of several rights found in the 1933 Refugee Convention and accounted for six additions to the earlier formulation of refugee rights."[2]

The rights provided for by the Refugee Convention include "several critical protections which speak to the most basic aspects of the refugee experience, including the need to escape, to be accepted, and to be sheltered" as well as "a number of basic survival and dignity rights."[3] In addition to such basic (yet essential) requirements, the Convention goes on to guarantee a range of civil, political and socio-economic rights. Whilst the rights provided for by the Refugee Convention do not equal the full range of protections encapsulated in the Universal Declaration of Human Rights, "the Refugee Convention nonetheless pays significantly more attention to the definition of a sphere of personal freedom for refugees than did any of the earlier refugee agreements."[4] However, it is

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[1] See further chapter 1.

[2] Hathaway *The Rights of Refugees in International Law* (Cambridge University Press, 2005) at pp.93-94.

[3] *Ibid* at p.94.

[4] *Ibid.*

noteworthy that states may enter reservations in respect of many of the substantive guarantees of the Convention, other than in respect of the principle of non-discrimination, freedom of religion and access to the courts; states party to the Convention are therefore afforded a significant discretion as to the precise scope of the rights of refugees within their territory.[5]

This chapter will address the rights enjoyed by refugees under the Convention, beginning by exploring the basis of entitlement for the enjoyment of such rights, having regard to the Convention's distinction between three broad categories of beneficiaries. Having clarified the scope of each of these categories, the discussion turns to the nature of the rights of refugees, including the right to freedom of religion, freedom of association, access to the courts, the right to work, public relief and social welfare, rights of residence and travel, citizenship and the right to family reunification. Within this chapter, the rights enjoyed under the Convention are considered side-by-side with the implementation of such rights within Irish law, with the analysis informed by the rule of law perspective, highlighting instances where lack of clarity, independence and transparency give rise to concern.

The basis of entitlement under the Refugee Convention

Before considering the individual provisions of the Refugee Convention which guarantee the rights of refugees, it is important to note that the Convention does not provide a single, unified standard for enjoyment of rights by refugees. Goodwin-Gill, whilst lamenting the lack of consistency in the language of the Convention, proposes that the structure of entitlement may be divided into three broad categories: rights enjoyed by refugees by the fact of their "simple presence"; rights limited to those refugees "lawfully present"; and rights limited to those

[5] Article 42 of the Refugee Convention provides that "At the time of signature, ratification or accession, any state may make reservations to articles of the Convention other than to Articles 1, 3, 4, 16(1), 33, 36-46 inclusive."

refugees who are "lawfully resident." [6] Hathaway's account of the structure of entitlement is perhaps the more compelling, noting that "refugees are entitled to an expanding array of rights as their relationship with the asylum state deepens":

> "At the lowest level of attachment, some refugees are simply subject to a state's jurisdiction, in the sense of being under its control or authority. A greater attachment is manifest when the refugee is physically present within a state's territory. A still more significant attachment is inherent when the refugee is deemed to be lawfully present within the State. The attachment is greater still when the refugee is lawfully staying in the country. Finally, a small number of rights are reserved for refugees who can demonstrate durable residence in the asylum state. As the refugee's relationship to the asylum state is solidified over the course of this five-part assimilative path, the Convention requires that a more inclusive range of needs and aspirations be met."[7]

Notwithstanding this more sophisticated account of the structure of entitlement provided for in the Convention, it must nonetheless be noted that identifying the precise category to which particular rights belong can be a difficult task, in particular once the Convention's provisions are transposed into domestic legal systems. This has clear implications for the core principle of certainty and the rule of law. Furthermore, the withholding of some refugee rights until such time as a formal determination of refugee status has been made can significantly prejudice refugees who are awaiting a determination on their status. As UNHCR has observed:

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[6] Goodwin-Gill *The Refugee in International Law* (2nd ed, Oxford University Press, 1996) at p.307.

[7] Hathaway *op cit* at p.156.

> "Every refugee is, initially, also an asylum-seeker; therefore, to protect refugees, asylum-seekers must be treated on the assumption that they may be refugees until their status has been determined."[8]

Unfortunately, many states fail to live up to this exhortation in practice. Thus, whilst a decision to grant refugee status is merely declaratory, in the sense that such person was a refugee from the moment he or she left his or her country of origin, the reality for many refugees is that their enjoyment of the rights regime provided for in the Convention is delayed until such time as the refugee determination process has concluded. This further serves to emphasise the importance of a scrupulous observance of fair procedures in the refugee determination process; if enjoyment of rights by refugees is made contingent on their recognition at the outcome of the decision-making process, it is all the more important the substantive enjoyment of such rights is not frustrated by failings within the procedural framework.

Freedom of religion/Religious education

Article 4 of the Refugee Convention provides:

> "The Contracting States shall accord to refugees within their territories treatment at least as favourable as that accorded to their nationals with respect to freedom to practice their religion and freedom as regards the religious education of their children."

As Hathaway notes, "[r]efugees who introduce a foreign religion into an asylum state are sometimes subjected to targeted restrictions on their freedom of religion."[9] Restrictions on the freedom of religion of refugees more frequently arise in the context of repressive regimes which

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[8] UNHCR *Note on International Protection* (1993) at para.11.

[9] Hathaway *The Rights of Refugees in International Law* (Cambridge University Press 2005) at p.560.

suppress the religious freedom of the general population,[10] creating a dilemma which "clearly arises for refugees arriving in a theocratic state in which all are expected to abide by a particular set of beliefs."[11] Hathaway has furthermore suggested that restrictions which are targeted at minority religions may undermine the rights-basis of refugee protection as envisaged by the Convention. [12] The Convention's recognition of freedom of religion is mirrored in the provisions of Article 18 of the Universal Declaration of Human Rights which provides that "[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance", the language of which is clearly replicated in Article 18 of the International Covenant on Civil and Political Rights.[13]

Provision has been made in respect of refugee rights to freedom of religion in Ireland by section 3(2) of the Refugee Act 1996, which provides:

> "a refugee *in relation to whom a declaration is in force—*
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> ...

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[10] See, eg, *Interim Report of the Special Rapporteur on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief* (2007) at paras.38-63.

[11] Hathaway *op cit* at p.560.

[12] *Op cit* at p.563.

[13] Article 18 of the ICCPR provides "1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."

(iv) shall have the same freedom to practise his or her religion and the same freedom as regards the religious education of his or her child as an Irish citizen..."[14] [Emphasis added]

The guarantee of freedom of religion for refugees under s.3(2)(iv) of the 1996 Act is thus limited to recognised refugees, and does not seem to extend to all refugees in the State (i.e. those who are seeking refugee status but have not yet been recognised). Given that Article 4 of the Refugee Convention explicitly extends the right to freedom of religion to all refugees "within [the] territory" there would appear to be a prima facie dissonance between the Convention requirements and Irish law. However, in the absence of any consideration by the Irish courts of the precise scope and extent of the rights of refugees to freedom of religion, the point remains undecided.

It might be thought that a wider protection in relation to freedom of religion could be found in the provisions of the Irish Constitution, Article 44 of which provides:

"1.The State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honour religion.

2.1° Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen."

However, it is immediately apparent that the constitutional guarantee of freedom of religion in Article 44.2.1° is restricted in application not just on grounds of public order and morality, but in respect of the

[14] The reference to "a refugee in relation to whom a declaration is in force" refers to a declaration of refugee status pursuant to s.17 of the Refugee Act 1996, per s.(1) of the 1996 Act.

beneficiaries of such guarantee – the right being expressed as a right of citizens only. This would clearly exclude the possibility of a refugee in the State seeking to invoke the provisions of this constitutional provision in the context of freedom of religion.[15]

Limitations on refugees' freedom of religion in Ireland may arise in two particular contexts. The first relates to asylum-seekers whose applications for refugee status are pending, and who are subject to the policy of direct provision, whereby asylum seekers are assigned accommodation in designated refugee hostels, and receive the limited sum of €19.10 per week by way of financial support.[16] Allied to the policy of direct provision is the so-called dispersal policy, which was introduced to alleviate difficulties arising from a high demand on accommodation in Dublin in or around 2000, as a result of the large numbers of asylum seekers entering the state; the policy of dispersal involves "ensur[ing] a more equal distribution of asylum seekers ... throughout the country",[17] often in remote, rural areas. Asylum seekers in such areas may face practical difficulties in the exercise of their religion by reason of the distances of their accommodation centres from an appropriate place of worship. Difficulties may also arise in obtaining appropriate religious education for the children of such asylum seekers

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[15] Although the scope of the restrictions on the provisions of Article 44.2.1° have been considered by the courts insofar as public order and morality are concerned (see eg *Murphy v Independent Radio and Television Commission* [1999] 1 IR 12, [1998] 2 ILRM 360 and *People (DPP) v Draper* (1988) referred to in Hogan & Whyte *JM Kelly: The Irish Constitution* (4th ed, LexisNexis Butterworths, 2003) at para.7.8.43) the restriction on the availability of such guarantee to citizens only does not appear to have received any judicial consideration.

[16] The policies of direct provision and dispersal are further discussed below.

[17] See FLAC *Direct Discrimination? An Analysis of the Scheme of Direct Provision in Ireland* (2003) and *One Size Doesn't Fit All: A Legal Analysis of the Direct Provision and Dispersal Policy in Ireland Ten Years On* (2009).

owing to the predominant role of the Catholic church in the provision of education in Ireland.[18]

Although these issues do not appear to have been the subject of judicial consideration in Ireland, it may be concluded that given the limitations inherent in the constitutional provisions on freedom of religion in Ireland and the statutory provisions of s.3(2) of the Refugee Act 1996, there is a prima facie argument that Irish law does not adequately protect the rights of refugees to freedom of religion as required by Article 4 of the Refugee Convention.

Freedom of association

The right to freedom of association is recognised by Article 20 of the Universal Declaration of Human Rights, which provides:

> "Everyone has the right to freedom of peaceful assembly and association."

The universal scope of the right to freedom of association is also provided for in Article 22 of the International Covenant on Civil and Political Rights, which provides "[e]veryone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests", and which allows of exceptions only where necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

The extension and scope of such rights for refugees were somewhat controversial, arising from a concern on the part of states that in cases of mass influx of refugees, domestic political stability could be

[18] See further O'Mahony *Educational Rights in Irish Law* (Thomson Round Hall, 2006).

threatened.[19] As Hathaway notes, an earlier draft of Article 15 drawn up by the Secretary General proposed that "[r]efugees ... shall have the right to join non-profit-making associations, including trade unions".[20] This provision would have applied to all refugees, regardless of their particular status, and would not have been subject to any exceptions or qualifications. However, the final text of Article 15 fell short of this broad conception of the right, providing:

> "As regards non-political and non-profit-making associations and trade unions the Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country, in the same circumstances."

As Hathaway notes, the content of the right to freedom of association in the final version of Article 15 was "narrowly conceived"; [21] this reluctance to establish a comprehensive right of refugees to freedom of association has been attributed to "genuine concern about the risk of political destabilisation, both in receiving states and internationally."[22] Nevertheless, it is clear that by restricting the right of refugees to freedom of association to those lawfully staying in the host state, the provisions of Article 15 are more limited than the universal conception of the right which appears in both the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights. Thus, as Hathaway notes, "[b]ecause of its critical deficiencies ... the

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[19] See, eg, the comments of the Danish representative at the drafting conference on January 24, 1950 that "Refugees who had found freedom and security in another country should not be permitted to engage in political activity which might endanger that country" (UN Document.E/AC.32/SR.10 at p.10) and the statement of the Egyptian delegate on July 5, 1951 that "Refugees admitted to a country should not be in a position to engage in political activities prejudicial to the security of that country" (UN Document.A/CONF.2/SR.8 at p.10.)

[20] Hathaway *op cit* at p.881.

[21] *Ibid* at p.882.

[22] *Ibid.*

right of refugees to freedom of association ... is more effectively vindicated by reliance upon the subsequently codified"[23] provisions of the International Covenant on Civil and Political Rights.

Section 3(2)(a)(vi) of the Refugee Act 1996 goes somewhat further than the limited requirements of Article 15 of the Refugee Convention, providing:

> "(2) (a) Without prejudice to the generality of subsection (1), a refugee in relation to whom a declaration is in force—
> (vi) shall have the right to form and be a member of associations and trade unions in the like manner and to the like extent in all respects as an Irish citizen."

The limitation of such rights to refugees in respect of whom a declaration is in force is wholly consistent with the provisions of Article 15 of the Refugee Convention which explicitly refers to "refugees lawfully staying in the territory." However, the exclusion of asylum-seekers and those awaiting a decision on their refugee application is arguably inconsistent with the broader conception of the right to freedom of association as found in the Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights. Nevertheless, in terms of the scope of the right enjoyed by recognised refugees pursuant to section 3(2)(a)(vi) of the 1996 Act, it is clear that this provision goes further than the Convention by placing refugees' rights to freedom of association on an equal footing with the freedom of association enjoyed by Irish citizens; Article 15 requires only parity of treatment with the "treatment accorded to nationals of a foreign country." Thus, although the provisions of section 3(2)(a)(vi) of the 1996 Act do not appear to have been the subject of judicial consideration, a prima facie reading of the legislation indicates that while Irish law in this regard goes further than the minimum requirements of Article 15 of the

[23] *Op cit* at p.892.

Refugee Convention, it may fall short of the more universal conception of the right as found in subsequent human rights instruments.

Access to the courts

As noted above, the right of access to the courts is one of the core, non-derogable rights contained in the Refugee Convention. Article 16 provides:

> "1. A refugee shall have free access to the courts of law on the territory of all Contracting States.
>
> 2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from cautio judicatum solvi.
>
> 3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence."

There are clearly different strata to the right of access to the court envisaged by the different provisions of Article 16. The broad principle of access to the courts in paragraph 1 is expressed without restrictions; Hathaway notes that it is thus clear that the right of access to the courts "[does not] inhere only in refugees once they are granted a right to enter or remain in a given state. To the contrary, the drafting history makes quite clear that Article 16(1) rights inhere in *all* refugees..."[24] Paragraph 2 concerns the provision of legal assistance and "exemption from cautio

[24] *Op cit* at p.645 (emphasis added). To this extent, the provisions of the Refugee Convention are broader than the equivalent provisions in other international human rights instruments; for example, Article 14 of the International Covenant on Civil and Political Rights provides only that "[a]ll persons shall be equal before the courts and tribunals", a provision described by Hathaway as "exceedingly general."

judicatum solvi,"[25] with the entitlement here limited in application to refugees who have established habitual residence. The concept of habitual residence is not defined in the Refugee Convention, but Hathaway suggests that:

> "the 'habitual residence' requirement for access to the additional benefits set by paras 2 and 3 of Art.16 was not intended to limit those rights to refugees who are formally domiciled in a state party. Instead, a refugee's presence need only be ongoing in practical terms."[26]

The availability of legal assistance and the requirements, if any, that refugees or asylum-seekers furnish security for costs, are not addressed in the Refugee Act 1996. The provisions of the Civil Legal Aid Act 1995 provide for a system of legal assistance and legal aid, primarily based on the basis of a means and merits test;[27] however, provided that an individual can meet these tests, the availability of legal aid does not seem to be limited to citizens or those permanently domiciled or resident in the State, suggesting that refugees and asylum-seekers are not automatically excluded from the scope of legal aid in Irish law. As noted in chapter 4, limitations in the scope of application of legal aid for refugees can give rise to concerns insofar as this may impact the refugee's ability to secure recognition as early as possible in the procedure. Under Irish law, legal advice may be given to a refugee in the course of the first instance application, but full legal representation is not

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[25] This phrase is generally translated as meaning "payment of security for legal costs."

[26] *Op cit* at p.909, citing Robinson's views that the term habitual residence was intended "to denote that a stay of short duration was not sufficient. On the other hand, the exercise of the right was not made dependent on 'permanent residence' or on 'domicile' because it was felt that it was a too far-reaching concept for the enjoyment of civil rights. 'Habitual residence' means residence of a certain duration, but it implies much less than permanent residence": Robinson *Convention Relating to the Status of Refugees: Its History, Contents and Interpretation* (1953, Institute of Jewish Affairs) at p.107.

[27] See sections 24, 26 and 28 of the Civil Legal Aid Act 1995.

available until the appeal stage.[28] Concerns have been expressed that denial of full legal representation at the first instance stage may undermine the rights of refugees:

> "Getting the decision right first time, at ORAC stage, can avoid a protracted asylum application process that is both highly detrimental to individual applicants and hugely expensive to the State. The early identification of people in need of international protection allows Ireland to meet its obligations under international law in a timely manner."[29]

Under Irish law, access to the courts by refugees is addressed in section 3(2)(v) of the Refugee Act 1996, which provides:

> "a refugee in relation to whom a declaration is in force—
>
> ...
>
> (v) shall have access to the courts in the alike manner and to the like extent in all respects as an Irish citizen."

Because of the limitation on this right to recognised refugees, the provisions of section 3(2)(v) of the 1996 Act would seem prima facie in breach of the provisions of Article 16 of the Refugee Convention. It does not appear that Article 16 of the Refugee Convention has been the subject of specific judicial consideration in Ireland. However, the right of access to the courts by refugees and asylum seekers has been

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[28] The Civil Legal Aid (Refugee Appeals Tribunal) Order 2005 (SI No.730 of 2005) prescribes the Refugee Appeals Tribunal for the purposes of section 27(2)(b) of the Civil Legal Aid Act 1995 as a body at whose proceedings legal aid may be provided by the Legal Aid Board. The Refugee Applications Commissioner is not a prescribed body for these purposes, thus limiting the Legal Aid Board to the provision of legal advice to an asylum seeker in the course of the initial application for asylum.

[29] Kelly "Early Recognition of People in Need of International Protection: The Irish Refugee Council Independent Law Centre's Early Legal Advice & Representation Project" (2013) 8(2) The Researcher 2 at p.2.

considered in the context of limitations on the availability of judicial review in respect of refugee decisions.[30] Kneebone et al note one of the trends apparent in Western states recent years, aimed at restricting or denying the rights of refugees, involves limitations on the ability of refugees to access the courts.[31] Ireland can be identified as subscribing to this trend, insofar as section 5 of the Illegal Immigrants (Trafficking) Act 2000 is concerned. This section incorporates a number of procedural hurdles to be met by applicants seeking judicial review of certain decisions in the refugee context, a number of elements of which impose a higher or more restrictive standard than in "conventional" or ordinary judicial review.[32] Thus, section 5 stipulates that an application for judicial review in respect of certain specified decisions in the refugee process "shall be made within the period of 14 days commencing on the date on which the person was notified of the decision ... unless the High Court considers that there is good and sufficient reason for extending the period within which the application shall be made." Section 5 imposes additional procedural obstacles on the refugee's right of access to the courts including a higher threshold for the grant of leave ("substantial grounds" must be demonstrated, as opposed to the lower standard of "arguable grounds" which generally applies), and an application for leave is fully contested, unlike in conventional judicial review where such applications are heard ex parte. As Macklin notes:

> "one of the foundational tenets of the rule of law is the guarantee of access to an independent and impartial court (Dicey's so-

[30] See further Delany and McGrath *Civil Procedure in the Superior Courts* (2nd ed, Round Hall, 2004) at paras 27-116 – 27-124, Hogan and Whyte *JM Kelly: The Irish Constitution* (4th ed, Lexis Nexis Butterworths, 2003) at paras 7.3.132-169 and Delany "Extension of Time for Bringing Judicial Review Pursuant to s.5 of the Illegal Immigrants (Trafficking) Act 2000" (2002) 20 Irish Law Times 44.

[31] Kneebone (ed) *Refugees, Asylum Seekers and the Rule of Law* (Cambridge University Press 2009) at pp.48-50.

[32] See generally Law Reform Commission *Consultation Paper on Judicial Review Procedure* (LRC 20, 2003) and Law Reform Commission *Report on Judicial Review Procedure* (LRC 71, 2004).

called 'ordinary courts') to challenge the legality of a decision affecting fundamental rights... the use of a leave requirement to constrict that access, however compelling the administrative exigencies animating it, directly and incontrovertibly breaches that fundamental principle."[33]

This section was the subject of an Article 26 reference to the Supreme Court in *In re Article 26 and ss.5 and 10 of the Illegal Immigrants (Trafficking) Bill 1999.*[34] One of the arguments advanced was that the fourteen day limitation period for institution of judicial review proceedings amounted to a breach of the constitutional right of access to the courts. The Supreme Court upheld the constitutionality of the section, in a judgment which was disappointing insofar as it upheld the legality of the additional procedural hurdles to be met by refugees seeking judicial review, but nonetheless contained a resounding affirmation of non-citizens' right of access to the courts:

> "It would be contrary to the very notion of a state founded on the rule of law, as this State is, and one in which, pursuant to Article 34 justice is administered in courts established by law, if all persons within this jurisdiction, including non-nationals, did not, in principle, have a constitutionally protected right of access to the courts to enforce their legal rights ...
>
> It may be that in certain circumstances a right of access to the courts of non-nationals may be subject to conditions or limitations which would not apply to citizens. However, where the State, or State authorities, make decisions which are legally binding on, and addressed directly to, a particular individual, within the jurisdiction, whether a citizen or non-national, such

[33] Macklin "Asylum and the Rule of Law in Canada: Hear the Other (Side)" in Kneebone (ed) *op cit* at p.104.

[34] [2000] 2 IR 360.

> decisions must be taken in accordance with the law and the Constitution. It follows that the individual legally bound by such a decision must have access to the courts to challenge its validity. Otherwise the obligation on the State to act lawfully and constitutionally would be ineffective. For the purpose of this reference, the court is satisfied that non-nationals have a constitutional right of access to challenge the validity of any of the decisions or other matters referred to in s. 5(1) taken in relation to him or her."[35]

The court upheld the constitutionality of the 14 day time limit on the grounds that the discretion conferred on the High Court to extent the time for the institution of proceedings was sufficiently flexible to ensure the right of access to the courts was not unlawfully impeded.[36] The decision of the Supreme Court in *In re Article 26 and ss.5 and 10 of the Illegal Immigrants (Trafficking) Bill 1999* might be characterised as seeking to strike a delicate balance between respect for the separation of powers and the role of the Oireachtas to make laws pursuant to Article 15.2.1 and respect for the rights of refugees on the other. Thus, the court "acknowledged that it is within the competence of the Oireachtas to regulate by law, either by primary or secondary legislation, procedural matters before the courts *provided constitutional rights are not infringed.*"[37] This approach, insofar as it ultimately reserves to the court the ability to engage in a rights-based analysis of the implications of the legislation, is consistent with the substantive approach to the rule of law.[38]

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[35] *Ibid* at p.385.

[36] See further pp.393-394.

[37] Delany and McGrath *op cit* at p.1051 (emphasis added).

[38] The Supreme Court was also cognisant of the need to have regard to the specific circumstances of refugees and asylum seekers in deciding whether to extend the time for the institution of proceedings, noting "certainly non-nationals who enter the State and seek asylum or refugee status face difficulties which are special to them. In many, if not most, cases they will be strangers to its culture, its way of life and its languages.

Furthermore, subsequent decisions of the High Court concerning the grounds on which the time may be extended have also demonstrated concern to vindicate the right of access to the courts, informed by a proportionality assessment; as MacEochaidh J held in *KB v Refugee Appeals Tribunal*:

> "... I would be extremely reluctant to entertain an application to dismiss proceedings four years after the institution of those proceedings where the first indication of a complaint about delay is to be found in the written submissions filed in the days before the hearing. If a State respondent is keen to pursue a genuine delay point, this itself should not be delayed, and I say this having regard to the particular circumstances of failed refugee judicial review applicants who live, generally, in very difficult circumstances on a mere €19 or so a week. It would be unconscionable to permit proceedings to fail on a time point where an applicant might have endured significant hardship over many years waiting for such a simple point to be determined."[39]

Whilst the legislative intention behind section 5 of the 2000 Act was clearly to limit the ability of refugees and asylum seekers to access the courts, the above decisions demonstrate the willingness of the courts to adopt a substantive, rights-based approach in order to uphold the right of access to the courts, and ultimately the rule of law.[40]

They may be located a good distance away from the centre where decisions concerning them are taken and may be completely ignorant of the legal system. These and many other factors could combine to make it difficult to pursue applications for asylum or refugee status or, which is what the court is concerned with in this reference, to seek judicial review of administrative decisions affecting them": at p.389.

[39] [2013] IEHC 169.

[40] See further the discussion of the role of the courts on judicial review in chapter 4.

Right to work

The rights of refugees to employment are set out in Chapter III of the Refugee Convention, which deals with the right to take up wage-earning employment, the right to self-employment and the treatment of the liberal professions. It is clear that the right to work for refugees involves sensitive considerations in terms of the national labour market of the host state; as UNHCR has noted:

> "The arrival of large numbers of asylum-seekers and the absorption of some or even all of them as refugees, even on a temporary basis, can create serious strains for host countries. This is particularly the case for poorer communities where the ability of the people and the inclination of the government to shoulder the resulting burden may be severely diminished by economic difficulties, high unemployment, declining living standards, and shortages in housing and land. ... Inevitably, there are tensions between international obligations and national responsibilities in such circumstances, with the result, in a number of States, that priority is accorded to nationals over all aliens, including refugees, in fields such as employment..."[41]

As a result of such concerns, the Refugee Convention provisions on the right to work are limited in a number of respects; first, these rights are conferred only on those refugees "lawfully staying" in the host state, ie those who have been recognised as refugees or who enjoy other durable protection status.[42] Secondly, the right to work is limited to a right to equal treatment with nationals of a foreign country rather than providing for equal rights to work as those enjoyed by citizens of the host state. Furthermore, the Convention specifically contemplates restrictions on

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[41] UNHCR "Implementation of the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees" (1989) at para.11.

[42] See further Hathaway *op cit* at pp.156–160 and 730–912. See also Goodwin-Gill and McAdam *The Refugee in International Law* (Oxford University Press 2007), at pp.524-527.

the employment rights of refugees for the protection of the national labour market, although certain conditions are placed on such restrictions. Thus, Article 17 provides for wage-earning employment in the following terms:

> "1. The Contracting States shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.
>
> 2. In any case, restrictive measures imposed on aliens or the employment of aliens for the protection of the national labour market shall not be applied to a refugee who was already exempt from them at the date of entry into force of this Convention for the Contracting State concerned, or who fulfils one of the following conditions:
> (a) He has completed three years' residence in the country;
> (b) He has a spouse possessing the nationality of the country of residence. A refugee may not invoke the benefit of this provision if he has abandoned his spouse;
> (c) He has one or more children possessing the nationality of the country of residence.
>
> 3. The Contracting States shall give sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals, and in particular of those refugees who have entered their territory pursuant to programmes of labour recruitment or under immigration schemes."

Article 18 provides for self-employment as follows:

> "The Contracting States shall accord to a refugee lawfully in their territory treatment as favourable as possible and, in any event,

not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies."

Finally, Article 19 of the Convention provides for treatment of refugees who wish to practise a "liberal profession" as follows:

> "1. Each Contracting State shall accord to refugees lawfully staying in their territory who hold diplomas recognized by the competent authorities of that State, and who are desirous of practising a liberal profession, treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.
>
> 2. The Contracting States shall use their best endeavours consistently with their laws and constitutions to secure the settlement of such refugees in the territories, other than the metropolitan territory, for whose international relations they are responsible."

Reference should also be made in this context to the provisions of Article 6 of the International Covenant on Economic, Social and Cultural Rights, which provides:

> "1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right."

Whilst this provision might seem to encapsulate a broader right to work than that which is provided for in Articles 17-19 of the Refugee

Convention, this is not in fact the case; as Craven has noted, there is no guarantee of a right to secure work, only to *seek* work.[43]

The rights of refugees to work in Irish law is provided by section 3(2)(a) of the Refugee Act 1996 provides:

> "a refugee in relation to whom a declaration is in force—
> (i) shall be entitled to seek and enter employment, to carry on any business, trade or profession and to have access to education and training in the State in the like manner and to the like extent in all respects as an Irish citizen."

This provision is clearly limited to recognised refugees through the restriction to refugees "in relation to whom a declaration is in force"; this limitation on asylum-seekers' right to work is confirmed by s.9(4) of the 1996 Act, which provides:

> "An applicant shall not—
> ...
> (b) seek or enter employment or carry on any business, trade or profession during the period before the final determination of his or her application for a declaration."[44]

As Hathaway has noted, "despite their generally good record on allowing recognised refugees full access to employment opportunities, many countries including France, Germany, Italy and the United Kingdom have nonetheless traditionally denied persons undergoing

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[43] Craven *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Clarendon Press, 1995) at p.203.

[44] This prohibition is further bolstered by the provisions of s.9(7), which provides that any person who contravenes s.9(4) is guilty of a criminal offence "and shall be liable on summary conviction to a fine not exceeding £500 or to imprisonment for a term not exceeding 1 month or to both."

refugee status assessment the right to undertake employment." [45] Hathaway specifically refers to Ireland's exclusion of asylum seekers from the right to work, describing it as a policy that "seems to have pleased virtually nobody." [46] Even a cursory examination of commentaries on the Irish position confirms this view; those calling for change include the Council of Europe's Commission against Racism and Intolerance,[47] the Council of Europe's Commissioner for Human Rights Thomas Hammarberg[48] as well as a host of domestic non-governmental organisations and academic commentators.[49] Most recently, the Irish Refugee Council published a compelling report which details the barriers to employment for those who are recognised as refugees, having spent many years in some cases in the asylum process during which they were prohibited from working, and the consequences of "the years spent cut off from society, leaving them with gaps in their employment and education history, a lack of contacts and networks, wasted skills and time lost."[50]

It is interesting to note that Council Directive 2003/9/EC of 17 January 2003 laying down minimum standards for the reception of asylum seekers ("the Reception Directive") expressly provides for a right to

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[45] *Op cit* at pp.734-735 (footnotes omitted).

[46] *Ibid* at p.735.

[47] European Commission Against Racism and Intolerance *Third Report on Ireland* (2007).

[48] *Report by the Commissioner for Human Rights, Mr Thomas Hammarberg, on his visit to Ireland 26 – 30 November 2007* (2008).

[49] See eg Fanning, Loyal and Staunton *Asylum Seekers and the Right to Work* (Irish Refugee Council, 2000), FLAC Reports *Direct Discrimination? An Analysis of the Scheme of Direct Provision in Ireland* (2003) and *One Size Doesn't Fit All: A Legal Analysis of the Direct Provision and Dispersal Policy in Ireland Ten Years On* (2009); Thornton "Upon the Limits of Rights Regimes: Reception Conditions of Asylum Seekers in the Republic of Ireland" (2007) 24(2) Refuge 86; Irish Refugee Council *Direct Provision: Framing an Alternative Reception System for People Seeking International Protection* (2013).

[50] Irish Refugee Council *Counting the Cost: Barriers to Employment After Direct Provision* (2014) at p.6. The direct provision system will be considered below.

work for asylum-seekers who have been awaiting a first instance decision on their refugee application for more than one year where that delay is not attributable to the asylum-seeker.[51] However, Ireland opted out of the Reception Directive so its provisions cannot be relied upon in order to assert a right to work for asylum-seekers in Ireland. It seems that the provisions regarding access to the labour market were a significant influence on the decision of the State not to opt in to this Directive:

> "One of the main reasons behind the prohibition on allowing direct provision residents the right to work is that the state did not want to create an "economic pull factor for economic migrants using the asylum system to enter the State."[52]

The European Commission's proposals on a recast of the Reception Directive stated:

> "Access to employment is beneficial both for the asylum seeker and the hosting Member State. Facilitated access to employment for asylum seekers could prevent exclusion from the host society, and therefore facilitate integration. It would also promote self-sufficiency among asylum seekers.
>
> Mandatory unemployment on the other hand imposes costs on the State through the payment of additional social welfare payments. It should be noted in this respect that labour market

[51] Article 11(2) of the Reception Directive provides "2. If a decision at first instance has not been taken within one year of the presentation of an application for asylum and this delay cannot be attributed to the applicant, Member States shall decide the conditions for granting access to the labour market for the applicant."

[52] FLAC *One Size Doesn't Fit All: A Legal Analysis of the Direct Provision and Dispersal Policy in Ireland Ten Years On* (2009) at p.118. However, as FLAC has observed, "one of the principles behind the Directive is to "limit the secondary movements of asylum seekers influenced by the variety of conditions for their reception" which would seem to contradict the Irish government's perception that granting this right would serve as a 'pull factor'."

> restrictions could encourage illegal working. This is particularly relevant for those Member States which create obstacles on access to the labour market and which grant very low welfare assistance to asylum seekers at the same time."[53]

However, there are no indications of a change in stance vis-à-vis the right of asylum seekers to access the labour market in the State; indeed, given the current economic crisis it is difficult to foresee a liberalisation of the Irish approach to this issue in the near future. In conclusion, whilst it would seem that the provisions of Irish law which restrict the right to work to recognised refugees are out of step with the equivalent European provisions, but are not incompatible per se with the requirements of the Refugee Convention nor of the International Covenant on Economic, Social and Cultural Rights, having regard to the limited nature of those rights as expressed in these instruments.

Public relief and social welfare

As Hathaway notes, "while the structure of the Refugee Convention anticipates that refugees lawfully staying in an asylum country will support themselves by undertaking work, the drafters logically took account of the possibility that refugees, like citizens, might sometimes be prevented from circumstances beyond their control from earning their own living."[54] Accordingly, the Convention provides that refugees shall enjoy equal treatment in respect of social welfare as regards the entitlements of nationals of the host states in Article 23 as follows:

> "The Contracting States shall accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals."

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[53] European Commission *Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (Recast)* (December 3, 2008) at pp.4-5.

[54] *Op cit* at p.773.

It has been noted that "in view of the controversy which frequently exists regarding the right of refugees to benefit from public assistance programs, both the simplicity of Article 23 and the ease with which its adoption were secured are quite astounding."[55] However, the right of refugees to claim public relief and assistance are limited in two material respects; first, the limitation of such right to refugees "lawfully staying" in the host state, and secondly, a state is not required to grant refugees public relief and assistance unless it provides such relief and assistance for its own citizens.[56] However, "where social welfare systems exist, even at a rudimentary level, the Refugee Convention is breached to the extent that refugees are not fully enfranchised under national initiatives."[57] It should be noted that although the term "public relief and assistance" is not defined in the Convention itself, the Secretary-General during the debates proposed that public relief would generally include benefits paid to people "suffering from physical or mental disease and incapable because of their condition or age from earning a livelihood for themselves and their families, and also to children without support."[58]

The right of refugees to seek assistance from social security systems of the host state are further provided for in Article 24, para.(1) of which provides:

> "The Contracting States shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters;

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[55] *Ibid* at p.806.

[56] Thus Hathaway notes "Because Art.23 requires only equivalency of treatment with that afforded citizens, there is no case to be made under Art.23 in respect of the failure by asylum states such as Kenya, Sudan and Uganda to provide welfare assistance to refugees, since these states lack a meaningful social assistance program for their own nationals": *op cit* at p.809.

[57] *Ibid.*

[58] United Nations "Memorandum by the Secretary General to the Ad Hoc Committee on Statelessness and Related Problems" (January 3, 1950) at p.39.

(a) ...

(b) Social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme)..."

Clearly, Article 24(1)(b) also requires equality of treatment for refugees in respect of entitlement to seek social security.[59]

The right of refugees to seek social welfare under Irish law are addressed in section 3(2)(a)(ii) of the Refugee Act 1996, which provides:

> "a refugee in relation to whom a declaration is in force—
> (ii) shall be entitled to receive, upon and subject to the terms and conditions applicable to Irish citizens, the same medical care and services and the same social welfare benefits as those to which Irish citizens are entitled."[60]

It is clear that the receipt of social welfare benefits pursuant to section 3(2)(a)(ii) of the 1996 Act is limited to recognised refugees. However, this was not always the case. Until 1999, asylum-seekers in Ireland enjoyed the same social welfare entitlements as citizens in the State. However, with a growing number of asylum seekers entering the State which in turn placed significant strain on public resources, particularly in

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[59] Reference should also be made to the provisions of Article 9 of the International Covenant on Economic, Social and Cultural Rights, which provides that "[t]he States Parties to the present Covenant recognize the right of everyone to social security, including social insurance." The scope of this right would appear to be broader than that which is envisaged by Articles 23 and 24 of the Refugee Convention.

[60] Section 3(2)(b) of the 1996 Act defines the term "social welfare benefits" in s.3(2)(a) as including any payment or services provided for in or under the Social Welfare Acts, the Health Acts, 1947 to 1994, and the Housing Acts, 1966 to 1992.

the Dublin area, the system of "direct provision" was introduced.[61] As noted above, this system involves the assignment of accommodation to asylum seekers on a "bed and board basis" with payment of €19.10 per week by way of financial support. This scheme comprised a number of administrative circulars detailing the operation of the direct provision scheme, [62] underpinned by section 13 of the Social Welfare (Miscellaneous Provisions) Act 2003 which provides:

> "(4) (a) A person shall not be entitled to a payment referred to in subsection (3) where—
>
> (i) the person is not lawfully in the State, or
>
> (ii) the person has made an application to the Minister for Justice, Equality and Law Reform for a declaration under paragraphs (a) or (c) of section 8 (1) of the Refugee Act 1996, other than a person—

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[61] The background to the introduction of direct provision is set out in the FLAC Report *Direct Discrimination?* which notes at p.8: "In November 1999, the Minister for Justice, Equality and Law Reform stated the government's intention to introduce Direct Provision as a matter of 'extreme urgency', commenting that the number of applications for asylum were 'spiralling out of control' and announcing the need for the burden to be spread throughout the country. The Minister also expressed concern that 'the welfare scheme must not act as a pull factor for non-genuine asylum seekers.' The United Kingdom was introducing Direct Provision in April 2000 and the Minister was of the view that if Ireland did not have a similar scheme up and running by that time, the country would be overwhelmed by the numbers of asylum applicants. Indeed government correspondence at the time shows that the primary motivation for introducing the scheme was to follow the regime being implemented in the UK."

[62] Circulars 04/00 stated that newly arrived asylum seekers should be accommodated in an "arrivals reception centre" on a full board basis in Dublin, with the expectation that they should be "dispersed" to alternative accommodation centres outside of Dublin within two weeks. Because the expectation was that all asylum seekers would be accommodated in direct provision, Health Boards were directed that social welfare payments in respect of rent supplements and deposits should not be made available to asylum seekers "save in exceptional circumstances". Circular 05/00 provided guidance to the Health Boards on what constituted exceptional circumstances, generally limited to exceptional social or medical grounds.

> (I) in respect of whom a declaration within the meaning of section 17 of the Refugee Act 1996 is in force..."

Section 17 of the Social Welfare (Miscellaneous Provisions) Act 2004 further limited the availability of social welfare payments to asylum seekers by introducing a "habitual residence" requirement in respect of certain social assistance payments.[63] Breen has criticised the cumulative effect of these legislative and administrative provisions, stating that "[t]hese provisions have resulted in many asylum seekers being forced to live in over-crowded conditions of abject poverty since as far back as 2000."[64] Similar conclusions were reached by FLAC in its 2002 report *Direct Discrimination?*, which called for an end to the system of direct provision, stating:

> "The experience of dispersed asylum seekers living in Direct Provision is well documented and generally the picture is one of social exclusion, poverty and hopelessness. With the scheme now in operation for over three years, the danger is that it will become a permanent feature of the social welfare system."[65]

In its follow-up report in 2009, *One Size Doesn't Fit All: A Legal Analysis of the Direct Provision and Dispersal System in Ireland, Ten Years On* the organisation noted that the system of direct provision, built upon the exclusion of asylum-seekers from mainstream social welfare benefits, had been further entrenched by recent legislation which provides that no asylum-seeker can ever meet the "habitual residence"

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[63] One parent family payment, child benefit, disability allowance, carer's allowance, widow/widower's (non-contributory) pension, blind person's pension and the old age (non-contributory) pension.

[64] Breen "The Policy of Direct Provision in Ireland: A Violation of Asylum Seekers' Right to an Adequate Standard of Housing" (2008) 20(4) International Journal of Refugee Law 611 at 613.

[65] *Ibid* at p.6.

test. This legislation came about after FLAC succeeded in obtaining decisions from the Social Welfare Chief Appeals Officer that asylum-seekers who had been residing in the State for lengthy periods of time awaiting finalisation of their refugee applications could meet the habitual residence criteria. The government acted swiftly to reverse the effect of these decisions, by introducing an amendment to the Social Welfare and Pensions (No.2) Bill 2009 which was then before the Dáil. Section 15 of the Social Welfare and Pensions (No.2) Act 2009 amended section 246(7) of the Social Welfare Consolidation Act 2005 to provide:

> "The following persons shall not be regarded as being habitually resident in the State for the purpose of this Act:
> (a) a person who has made an application under section 8 of the Act of 1996 and where the Minister for Justice, Equality and Law Reform has not yet made a decision as to whether a declaration under section 17 of the Act of 1996 will be given in respect of such application..."

Kneebone has expressed concern about the implications for the rule of law of the "use of legislation which overturns judicial decisions whose outcomes the executive disapproves of", suggesting it is indicative of a lack of integrity and the absence of an integrated legal system which fully respects and implements the rights of refugees.[66] As Harvey has expressed it, "by such action governments show their lack of concern for principle in the face of public policy imperatives."[67]

The rule of law is also threatened by the direct provision system insofar as compliance with the formal processes for introduction of legislation are concerned. As noted above, the direct provision system has no legislative basis, having been established primarily by way of

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[66] *Op cit* at p.58.

[67] Harvey "Asylum Seekers, Ultra Vires and the Social Security Regulations" (1997) Public Law 394.

administrative circulars. The fact that such a system operates on a non-statutory basis, and has never been the subject of legislative consideration, is troubling indeed from the perspective of the rule of law. The system of direct provision has grave implications for the rights of refugees across a broad spectrum including the dignity of the person, the right not to be subjected to inhuman and degrading treatment and the right to respect for private and family life. Smyth has suggested that the scheme of direct provision could be challenged on the basis of the European Convention on Human Rights, or even under the EU Charter of Fundamental Rights. [68] Furthermore, in 2014 the Human Rights Committee expressed concern at the lack of a single application procedure for the consideration of all grounds for international protection, "leading to delays in the processing of asylum claims and prolonged accommodation of asylum seekers in Direct Provision centres which is not conducive to family life."[69] The Committee also expressed regret at the lack of an accessible and independent complaints mechanism in direct provision centres.

Direct provision is currently the subject of a legal challenge before the High Court, which was still being heard at the time of writing in May 2014. In *A v Minister for Justice, Equality and Law Reform* the applicants have issued a wide ranging, fundamental attack on the legality of direct provision from a number of perspectives, including the lack of a statutory basis for direct provision and direct provision allowance, the violation of fundamental human rights under both the Constitution and the European Convention on Human Rights in direct provision as well as the blanket exclusion of asylum seekers from receiving social welfare under social welfare law. It is instructive to note in this regard that the High Court of Northern Ireland in *Re ALJ* refused to permit the applicant

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[68] See Smyth "Children, Direct Provision and the European Convention on Human Rights" in Egan, Thornton and Walsh (eds) *Ireland and the ECHR: 60 Years and Beyond* (Bloomsbury, 2014).

[69] United Nations Human Rights Committee *Concluding observations on the fourth periodic report of Ireland* (August 19, 2014) at para.19.

and her children to be returned to this jurisdiction where they had initially claimed asylum, on the basis that the system of direct provision was contrary to the best interests of the child.[70] The decision of the High Court may have significant implications not just for the system of direct provision and those who live in it, but also for the rule of law in Ireland, and it is submitted that much will depend on whether the court adopts a thin, formalist approach or a more substantive, rights based approach to the determination of those proceedings.

Right of residence/travel

The issue of identity documentation and refugees can raise complex and sometimes controversial considerations. As UNHCR has noted, "[i]n most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents." [71] Hathaway considers two alternative reasons for a refugee's arrival without a passport, "either because they were incapable of (safely) securing that document before departure, or because its destruction was effectively compelled to avoid visa controls, carrier sanctions, or other impediments to their escape and entry into an asylum state."[72] Article 27 of the Refugee Convention makes provision for refugees arriving without identity papers in the following terms:

> "The Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document."

The availability of such documents is expressly based on the *fact* of presence in the territory of the state, and is not limited to *lawful* presence, as is the case with other substantive rights enjoyed by refugees.

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[70] [2013] NIQB 88.

[71] UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* at para.196.

[72] Hathaway *op cit* at pp.840-841.

Further provision is made for the issuing of travel documents to refugees in Article 28 of the Refugee Convention, which provides:

> "The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require...
> The Contracting States may issue such a travel document to any other refugee in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence."[73]

It would seem that the purpose of the document to be issued pursuant to Article 27 of the Refugee Convention is to provide some proof of identity to all refugees and asylum seekers in the State. The document provided for in Article 28 is not merely for the purpose of attesting to a refugee's identity, but is also intended to provide for travel outside of the State by the holder of the document; essentially, such document is intended as a surrogate passport.[74] In terms of the scope of the obligation pursuant to Article 28, Hathaway notes that the effect of the provision is that "governments oblige themselves not only to issue Convention travel documents, but more importantly to honour the refugee travel documents issued by other state parties, to make transit visas available to refugees as required, and to re-admit the holders of refugee travel documents issued by them", concluding "[t]he net result is to establish a unified

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[73] Note that further, detailed provisions in relation to the issuing of travel documents pursuant to Article 28 is made in the Schedule to the Refugee Convention, paras. 1-16.

[74] A recognised refugee cannot, of course, obtain a passport from his or her country of origin without risking revocation of refugee status, as the act of applying for an obtaining a passport may be seen as an indication of cessation of a protection need pursuant to Article 1C of the Refugee Convention; see further UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status* at paras.111-118.

regime for international freedom of movement that exists in parallel to the more general passport-based system."[75]

In terms of the limitations of the Convention travel document, it is clear from the Schedule to the Refugee Convention that the issue of a Convention travel document "does not in any way entitle the holder to the protection of the diplomatic or consular authorities of the country of issue..."[76] Furthermore, it is clear from the terms of Article 28 itself that the obligation to issue travel documents to refugees is not absolute; exceptions can be made for "compelling reasons of national security or public order." Examples given of the circumstances in which the "national security" ground might be invoked in order to deny a refugee a travel document include "if a refugee is travelling to raise funds for, or otherwise to contribute to the endeavours of, a terrorist organisation", whilst the "public order" ground is generally understood to permit states to refuse to issue a travel document for a refugee in respect of whom a prosecution is outstanding, thus enabling the state to prevent the refugee from evading prosecution and/or punishment.[77]

The right to travel is also governed by Article 12 of the International Covenant on Civil and Political Rights, which states:

> "2. Everyone shall be free to leave any country, including his own.
>
> 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and

[75] *Op cit* at p.846.

[76] Paragraph 16.

[77] Hathaway *op cit* at pp.864-865.

are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country."

As Nowak has commented of Article 12, "[f]reedom to leave and emigrate is available to *everyone,* i.e. to nationals and aliens alike, and is not conditioned on lawful residency within the territory of a state party."[78] Thus, the right of refugees to travel outside of the host state is guaranteed by Article 12 of the ICCPR irrespective of whether a determination has been made in respect of refugee status. Furthermore, the Human Rights Committee has recognised that "the right to leave one's country is essentially meaningless without access to the documentation required for travel abroad", and has thus determined that Article 12(2) requires states to issue the necessary documents to facilitate that travel, unless there is a valid reason for refusing to do so.[79]

The issuing of travel documents is provided for in Irish law by section 3(2)(a)(iii) of the Refugee Act 1996, which provides that:

"a refugee in relation to whom a declaration is in force—
(iii) shall be entitled, subject to section 4 (2)—
(I) to reside in the State, and
(II) to the same rights of travel in or to or from the State as those to which Irish citizens are entitled"

Section 4(1) of the 1996 Act provides that the Minister for Justice shall, subject to subsection (2), "issue to a refugee in relation to whom a declaration is in force a travel document identifying the holder thereof as

[78] Nowak *United Nations Covenant on Civil and Political Rights* (2nd ed, Engel, 2005) at p.204.

[79] Hathaway *op cit* at p.850.

a person to whom a declaration has been given." Section 4(2) of the 1996 Act provides:

> "(2) The Minister may, in the interest of national security or public policy ("ordre public"), refuse to issue a travel document."

However, it is clear that section 3 and 4 do not apply to asylum-seekers, or those awaiting a decision on their refugee application. It would seem that the requirement in Article 27 of the Convention to issue an identity document to such persons is met by the provisions of section 9 of the Refugee Act 1996. Section 9(1) and (2) provide that a person who has applied for asylum in the State shall be entitled to remain in the State until the conclusion of his or her refugee application. Section 9(3) goes on to provide:

> "(3) The Minister shall give or cause to be given to [such person] a temporary residence certificate ... stating the name and containing a photograph of the person concerned, specifying the date on which the person's application for a declaration was referred to the Commissioner and stating that, subject to the provisions of this Act, and, without prejudice to any other permission or leave granted to the person concerned to remain in the State, the person referred to in the certificate shall not be removed from the State before the final determination of his or her application."

However, it should be noted that in practice, such documents contain a statement that "This is not an identity document". This would prima facie seem to be contrary to the requirements of Article 27 of the Refugee Convention.

In conclusion, recognised refugees have the right to a travel document pursuant to section 3(2)(a)(iii) and 4(1) and (2) of the 1996 Act; whilst these provisions have not been the subject of judicial consideration, they

would appear to comply with the requirements of Article 28 of the Convention both in terms of the restriction of the right to recognised refugees, and the permissible exceptions provided for in section 4(2). For asylum-seekers and those awaiting determination of refugee status, the temporary residence certificate issued pursuant to s.9(3) of the Refugee Act 1996 goes some way towards meeting the requirements of Article 27, but regarding the practice of stating that such documents are not identity documents, there may be an issue vis-a-vis Article 27 of the Refugee Convention.

Citizenship

The concept of integration is inextricably linked with discussions of durable solutions for refugees.[80] Hathaway describes the concept of "local integration" in this regard as follows:

> "Local integration means in essence that a refugee is granted some form of durable legal status that allows him or her to remain in the country of first asylum on an indefinite basis, and fully to participate in the social, economic, and cultural life of the host community."[81]

Chapter V of the Refugee Convention, which addresses "Administrative Measures", provides for naturalisation of refugees in Article 34, which states:

> "The Contracting States shall as far as possible facilitate the assimilation and naturalisation of refugees. They shall in particular make every effort to expedite naturalisation

[80] See further Chimni 'From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems" (2004) 23(3) Refugee Survey Quarterly 55 and UNHCR *Refugee Protection and Durable Solutions in the Context of International Migration: Report on the High Commissioner's Dialogue on Protection Challenges* (2008).

[81] Hathaway *op cit* at p.977.

proceedings and to reduce as far as possible the charges and costs of such proceedings."

It has been suggested that "the refugee rights regime prohibits the isolation of refugees from their host communities and requires that they be granted a broad array of social, economic and civil rights on a par with those enjoyed by others in the host state community."[82] On this view, the provisions of Article 34 on naturalisation in fact operate in such a way as to bring a person's refugee status to an end,[83] with the newly acquired citizenship of the host state offering to the refugee more extensive rights than those imposed under either the Convention or indeed, international human rights law.

It seems clear from the wording of Article 34 that there are three separate elements to the provision: first is the obligation to facilitate assimilation;[84] secondly, the obligation to facilitate naturalisation; and thirdly, the specific obligation to expedite naturalisation proceedings and so far as possible reduce the charges and costs of such proceedings. In terms of the nature of the first obligation, Weis is clearly correct in his

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[82] *Ibid* at p.978.

[83] This arises as a result of the provisions of Article 1(C)(3) of the Convention, which provides: "This Convention shall cease to apply to any person falling under the terms of section A if: (3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality". The concept of cessation of refugee status will be discussed further in Chapter 6.

[84] The use of the term "assimilation" in this context was not without controversy; as Joly observes, contemporary refugees may not seek citizenship in the asylum state, even when it is available to them. "Despite the advantages to be gained, many, if not most, refugees are reluctant to become citizens of the host country, or do so only after a long time has elapsed in exile. Several factors shape this attitude, of which the most important is loyalty to the homeland which they were forced to leave" D Joly "Refugees: Asylum in Europe?" (1992) at p.64. See further Hathaway op cit at pp.981-984.

description of the article as being only a recommendation,[85] as opposed to a strong obligation.[86]

Hathaway describes the concept of assimilation as "a means of giving refugees a fair chance to persuade states of their suitability for citizenship."[87] Thus, as Grahl-Madsen states:

> "What is meant ... is in fact the laying of foundations, or stepping stones, so that the refugee may familiarise himself with the language, customs and way of life of the nation among whom he lives, so that he – without any feeling of coercion – may be more readily integrated in the economic, social and cultural life of his country of refugee."[88]

One issue which is not always clearly addressed in the academic commentaries on Article 34 is the extent to which its provisions may be said to relate to the substantive requirements for naturalisation as opposed to the procedural framework governing such applications. For example, Hathaway seems to conflate the two, suggesting that Article 34 is "an appeal to [state parties] to accelerate their procedure"[89] before going on to discuss the Hungarian and Canadian approaches whereby the substantive requirements for applications for naturalisation were reduced in cases of refugee applicants. It is suggested that, on the face of the Article itself, there is no reason why the requirement to "facilitate the assimilation and naturalisation of refugees" should not extend to substantive as well as procedural aspects of naturalisation law, and that this approach is consistent with a substantive, rights-based approach.

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[85] Weis *The Refugee Convention 1951: The Travaux Preparatoires Analysed* (Cambridge University Press 1995) at p.352.

[86] Hathaway op cit at p.981.

[87] *Ibid* at p.984.

[88] Grahl-Madsen *Commentary on the Refugee Convention 1951* (1963, published 1997, UNHCR) at p.247.

[89] *Op cit* at p.986.

Part III of the Irish Nationality and Citizenship Act 1956 (as amended) provides for naturalisation ie acquisition of Irish citizenship. Section 14 (as amended by s.8(a) of the Irish Nationality and Citizenship Act 2001) provides that "Irish citizenship may be conferred on a non-national by means of a certificate of naturalisation granted by the Minister." The conditions for the grant of a certificate of naturalisation are set out in section 15 (as substituted by s.4 of the Irish Nationality and Citizenship Act 1986 and amended by section 8 of the Irish Nationality and Citizenship Act 2004) which states that the Minister may, "in his absolute discretion", grant an application if satisfied the applicant:

> "(a) (i) is of full age, or
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> (ii) is a minor born in the State;
>
> (b) is of good character;
>
> (c) has had a period of one year's continuous residence in the State immediately before the date of the application and, during the eight years immediately preceding that period, has had a total residence in the State amounting to four years;
>
> (d) intends in good faith to continue to reside in the State after naturalisation; and
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> (e) has made, either before a Justice of the District Court in open court or in such manner as the Minister, for special reasons, allows, a declaration in the prescribed manner, of fidelity to the nation and loyalty to the State."[90]

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[90] It should be noted that the concept of "residence" is defined by s.6B(4) of the Irish Nationality and Citizenship Act 1956 (as amended), which provides "A period of residence in the State shall not be reckonable for the purposes of calculating a period of residence under section 6A if—(a) it is in contravention of section 5(1) of the Act of 2004, (b) it is in accordance with a permission given to a person under section 4 of the Act of 2004 for the purpose of enabling him or her to engage in a course of education or study in the State, or (c) it consists of a period during which a person (other than a person who was, during that period, a national of a Member State, an EEA state or the Swiss Confederation) referred to in subsection (2) of section 9 amended by section 7(c)(i) of the Act of 2003) of the Act of 1996 is entitled to remain in the State in accordance only with the said subsection."

Thus, the primary substantive requirements are that the applicant is of good character, has resided in the State for at least four of the previous eight years including one year's continuous residence prior to the date of application, and that the applicant intends in good faith to continue to reside in the State after naturalisation.

Section 16 of the 1956 Act (as inserted by s.5 of the Irish Nationality and Citizenship Act 1986) confers upon the Minister the power to dispense with conditions of naturalisation in certain cases, providing:

> "The Minister may, in his absolute discretion, grant an application for a certificate of naturalisation in the following cases, although the conditions for naturalisation (or any of them) are not complied with:
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> ...
>
> (g) where the applicant is a person who is a refugee within the meaning of the United Nations Convention relating to the Status of Refugees of the 28th day of July, 1951, and the Protocol Relating to the Status of Refugees of the 31st day of January, 1967, or is a Stateless person within the meaning of the United Nations Convention relating to the Status of Stateless Persons of the 28th day of September, 1954."

Section 16 of the 1956 Act as amended thus allows the Minister to waive the substantive requirements for acquisition of Irish citizenship in the case of a recognised refugee. The section might thus be described as complying with the provisions of Article 34 of the Refugee Convention which encourages states to facilitate the assimilation and naturalisation of refugees.

However, whilst the provisions of section 16 might be regarded as sufficient to meet the Convention's emphasis on facilitating assimilation and naturalisation of refugees, recent case law in Ireland has indicated that the practice in this area may fall short of the stated aim, particularly

in respect of the Minister's "absolute discretion" in the exercise of his powers pursuant to section 16. This once again illustrates the extent to which substantive rights may be undermined by restrictive procedural practices. The extent of the obligation on the Minister to waive the substantive requirements in the case of a recognised refugee was considered by the High Court in the case of *AB v Minister for Justice, Equality and Law Reform.*[91] The applicant was a Nigerian national who had been recognised as a refugee in the State and subsequently applied to the Minister for a certificate of naturalisation in accordance with the provisions of the 1956 Act. The Minister refused this application in the exercise of his "absolute discretion", but enclosed with the Minister's decision was a note from the citizenship section of the Department of Justice which recommended refusal of the application for naturalisation on the grounds that the applicant had "come to the adverse attention of An Garda Síochána".[92] The applicant subsequently instituted judicial review proceedings seeking to challenge the decision to refuse his application for naturalisation, relying *inter alia* on the provisions of Article 34 of the Refugee Convention. Cooke J held that the Minister's refusal to grant the application for naturalisation was primarily on the grounds that he was not satisfied that the applicant met the "good character" requirement set out in section 15(1) of the Act. The court did not engage with the applicant's complaint that this decision was contrary to Article 34 of the Refugee Convention, holding that the Minister had "implicitly declined" to consider the possible exercise of the discretion under section 16 to waive the "good character" condition. Cooke J concluded that the applicant's complaints could not be remedied by the court but instead suggested that the applicant could make a further application for naturalisation to the Minister in which he could address the various matters complained of in the proceedings. This decision involves scant consideration of the requirements of Article 34 and its

[91] [2009] IEHC 449.

[92] This referred to the fact that the applicant had been charged with driving without a licence and failure to produce a driving licence, although no conviction was recorded as the summonses were never served on the applicant

requirement that states facilitate, as far as possible, a recognised refugee in acquiring citizenship and is indicative of a restrictive, narrow judicial approach which is not particularly concerned with vindicating the rights of the refugee.

The requirements of Article 34 of the Refugee Convention received more extensive consideration by Clark J in *Abuissa v Minister for Justice, Equality and Law Reform.*[93] The applicant was a Palestinian national who was granted refugee status in the State. He applied for naturalisation pursuant to the 1956 Act, which application was ultimately refused. No reasons were given for the minister's decision; the decision simply stated that in reaching his decision "the minister has exercised his absolute discretion, as provided for by the Irish Nationality and Citizenship Acts 1956 and 1986." The applicant subsequently instituted judicial review proceedings challenging the Minister's refusal of his application on the basis that the failure to give reasons for the refusal to grant a certificate of naturalisation was a breach of fair procedures and natural and constitutional justice. It was submitted that in the absence of reasons, it was not possible to determine whether the Minister had accorded with his obligation to act fairly and in accordance with natural or constitutional justice, thus depriving the court of its jurisdiction to review the reasonableness of the minister's decision. A secondary ground advanced on behalf of the applicant was that Article 34 of the 1951 Convention Relating to the Status of Refugees places an obligation on the Minister to complete the refugee process by integrating the applicant into Irish society by the grant of naturalisation. In response, the Minister emphasised the "absolute discretion" conferred on him by section 15(1) of the Irish Nationality and Citizenship Act 1956 as amended.[94]

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[93] [2011] 1 IR 123.

[94] Reliance was placed on *Pok Sun Shum v Ireland* [1986] ILRM 593 where Costello J held that while the Minister's discretion must be exercised in accordance with the principles of constitutional and natural justice, natural justice did not require reasons to be provided in every case. Costello J furthermore held that the Minister had a very wide

Clark J noted at the outset that the framework of the court's assessment of the arguments was limited because there had been no constitutional challenge to the legality of sections 15 or 16 of the Irish Nationality and Citizenship Act 1956 as amended. Insofar as the applicant had argued that the Minister was obliged to give reasons for the decision to refuse the application for naturalisation, Clark J was satisfied that *Pok Sun Shum* remained good law and had not been overruled by the subsequent decisions of *Mishra v Minister for Justice*,[95] *LGH v Minister for Justice*[96] and *AB v Minister for Justice*.[97] It was held that if the legislature had intended that the Minister should provide reasons, it was highly unlikely that he would have been given absolute discretion by the 1956 Act, or that the words "absolute discretion" would have been retained in the amendment in 1986.

However, Clark J accepted the principle enunciated by Costello J in *Pok Sun Shum* that the minister's absolute discretion is fettered by the obligation to act fairly and in accordance with the principles of natural justice. Turning to this issue, it was noted that:

> "there is no *right* to a certificate of naturalisation. The grant of such a certificate is a *privilege*. In such circumstances, different principles apply compared with a situation where the applicant has a right to a benefit subject to compliance with statutory pre-determined requirements. The grant of a certificate of naturalisation which leads on to the entitlement to travel on an Irish passport as an Irish national is a privilege which for good reasons is jealously guarded."[98]

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discretion to grant or refuse a certificate of naturalisation, which was not a right but a privilege.

[95] [1996] 1 IR 189.

[96] [2009] IEHC 78.

[97] [2009] IEHC 445, discussed above.

[98] [2011] 1 IR 123 at 135 (emphasis in original).

Clark J identified the fundamental question thus arising as "whether the court can determine that the minister's decision to refuse to grant a certificate of naturalisation to a foreign national should be accompanied with some statement of reason", noting that "in effect such a determination would qualify the minister's absolute discretion and may give rise to the inference that those reasons can then be reviewed by the court."[99] Clark J concluded that the powers of the Minister to grant or refuse a certificate of naturalisation:

> "forms part of the executive functions of government where courts are usually reluctant to interfere and which are not usually considered justiciable issues on the basis of the doctrine of the separation of powers. The law has been and remains that generally, where defence, security or international relations issues arise, the Minister is not obliged to give reasons for his decisions. If he chooses to rely on his absolute discretion, then in the absence of a demonstrated breach of constitutional justice or manifest unfairness, or a prima facie case of mala fides, his decision cannot be challenged. If the Minister elects not to give reasons, that is within his prerogative and his decision must be accepted unless it can be shown that the actions of the Minister are mala fides. No such allegation was made in this case."[100]

In relation to the applicant's secondary ground of challenge concerning Article 34 of the Convention, Clark J noted that there was nothing in the

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[99] *Ibid* at pp.135-136. Reference was made to analogous circumstances where public bodies may not be required to give reasons for the exercise of discretionary decision-making powers, such as the right of the Director of Public Prosecutions not to initiate a prosecution of any particular offence without providing reasons, the Minister's decision to attach conditions to temporary release from prison as considered in *Breathnach v Minister for Justice, Equality and Law Reform* [2004] 3 IR 336 and the Minister's refusal to grant temporary release without reasons which was upheld by the Supreme Court in *Kinahan v Minister for Justice, Equality and Law Reform* [2001] 4 IR 454.

[100] At p.138.

Refugee Act 1996, as amended, or its appendices that in any way qualified the minister's absolute discretion pursuant to s.15 of the Irish Nationalisation and Citizenship Act 1956, as amended. It was noted that:

> "[w]hile the terms of the Geneva Convention guide and advise the State on the assessment and determination of refugee status, the Convention does not displace domestic law. The executive arm of the State through the Minister retains the ultimate power to grant naturalisation and citizenship to all foreign nationals including recognised refugees."[101]

Clark J noted that Article 34 of the Convention was not incorporated into domestic law by reason of its inclusion in a schedule to the Refugee Act 1996 and it was not the law of the State. On the basis that there was nothing in the Refugee Act 1996 to suggest an intention on the part of the Oireachtas to incorporate Article 34 of the Refugee Convention into domestic law, Clark J held that the applicant could not rely on the Convention in his challenge to the Minister's decision to refuse his application for naturalisation. The court's approach to the issues in *Abuissa* fall squarely within the narrow, formalist approach, permitting deference to the executive and administrative processes to outweigh the rights of the refugee. Clark J's approach to the application of Article 34 is particularly disappointing in that it permits divergence between the State's commitment to the provisions of the Convention on the international plane while simultaneously allowing departure from such commitment in the domestic sphere, with regrettable consequences for the rule of law.

The most recent consideration by the Irish courts of Article 34 of the Refugee Convention was in the case of *Mallak v Minister for Justice*.[102] The applicant was a Syrian national who was recognised as a refugee

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[101] At para.61.

[102] [2011] IEHC 306.

and applied for naturalisation pursuant to the 1956 Act as amended. The Minister refused that application on identical grounds to those in issue in *Abuissa*, namely in the exercise of his "inherent discretion" and without any reasons for the decision to refuse the application. The applicant subsequently instituted proceedings seeking to challenge the decision to refuse his application for naturalisation, but unlike the narrow grounds of challenge in *Abuissa,* in *Mallak* the applicant challenged the constitutionality of the absolute discretion conferred on the Minister in this context by the 1956 Act. The High Court, which dismissed the challenge, adhered to the narrow, conservative approach espoused by Costello J in *Pok Sun Shum,* and followed by Clark J in *Abuissa,* and simply reiterated that the Minister was conferred with an absolute discretion by section 15 of the 1956 Act and was not obliged to give any reasons for the exercise of that discretion.

This decision was overturned on appeal by the Supreme Court, which delivered an important ruling on the constitutional right to fair procedures including the right to a reasoned decision.[103] The Supreme Court rejected the contention that the "absolute discretion" conferred on the Minister necessarily implied that he was not obliged to have a reason, saying "that would be the very definition of an arbitrary power."[104] Importantly, Fennelly J expressly invoked the rule of law in this regard:

> "Leaving aside entirely the question of the disclosure of reasons to an affected person, *it seems to me axiomatic that the rule of law requires all decision-makers to act fairly and rationally*, meaning that they must not make decisions without reasons."[105]

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[103] *Mallak v Minister for Justice* [2012] 3 IR 297; [2013] 1 ILRM 73.

[104] Per Fennelly J, at pp.312/87.

[105] *Ibid.*

Fennelly J noted that once it was established that there must be a reason for a decision, "the characterisation of a decision-maker's discretion as absolute provides no justification for the suggestion that he is dispensed from observance of such requirements of the rules of natural and constitutional justice as would otherwise apply."[106] The Supreme Court also referred with approval to the decision of Hogan J in *Hussain v Minister for Justice* where he stated that the conferral of an absolute discretion on the Minister:

> "[N]evertheless cannot mean, for example, that the Minister is freed from the obligations of adherence to the rule of law, which is the very cornerstone of the Irish legal system … Nor can these words mean that the Minister is free to act in an autocratic and arbitrary fashion, since this would not only be inconsistent with the rule of law, but it would be at odds with the guarantee of democratic government contained in Article 5 of the Constitution."[107]

The decision of the Supreme Court in *Mallak*, and that of Hogan J in *Hussain,* are clearly of great significance insofar as the rule of law is concerned. Both courts undoubtedly adopted a rights based, substantive conception of the judicial role in the context of the disputes before them (both of which concerned the rights of refugees to naturalisation) and insofar as the decisions imposed both positive and negative duties on the Minister for Justice to exercise his statutory powers in accordance with fundamental rights, they are indeed to be welcomed.

Family reunification[108]

Given the universal acceptance of the importance of the family unit, it is somewhat surprising that the Convention Relating to the Status of

[106] At pp.313/88.

[107] At para.17, per Hogan J.

[108] Parts of this discussion are drawn from an article published as Brazil "Recent Issues in Refugee Family Reunification under Irish Law" (2009) DULJ 412.

Refugees 1951 makes no reference to the concept of family reunification. Instead, the issue was dealt with by the Final Act of the Conference Plenipotentiaries at Recommendation B, where it was recommended that governments take the necessary measures for the protection of the refugee's family, especially with a view to:

> "(1) ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country, and (2) the protection of refugees who are minors, in particular unaccompanied children and girls."[109]

Hathaway explains the absence of any specific guarantee in the text of the Refugee Convention itself as follows:

> "The drafters of the Refugee Convention assumed that the family members of a refugee would benefit from the protection of the Refugee Convention, even if not able themselves to show a 'well-founded fear of being persecuted'. Under earlier refugee accords, there had been a consistent pattern of assimilating family members to the "head of the family" for purposes of defining entitlement to the benefits of refugee status. That practice was affirmed and broadened by the Conference of Plenipotentiaries, but only as a commitment in principle, not as a matter of clearly binding law."[110]

In the absence of any binding obligations in respect of family reunification under the Convention, family reunification in Ireland is governed primarily by section 18 of the Refugee Act 1996, in the light of

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[109] Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 189 UNTS 37, 1951, Section IV. B on the Principle of the Unity of the Family.

[110] Hathaway *The Rights of Refugees in International Law* (Cambridge University Press 2005) at p.541.

the provisions of Article 41 of the Constitution and Article 8 of the European Convention on Human Rights. As Hedigan J noted in *POT v Minister for Justice*:[111]

> "The matter of family reunification is a matter of great urgency and importance. The fundamental importance of the family unit and its right to be protected is enshrined at the heart of the Irish Constitution. It is further protected by Article 16 of the Universal Declaration of Human Rights and Article 8 of the European Court of Human Rights, among other domestic, regional and international instruments.... Thus, family reunification is not only a way of bringing families back together but it is also essential to facilitate the integration of third-country nationals into the State and into the EU."[112]

Section 18 provides for two classes of family reunification: under section 18(3)(b) there is a mandatory entitlement (subject only to national security or public policy) to family reunification in respect of a refugee's spouse, the parents of a refugee who is under the age of 18 on the date of application for family reunification, or the children of a refugee who are under the age of 18 and unmarried on the date of application for family reunification. The second class of family reunification is on a discretionary basis only, and relates to dependent members of the refugee's family who are defined in section 18(4)(b) as "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."

The procedure for applications for family reunification is set out in bare detail in section 18(1)-(3): a refugee in respect of whom a declaration is

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[111] [2008] IEHC 361.

[112] At paras 14 and 15.

in force may apply to the Minister for Justice for permission to be granted to his or her family to enter and reside in the State. Such application is referred to the Refugee Applications Commissioner which is required to investigate the application and to submit a report in writing to the Minister, which "shall set out the relationship between the refugee concerned and the person the subject of the application and the domestic circumstances of the person."[113] If the Minister is satisfied upon receipt of the Commissioner's report that the person is a member of the family of the refugee, the Minister *shall* grant permission to the person to enter and reside in the State in the case of family members as defined in section 18(3), or *may* grant permission to the person to enter and reside in the State in the case of dependent members of the family as provided by section 18(4)(b).

Section 18 is remarkably lacking in detail in respect of crucial aspects of the family reunification process: what is the extent and nature of the "investigation" to be conducted by the Refugee Applications Commissioner? Is the Minister required, or even permitted, to conduct his own investigations upon receipt of the Commissioner's report? Does the family reunification procedure permit or require oral interview, or must it be an application on the papers only? What is the definition of "dependency"? The failure to lay down clear and transparent guidelines for the processing, investigation and determination of family reunification applications clearly pose challenges for the principles of certainty and transparency, and furthermore potentially impact on the rights of refugees in respect of a core aspect of human life. The lack of independence in the decision-making process surrounding family reunification is also a cause of concern from the perspective of the rule of law; in 2011 the Committee on the Elimination of Racial Discrimination encouraged Ireland to "assign the responsibility of dealing with applications for family reunification to an independent

[113] Section 18(2) of the Refugee Act 1996.

authority that would follow due process, and develop a system that would provide an appellate procedure to challenge its decisions."[114]

A number of decisions of the Minister in the family reunification context have been challenged before the High Court in recent times, and a review of the decisions in those cases gives rise to serious concern.[115] The High Court has expressly disapproved of the Minister's reliance on extra-statutory (or perhaps more accurately, non-statutory) criteria for the refusal of family reunification applications. For example, in *RX v Minister for Justice, Equality and Law Reform*[116] the High Court quashed the Minister's refusal of family reunification on the grounds that the applicant was not in a position to support her family members. As Hogan J commented, the test was not whether the refugee could afford to support the family members if they were to come to Ireland, but rather:

> "[i]t addresses ... the somewhat different question of whether the family members were dependent on the refugee at the date of the application. The evidence available to the minister would appear to admit of no conclusion other than that the mother and the daughter were so dependent."[117]

The approach to dependency in the family reunification context also gives rise to concerns from the perspective of the rights of refugees and the rule of law. As noted above, section 18(4) of the Refugee Act 1996 confers upon the Minister a discretion to grant family reunification to "a

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[114] Committee on the Elimination of Racial Discrimination *Concluding Observations on Ireland* (April 4, 2011) at para.25.

[115] See, eg, *Hamza v Minister for Justice, Equality and Law Reform* [2010] IEHC 427; *Hassan Sheekh Ali v Minister for Justice, Equality and Law Reform* [2011] IEHC 115; *M v F* [2011] IEHC 415; *AMS v Minister for Justice and Equality* [2012] IEHC 72; *Ducale v Minister for Justice, Equality and Law Reform* [2013] IEHC 25; *A v Minister for Justice, Equality and Law Reform* [2013] IEHC 356.

[116] [2011] 1 ILRM 444.

[117] *Ibid* at p.460.

dependent member of the family of a refugee", with this class of family members defined in section 18(4)(b) as "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." Whilst the second limb of the definition, based on mental or physical disability, is sufficiently clear, difficulties arise in relation to the first limb of the test – the lack of any clear guidelines on the definition of "dependency", and the restrictive interpretation given to the concept by the Minister for Justice, have resulted in a number of decisions of the High Court. In this regard, it is worth noting that many commentators note that "a useful limiting factor recognised by many States in determining whether more distant family members should be reunited is dependency."[118] This suggests that the concept of dependency may be deployed as a filtering mechanism to limit refugees' rights to family reunification. While there is no consensus in international human rights law instruments, UNHCR offer the following definition:

> "a dependent person is someone who relies for his or her existence substantially and directly on another person, in particular for economic reasons, but also taking emotional dependency into consideration"[119]

It would appear that in some cases at least, the practice of the Minister for Justice has been to assess dependency for the purposes of section 18(4) on the basis of strictly financial support, without proper regard to the broader circumstances of the relationship between the refugee and the family member concerned. This can also cause difficulties in terms

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[118] Jastram and Newland "Family Unity and Refugee Protection" in Feller, Turk & Nicholson (eds) *Refugee Protection in International Law* (Cambridge University Press, 2003) at p.585.

[119] UNHCR Division of International Protection *Resettlement Handbook* (revised ed. Geneva, 1998) at ch.4.6.7(b) cited in Jastram and Newland *ibid.*

of proving the financial dependency; while many refugees support their family members by way of remittances, depending on the circumstances in the country where the family members reside, such remittances may be disbursed via informal channels in the absence of organised banking or financial services.[120] In a number of cases, the Department of Justice has furthermore determined that family members cannot be regarded as dependents where the refugee is him- or herself dependent on social welfare. There is no basis for this requirement, and it is at least arguable that the imposition of such an additional requirement is *ultra vires* the provisions of section 18 of the Refugee Act 1996. The combination of an overly restrictive approach to the definition of dependency, allied to the total absence of any statutory guidance on the issue, is of concern from the perspective of certainty and consistency in this context. Most recently, the High Court has expressed its exasperation with the stance of the Minister in relation to such applications; in *AAM v Minister for Justice*[121] Clark J noted:

> "What factors, then, are relevant to that assessment? The parties in this and other cases agree that there are no guidelines available to applicants as to how the FRU Section will assess "dependency" in family reunification cases. In this case, $200 per month was considered insufficient. In *Hassan Sheik Alli*, sums of between $100 and $400 monthly and up to €1000 on one occasion were found by the FRU Section not to establish dependency of the Somali refugee's adult sister and his deceased brother's three children on the refugee. Without guidelines or guidance, the refugee simply has no idea what the FRU Section will accept as being a sufficient sum to establish dependency on his / her remittances. In the meanwhile, years go by and the refugee visits a solicitor for advice, a dossier of receipts is built

[120] See Crepeau and Nakache *Forced Migration and Global Processes* (Lexington, 2006) at 135-138.

[121] [2013] IEHC 68.

> up; information is obtained on the conditions in which his / her extended family members are living; money is sent to buy mobile phones so contact can be maintained; money is sent to obtain photographic identification, to pay for trips to the capital cities of the countries in which they live to facilitate DNA testing or to acquire supporting documentation; to pay for medical reports on any relevant medical conditions, all in the hope of meeting the undefined, impalpable threshold of "dependency."[122]

Clark J called on the Minister in the strongest terms to "identify some objective yardstick by which dependency can be assessed", concluding:

> "It is not for this court to set down guidelines as to the exercise of Ministerial discretion under section 18(4) but a system must, sooner rather than later, stop the haemorrhage of scarce resources in defending flawed FRU decisions and instead ensure that vulnerable refugees do not endlessly pursue futile applications thus depleting their own financial and emotional reserves. If refugees were better informed on what constitutes dependency and what conditions are de facto applied to family reunification applications, their attentions might be better directed towards obtaining language skills, training, qualifications, work experience and ultimately employment in Ireland before applying again for family reunification."[123]

The decision of Clark J is informed both by considerations of the need for certainty and transparency as hallmarks of the rule of law, but also reflects considerable concern for the rights of refugees in the family reunification context, and can thus be said to clearly conform to a substantive, rights-based approach. By comparison, the failure of the Minister for Justice to publish such guidelines merely bolsters the

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[122] *Ibid* at para.20.

[123] At para.28.

concerns that the rights of refugees may not be fully respected within the family reunification process as it currently operates.

A brief reference should also be made to the most recent decision of the High Court in the family reunification context, namely *Sharif v Minister for Justice, Equality and Law Reform.*[124] In what is probably the most substantive, rights based decision to date on the right of refugees to family reunification, MacEochaidh J held that the restrictive basis on which the Minister for Justice approaches family reunification applications has the effect of subverting the true statutory intent, namely respect for the rights of refugees. MacEochaidh J held that section 18 was enacted "in the interests of facilitating the reception of refugees and ensuring their personal wellbeing while in the State"[125] and further determined that:

> "the Oireachtas has decided that certain dependent relatives of refugees can come to Ireland and in my view this was to enable the refugee to fulfil moral obligations which could not be achieved without the physical presence in the State of the persons in question... In my view s.18(4) is a recognition that some family relationships require personal proximity. To grant a person asylum but to refuse the family access required to meet moral obligations would be to fail to achieve the object of "facilitating the reception of refugees and ensuring their personal wellbeing while in the State.'"[126]

Accordingly, MacEochaidh J concluded that "the central and often exclusive focus placed on financial dependency in family reunification decisions is misplaced" and quashed the decision of the Minister under challenge. The decision in *Sharif* is undoubtedly controversial from a

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[124] [2014] IEHC 57.

[125] *Ibid* at para.35.

[126] *Ibid* at para. 39.

formalist or narrow conception of the rule of law, insofar as the court's decision might be characterised as straying into the area of policy-making. However, from the substantive, rights-based perspective, this decision is fully consistent with the right to respect for family life (a right expressly called in aid by MacEochaidh J) in his decision. The decision has been appealed to the Supreme Court, whose decision is eagerly awaited insofar as it might definitively address the correct approach to applications for family reunification and the issue of dependence.

The final issue which will be canvassed briefly here is the issue of practice and procedure in the processing of family reunification applications, bearing in mind the familiar refrain that substantive rights may be undermined by inadequate procedural frameworks. Serious concerns have arisen regarding undue delay in the processing of family reunification applications in this jurisdiction; this is by no means unusual, as Hathaway notes: "there are often prolonged delays in authorising family reunification in developed states."[127] Staver reports "20% of family reunification applications for refugees in Canada take more than 32 months to process for applicants from West Africa, more than 39 months from Pakistan and more than 37 months from Sri Lanka."[128] Jastram and Newland attribute the growing phenomenon of extensive delays in processing family reunification applications to "heightened security concerns following the 11 September 2001 terrorist attacks in the United States" as a result of which "family reunification

[127] Hathaway *The Rights of Refugee under International Law* (Cambridge University Press, 2005) at 537.

[128] Staver "Family Reunification: A Right for Forced Migrants?" Refugee Studies Centre, Working Paper No. 51, November 2008 at 9 citing Canadian Council for Refugee *Making Speedy Family Reunification a Priority: Manifesto for Family Reunification* (2007).

procedures have become stricter and more protracted as more concrete evidence of family relationships and identity are demanded."[129]

Whilst national security concerns may have contributed to the problem of delays in the family reunification system in recent times, such delay has long been of concern to the UNHCR. It is twenty eight years since the UNHCR Executive Committee recognised the desirability that "countries of asylum and countries of origin support the efforts of the High Commissioner to ensure that the reunification of separated refugee families takes place with the least possible delay,"[130] and ten years since it called for "prioritisation of family unity issues at an early stage in all refugee applications."[131] Similarly, the European Council on Refugees and Exiles (ECRE) has recommended "[f]amily reunification should take place with the least possible delay and within a period of six months from the time an application is made".[132]

In a recent report on refugee integration in Ireland, the UNHCR was critical of delays which were arising in the family reunification system in Ireland, reporting "the main concern in relation to family reunification and integration is the processing time which can take up to 18 or 24 months."[133] Anecdotal evidence suggests that some applications take even longer; in at least one case there was a delay of over three years in

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[129] Jastram and Newland "Family Unity and Refugee Protection" in Feller, Turk & Nicholson (eds) *Refugee Protection in International Law* (Cambridge University Press, 2003) at 562.

[130] UNHCR Excom Conclusion No.24, "Family Reunification" (1981) at para.2.

[131] UNHCR Excom Conclusion No.88 "Protection of the Refugee's Family" (1999) at para.(b)(iv).

[132] European Council on Refugees and Exiles *Position on Family Reunification* (July 2000), at para.32.

[133] *"Mapping Integration: UNHCR's Age, Gender and Diversity Mainstreaming Project on Refugee Integration in Ireland 2008/2009"* April 2009, at 86.

the issuing of visas on foot of a successful family reunification application.[134]

Section 18 of the Refugee Act 1996 contains no guidelines as to the length of time for processing family reunification applications. However, in *POT v Minister for Justice, Equality and Law Reform,*[135] Hedigan J heavily criticised the four year delay in determining the applicant's application for family reunification as follows:

> "the court finds the timeline in the present case to be most disturbing. The requirements of constitutional justice dictate that an applicant seeking administrative relief, whether in the immigration context or otherwise, is entitled to a decision within a reasonable time .... The applicant in the present case applied for family reunification in June, 2003 and did not receive a decision until August, 2007; there was, therefore, a delay of over 4 years. This is a most unsatisfactory state of affairs."[136]

The court's invocation of the requirements of constitutional justice in this context owes much to a substantive, rights based conception of the rule of law. The excessive delays which occurred in this case, and in others, clearly represent a threat to the rule of law (if only from the ancient maxim "justice delayed is justice denied") and the decision of the High Court which makes clear that such delays are unacceptable is therefore welcome.

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[134] See "Review of visa system after family left in camp for 3 years" *Irish Times,* 26 July 2008. Although the Minister for Justice subsequently apologised for what was described as an "isolated error", anecdotal evidence suggests that this "profound system failure" was not unique: "Refugee group says visa errors common", *Irish Times,* 28 July 2008.

[135] [2008] IEHC 361.

[136] *Ibid* at para.16.

In summary, the provisions of section 18 of the Refugee Act 1996 are broadly consistent with the recommendation of the Final Act of the Conference Plenipotentiaries vis-à-vis the protection of family life. However, there are a number of difficulties arising in the implementation of that legislation in practice, with regard to the investigation of applications and in particular the problem of delay, as well as an unduly restrictive definitional approach to such issues as the definitions of "dependence" and "family members". Whilst the decisions of the High Court in such cases as *POT, RX, AAM* and *Sharif* have gone a long way to addressing these concerns, the Supreme Court will be the final arbiter of the appropriate balance to be struck. There is a clear measure of consistency in these decisions of the High Court, emphasising the rights of refugees and their families, and it is to be hoped that the Supreme Court adopts a similar approach in order to fully vindicate the rights of refugees and their families.

Conclusions

From this survey of the rights of refugees provided for by the 1951 Convention, a number of conclusions can be drawn. The rights regime provided for in the Refugee Convention was, at the time of conclusion of the Convention, the most comprehensive scheme of protection for refugees which had ever been achieved. However, one consequence of the Convention's incremental structure of entitlement, with the scope of rights deepening as the connection with the host state develops, is to delay or deny extension of certain rights to refugees whose status has not yet been recognised. Furthermore, whilst a logical explanation can be given for this progressive scale of rights enjoyment, the practical reality is that the refugee rights regime is fragmented, with the determination of the enjoyment of rights depending on the particular status of refugees at any given point in time. As Goodwin-Gill and McAdam note,[137] the language of the Refugee Convention is lamentably unclear as to the meaning of particular categories, and the identification of the precise

[137] *Op cit* at p.307.

scope of a particular article can become a vexed question, particularly once the provisions are transposed into the idiosyncratic features of national legal systems.

Furthermore, it is undoubtedly the case that there are gaps in the scope of the Convention's rights regime, by reason of the failure of the Convention to make any provision at all for certain key issues, such as in the case of family reunification. In such cases, it falls to the domestic legal systems to determine what, if any, response is required. As the survey of jurisprudence in this chapter has demonstrated, in a range of areas concerned with the rights of refugees such as the right of access to the courts, naturalisation of refugees and the right to family reunification, the courts have adopted a substantive, rights based approach in forcing executive and administrative agencies to vindicate to a significant extent the rights of refugees. In other areas, the gaps in the rights regime provided under the Convention might be said to have been exploited by the State, as is most clearly the case in respect of direct provision. The challenge to the direct provision regime in *A v Minister for Justice, Equality and Law Reform* has the potential to effect radical change in respect of what is widely regarded as one of the most shameful aspects of Ireland's refugee regime, and the decision of the court in that case is therefore eagerly awaited.

Chapter 6 Loss and Denial of Refugee Status

Introduction

The Refugee Convention contains a number of provisions detailing the circumstances in which a person who might otherwise qualify as a refugee is excluded from that status.[1] Furthermore, a person who has succeeded in obtaining recognition as a refugee may subsequently be the subject of a determination that he or she is no longer in need of protection as a refugee.[2] The provisions of the Convention governing the circumstances in which a person may be deemed to have lost his or her refugee status, or may be excluded from that status, have also now been supplemented within the European Union by the provisions of the Qualification Directive. Revocation of, and exclusion from, refugee status clearly have a major impact on the rights of refugees, by either denying or withdrawing the fundamental protection afforded under the Convention. The risk of refoulement in the event of an erroneous decision to revoke or exclude is also apparent. It is therefore particularly important that decisions in this area, by primary decision makers and by judicial bodies on review, comply with both the rule of law and the fundamental rights of refugees. These are the issues which will therefore be considered in this final chapter, commencing with a discussion of the relevant provisions under the Convention, before turning to consider the equivalent provisions under EU and Irish law.

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[1] Referred to herein as the "exclusion clauses" as contained in Article 1D, E and F of the 1951 Convention.

[2] Generally referred to as "cessation", which is addressed in Article 1C of the 1951 Convention.

Cessation - Article 1C of the Refugee Convention

Article 1C of the 1951 Refugee Convention sets out six "cessation clauses", detailing the circumstances in which a person who has been recognised as a refugee may be deemed to have lost that status. UNHCR has explained the rationale behind these cessation clauses as being "based on the consideration that international protection should not be granted where it is no longer necessary or justified."[3] The six cessation clauses contained in Article 1C are as follows:

> "This Convention shall cease to apply to any person falling under the terms of section A if:
> (1) He has voluntarily re-availed himself of the protection of the country of his nationality; or
> (2) Having lost his nationality, he has voluntarily re-acquired it; or
> (3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or
> (4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or
> (5) He can no longer, because the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;
> Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;

[3] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (Reissued, Geneva, December 2011) at para.111.

(6) Being a person who has no nationality he is, because of the circumstances in connexion with which he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence;

Provided that this paragraph shall not apply to a refugee falling under section A (1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to return to the country of his former habitual residence."

UNHCR advocates a "strict approach" to the application of the cessation clauses on the basis that refugees should be assured "that their status will not be subject to constant review in the light of temporary changes – not of a fundamental character – in the situation prevailing in their country of origin."[4] To this extent, it can be said that there is a rights basis underpinning Article 1C – refugees' sense of security and integration in a host state should not be undermined.

This link between the application of the cessation clauses and the notion of "durable solutions" is acknowledged by Hathaway, who explains the rationale underpinning Article 1C as follows:

> "The Convention conceives of refugee status as a transitory phenomenon, which expires when the refugee can either reclaim the protection of her own state or has secured an alternative form of enduring protection. Because refugee law is intended simply to afford surrogate protection pending the resumption or establishment of meaningful national protection, the Convention explicitly defines the various situations in which the cessation of refugee status is warranted."[5]

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[4] *Ibid* at para.112.

[5] Hathaway *The Law of Refugee Status* (Butterworths 1991) at p.189. See further UNHCR *Refugee Protection and Durable Solutions in the Context of International Migration: Report on the High Commissioner's Dialogue on Protection Challenges*

Thus, it is said that the cessation clauses in Article 1C are "exhaustively enumerated" and should be "interpreted restrictively";[6] no extension of the grounds for cessation as contained is Article 1C should occur. As Hathaway states:

> "Because these clauses are to be applied only in relation to persons who otherwise present a prima facie need for protection, they ought reasonably to be strictly construed. Nonetheless, it is clear that a state's duty under international refugee law [does not extend] to those persons who benefit from sufficient protection elsewhere..."[7]

The six cessation clauses can be grouped into two broad categories: Article 1C(1) to (4) concerns cessation on the basis of a voluntary act of the refugee which has the effect of neutralising the protection need, whether by re-availment of protection of the country of origin, re-acquisition of nationality previously lost, acquisition of a new nationality or voluntary re-establishment in the country of origin. In contrast, the second category of cessation clauses contained in Article 1C(5) and (6) arises not as a result of any voluntary act of the refugee, but rather as a result of a change in circumstances in the refugee's country of origin which has brought to an end the circumstances which gave rise to the need for refugee protection.[8]

(April 2008). As the UNHCR Excom *Note on International Protection* (July 15, 1986) at p.3 states: "It is the return of refugees to their own community or their integration in a new one which constitutes a permanent or durable solution ... [I]nternational protection is of an essentially temporary nature and is the sum of all action which seeks to achieve the admission of a refugee into, and his secure stay in, a country where he or she is not in danger of refoulement and can enjoy basic rights and humane treatment until the above objective is achieved – that of renewed belonging in a community".

[6] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status *op cit* at para.116.

[7] *Op cit* at p.191.

[8] *Ibid* at paras.114-115.

It is clear that the application of the cessation clauses contained in Article 1C(1) to (4) are premised not only on the conduct of the refugee, but that such conduct is voluntary,[9] intentional[10] and effective.[11] As noted above, the application of the cessation clauses in Article 1C(5) and (6) are not dependent upon any action by the refugee, arising instead due to a change of circumstances in the refugee's country of origin. However, the threshold to be met in respect of such change of circumstances is generally agreed to be onerous; Hathaway identifies three key criteria to be met in order for these cessation clauses to apply.[12] First, the change must be of substantial political significance, in the sense that the power structure under which persecution was deemed a real possibility no longer exists; secondly, there must be reason to believe that the substantial political change is truly effective; and thirdly, the change of circumstance must be shown to be durable, concluding:

> "Cessation is not a decision to be taken lightly on the basis of transitory shifts in the political landscape, but should rather be reserved for situations in which there is reason to believe that the positive conversation of the power structure is likely to last. This condition is in keeping with the forward looking nature of the refugee definition, and avoids the disruption of protection in circumstances where safety may be only a momentary aberration."[13]

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[9] Thus, for example, if a refugee is instructed by his country of refuge to obtain a passport from the consulate of his country of origin, that will not meet the requirement of voluntariness for the purposes of Article 1C(1). Similarly, the granting of nationality by operation of law or decree will not be sufficient to justify the application of Article 1C(2).

[10] See UNHCR Handbook *op cit* at paras.118-134 and Hathaway *op cit* at pp.191-199.

[11] See Kneebone and O'Sullivan "Article 1C" in Zimmermann (ed) *The 1951 Convention Relating to Refugee Status and its 1967 Protocol* (Oxford University Press 2011) at pp.496-498.

[12] *Op cit* at pp.200-203.

[13] *Ibid* at p.203.

Articles 1C(5) and (6) contain an exception to the application of these cessation clauses in relation to cases which demonstrate "compelling reasons arising out of persecution." Grahl Madsen explained the motivation underlying this proviso as arising from concern for:

> "the situation of refugees from Germany and Austria, who were unwilling to return to the scene of the atrocities which they and their kin had experienced, or to avail themselves of the protection of a country which had treated them so badly. The fact was appreciated that the persons in question might have developed a certain distrust of the country itself and a disinclination to be associated with it as a national."[14]

Difficulties arise insofar as this exception is stated to apply "only to statutory refugees under Article 1A, para.1 *ie* those who had suffered persecution prior to 1 January 1951."[15] Notwithstanding this limitation, UNHCR has "consistently argued that the proviso reflects a broader humanitarian principle which should be applied more broadly to all 1951 Convention Refugees."[16] As a result, the compelling reasons exception in Articles 1C(5) and (6) has become "a controversial and disputed provision."[17]

One interesting omission is apparent from Article 1C of the Refugee Convention, and that is the revocation or cancellation of refugee status, for example on the grounds of material misrepresentation. Whilst this scenario is not addressed by Article 1C, the UNHCR Handbook acknowledges that in such circumstances "the decision [granting refugee

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[14] Grahl Madsen *The Status of Refugees in International Law: Volume 1* (AW Sijthoff 1966) at p.410.

[15] See Kneebone and O'Sullivan *op cit* at p.487.

[16] *Ibid* at p.530.

[17] *Ibid.* This will be further addressed below in the context of the cessation provisions in the Qualification Directive.

status] will normally be cancelled." [18] This is a somewhat curious statement given the clear position of UNHCR that the grounds for cessation contained in Article 1C should be regarded as exhaustive and should be interpreted restrictively. The purported distinction drawn as between cessation and cancellation of refugee by UNHCR is less than helpful, and as shall be seen below, the revocation of refugee status on the basis of misrepresentation or failure to disclose "material facts" is an area of considerable difficulty.

Cessation of refugee status in EU law

As noted above, the provisions of the Refugee Convention in respect of both cessation and exclusion clauses must also be read in the light of the Qualification Directive, insofar as a complete understanding of Irish law is now concerned. Article 11 of the Qualification Directive is titled "Cessation", and provides as follows:

> "11(1) A third country national or a stateless person shall cease to be a refugee, if he or she:
> (a) has voluntarily re-availed himself or herself of the protection of the country of nationality; or
> (b) having lost his or her nationality, has voluntarily reacquired it; or
> (c) has acquired a new nationality, and enjoys the protection of the country of his or her new nationality; or
> (d) has voluntarily re-established himself or herself in the country which he or she left or outside which he or she remained owing to fear of persecution; or
> (e) can no longer, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, continue to refuse to avail himself or herself of the protection of the country of nationality;

[18] *Op cit* at para.117.

(f) being a stateless person with no nationality, he or she is able, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, to return to the country of former habitual residence."[19]

It is clear that Article 11(1)(a) to (d) closely corresponds to the cessation clauses contained in Article 1C(1) to (4), carefully preserving the requirements of voluntariness, intention and effectiveness discussed above. Similarly, Article 11(1)(e) and (f) closely resemble the provisions of Article 1C(5) and (6), with one significant exception: there is no provision made for the retention of refugee status derived from "compelling reasons." This omission is described by Lambert as "a step back from international practice."[20] O'Sullivan goes further and suggests that the compelling reasons proviso is part of contemporary international refugee law norms, and that the failure of the Directive to include an equivalent provision renders it inconsistent with customary international law.[21] The absence of the compelling reasons proviso becomes even more problematic in the light of Article 14 of the Qualification Directive, which contains a mandatory obligation on states to revoke refugee status in cases falling within the scope of Article 11. O'Sullivan suggests that the Directive's provisions on cessation in this regard are problematic from the perspective of the rule of law, first insofar as they appear to be incompatible with the Convention and/or customary international law, and secondly insofar as the mandatory obligation to revoke "may not

[19] This provision was unchanged by the Recast Qualification Directive.

[20] Lambert "The EU Asylum Qualification Directive, Its Impact on the Jurisprudence of the United Kingdom and International Law" (2006) 55(1) International and Comparative Law Quarterly 161 at 176.

[21] O'Sullivan "The Intersection Between the International, the Regional and the Domestic: Seeking Asylum in the UK" in Kneebone (ed) *op cit* at p.272, noting that "UNHCR has consistently argued that the exception reflects a broad humanitarian principle which should be applied to *all Convention* refugees."

leave decision makers with sufficient discretion to do justice in individual cases."[22]

In terms of the threshold required for the application of these cessation clauses, it is instructive to consider Article 11(2), which provides:

> "2. In considering points (e) and (f) of paragraph 1, Member States shall have regard to whether the change of circumstances is of such a significant and non-temporary nature that the refugee's fear of persecution can no longer be regarded as well-founded."

At first glance Article 11(2) appears to encompass only two of the three criteria articulated by Hathaway – namely significant and durable political change, but not effectiveness, and to the extent that it may thus be said to reduce the threshold for cessation, it is to be deprecated from both the perspective of the rule of law (insofar as this undermines the regime prescribed by the 1951 Convention) and also the rights of refugees (who may face refoulement if returned to a country where the change of circumstances is significant and non-temporary, but not (yet) fully effective). One solution from the substantive, rights-based approach would be to subsume the effectiveness component within the general concept of significant change, but this approach was not adopted by the Court of Justice in its first decision on cessation, *Abdulla v Bundesrepublik Deutschland.*[23] The applicants were Iraqi nationals who enjoyed refugee status in Germany, but whose refugee status was revoked following upon the overthrow of Saddam Hussein in 2003. The applicants challenged the revocation on the basis that while their original fear of persecution at the hands of the Baath party regime were no longer extant, the general situation in Iraq was such that it was unsafe for them to return there. One of the questions posed by the national court to the

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[22] *Ibid* at p.275.

[23] *Case C-175/03 Abdulla v Bundesrepublik Deutschland* [2010] ECR I-1493.

Luxembourg court was whether revocation arises when persecution is no longer in issue, or whether a more general examination of the risk of harm was required. The Court of Justice commenced its analysis by referring to the Refugee Convention as "the cornerstone of the international legal regime for the protection of refugees" and noted that the provisions of the Qualification Directive must be interpreted in the light of the Directive's general scheme and purpose, [24] while also "respecting the Geneva Convention." This somewhat amorphous statement might be regarded as a less than ringing endorsement for the centrality of the Refugee Convention in the European framework of refugee protection, at least from the perspective of the Court of Justice. Considering the applicable provisions of the Directive, including Articles 9 and 11, the Court of Justice was satisfied that:

> "refugee status ceases to exist where the national concerned no longer appears to be exposed, in his country of origin, to circumstances which demonstrate that that country is unable to guarantee him protection against acts of persecution against his person for one of the five reasons listed in Article 2(c) of the Directive. Such a cessation thus implies that the change in circumstances has remedied the reasons which led to the recognition of refugee status."[25]

On the threshold for cessation provided by Article 11(2), the Court of Justice noted:

> "The change of circumstances will be of a 'significant and non-temporary' nature, within the terms of Article 11(2) of the Directive, when the factors which formed the basis of the refugee's fear of persecution may be regarded as having been

[24] Namely to determine who qualifies for refugee status and the content thereof and to guide the competent authorities of the Member States in the application of the Refugee Convention on the basis of common concepts and criteria.

[25] At para.69.

> permanently eradicated. The assessment of the significant and non-temporary nature of the change of circumstances thus implies that there are no well-founded fears of being exposed to acts of persecution amounting to severe violations of basic human rights within the meaning of Article 9(1) of the Directive."[26]

Although the Court of Justice did not take the opportunity to expressly subsume the concept of effectiveness within the standard for cessation, the reference to the "permanent eradication" of the grounds which gave rise to the original fear of persecution would appear to allay any concerns regarding the possibility of a reduced standard of protection of refugees in the context of cessation under the Directive. This decision may thus be said to meet the requirements of the rule of law insofar as it is broadly consistent with the approach under the Convention advocated by UNCHR, and is further consistent with the substantive protection of the rights of refugees including the crucial right to non-refoulement.[27]

Cessation of refugee status in Irish law

Cessation is provided for in section 21 of the Refugee Act 1996, which provides as follows:

> "(1) Subject to subsection (2), if the Minister is satisfied that a person to whom a declaration has been given—
>
> (a) has voluntarily re-availed himself or herself of the protection of the country of his or her nationality,
>
> (b) having lost his or her nationality, has voluntarily re-acquired it,

[26] At para.73.

[27] See generally Errera "Cessation and Assessment of New Circumstances: A Comment on *Abdulla*" (2011) 23(3) International Journal of Refugee Law 521.

(c) has acquired a new nationality (other than the nationality of the State) and enjoys the protection of the country of his or her new nationality,

(d) has voluntarily re-established himself or herself in the country which he or she left or outside which he or she remained owing to fear of persecution,

(e) can no longer, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, continue to refuse to avail himself or herself of the protection of the country of his or her nationality,

(f) being a person who has no nationality is, because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist, able to return to the country of his or her former habitual residence,

(g) is a person whose presence in the State poses a threat to national security or public policy ("ordre public"), or

(h) is a person to whom a declaration has been given on the basis of information furnished to the Commissioner or, as the case may be, the Tribunal which was false or misleading in a material particular,

the Minister may, if he or she considers it appropriate to do so, revoke the declaration."

It is immediately apparent that the provisions of s.21 of the 1996 go beyond the scope of Article 1C of the Refugee Convention and Article 11 of the Qualification Directive. Whilst s.21(1)(a) to (f) replicate the cessation clauses found in both the Convention and the Directive, the provisions in s.21(1)(g) and (h) have no basis in either of those instruments. Section 21(1)(g) would appear to echo the provisions of Article 32(1) of the Refugee Convention, which is titled "Expulsion" and provides:

> "The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order."

Given that there is no equivalent cessation clause in Article 1C of the Refugee Convention, and having regard to UNHCR's insistence on a restrictive application of that Article, it might be argued that section 21(1)(g) impermissibly extends the scope of cessation of refugee status in Ireland.

Similarly, section 21(1)(h) of the Refugee Act 1996 has no equivalent in either the Refugee Convention or the Qualification Directive. As noted above, the UNHCR Handbook makes brief reference to the possibility of refugee status being cancelled on the basis of material misrepresentation. However, the concept of "information which is false or misleading in a material particular" is not defined in the legislation, and it is submitted that insofar as the phrasing of this section is unsatisfactorily vague, and may tend to undermine the scope of protection of refugees in Irish law.

Section 21(2) of the Refugee Act 1996 provides:

> "(2) The Minister shall not revoke a declaration on the grounds specified in paragraph (e) or (f) where the Minister is satisfied that the person concerned is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself or herself of the protection of his or her nationality or for refusing to return to the country of his or her former habitual residence, as the case may be."

It is noteworthy that section 21(2) of the Refugee Act 1996 preserves the derogation in respect of cessation on compelling grounds, notwithstanding that such derogation was not included in the Qualification Directive, although the compatibility of such provisions with the Directive might also be questionable.

The provisions of the Qualification Directive were incorporated into Irish law by way of the European Communities (Eligibility for Protection) Regulations 2006.[28] Revocation of refugee status is provided for by Regulation 11 in the following terms:

> "11. (1) The Minister may refuse to grant or to renew or may revoke a declaration that a person is a refugee where—
> (a) there are reasonable grounds for regarding him or her as a danger to the security of the State, or
> (b) he or she, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of the State.
>
> (2) Where—
> (a) paragraph (a), (b), (c), (d), (e), (f) or (h) of section 21(1) of the 1996 Act applies, as respects a person to whom a declaration has been given,
> (b) a person to whom a declaration has been given misrepresented or omitted facts (including through the use of false documents) and this was decisive for the granting of the declaration, or
> (c) a person to whom a declaration has been given should have been or is excluded from being a refugee,
> the Minister shall, without prejudice to section 21(2) of the 1996 Act, revoke or, as the case may be, refuse to renew the declaration."

The drafting of this Regulation is less than clear, particularly as regards the interrelationship between the Regulation and section 21 of the Refugee Act 1996, as shall be seen below.

[28] SI No.518 of 2006.

The procedure for revocation of refugee status is set out in section 21(3) of the 1996 Act which requires the Minister to give notice of a proposal to revoke and the reasons for it. The person who is the subject of the proposal is then allowed fifteen days to make representations in respect of that proposal. Pursuant to section 21(4)(b) of the 1996 Act, a person who is notified that the Minister has revoked his or her refugee status may appeal to the High Court against that decision within fifteen working days of the issue of the decision to revoke.[29] On hearing an appeal against a revocation of refugee status, the High Court "may, as it thinks proper, on the hearing of the appeal, confirm the decision of the Minister or direct the Minister to withdraw the revocation of the declaration."

Until relatively recently, it would appear that the power of the Minister for Justice to revoke refugee status was sparingly used. However, in the last number of years, this power has come to be exercised on a more frequent basis,[30] as a result of which the High Court been called upon to consider the issue of cessation and revocation of refugee status in a number of cases. The first such decision is *Gashi v Minister for Justice, Equality and Law Reform.*[31] The appellant was a Kosovar national who was recognised as refugee in 2001. In his refugee application, he claimed to have fled from Kosovo because he had been beaten by police as a

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[29] It is noteworthy that the procedure so prescribed is not a judicial review, but rather a statutory appeal; for a general discussion of the procedural distinctions, see generally Hogan and Morgan *Administrative Law in Ireland* (4th ed Round Hall 2010) at paras.11-106-11-134.

[30] A parliamentary question of February 26, 2014 on the annual statistics concerning revocation of refugee status revealed that the numbers of revocations were minimal up to 2009 (ranging from four revocations in 2005 to 6 revocations in 2008) but that since 2009, the exercise of the power has increased (from fourteen in 2009 to the highest number of thirty revocations in 2011), before falling back to nine revocations in 2013: Dail Debates *Written Answer No.161* February 26, 2014. Although even at its height it might be thought that thirty decisions to revoke refugee status is low, it is worth recalling that the recognition rate in Ireland has also historically been very low.

[31] [2010] IEHC 436.

suspected member of the Kosovan Liberation Army. The Refugee Appeals Tribunal found the applicant to be credible and based on UNHCR advice, decided that he was still at risk of persecution as someone who had refused to join or had deserted from the Kosovan Liberation Army. However, in 2008 the Minister for Justice was notified by the UK Border Agency that prior to his arrival in Ireland, the appellant had applied for asylum in the UK as an Albanian national. Following receipt of this information, the Minister issued the appellant with a formal proposal to revoke his declaration of refugee status on the ground that he had given false and misleading information during the course of his asylum application. The appellant was invited to make representations to the respondent against that proposal but no representations were made. The respondent thereafter revoked the declaration of refugee status and the appellant subsequently appealed that decision to the High Court pursuant to section 21(5) of the Refugee Act 1996 (as amended).

Although no representations were made by the appellant in response to the proposal to revoke, in the course of the appeal he admitted that the fingerprint match was correct, and that he had travelled through the United Kingdom. However, the appellant denied that he had told the UK authorities that he was an Albanian national; rather, he claimed to have told them that he was from Kosovo but of Albanian ethnicity. It was argued on behalf of the appellant that such slight and hearsay information ought not to have been relied on to revoke a declaration of refugee status. It was submitted that at the very least, the respondent ought to have made further enquiries into the information held by the UK Border agency. Thus, it was contended, the process by which the decision to revoke was reached was flawed.

Dealing first with the question of the scope of the court's jurisdiction in a statutory appeal against a decision to revoke refugee status, Cooke J commented:

> "There is no doubt … that this proceeding is not confined by the judicial review rules as it is a statutory appeal in which the Court can 'as it thinks proper' either confirm the respondent's decision to revoke or direct that he withdraw it. The court is not, therefore, limited to judging the legality of the process by which the decision was made by reference only to the information before the respondent at the time. It can decide on the basis of the evidence now available whether the respondent was correct in finding that the original declaration had been given on the basis of information "which was false or misleading in a material particular" in accordance with paragraph (h) of section 21(5) of the 1996 Act."[32]

The court thus held that it could have regard to the appellant's explanation of what he claims to have told the UK Border Agency at the time, together with any other evidence he might now wish to adduce to prove that he was a native of Kosovo and that the information given in 2001 was not false or misleading. Cooke J was "satisfied that such an approach is open to [the court] under section 21(5), notwithstanding the failure to make representations under sub-section (3) of the section at the time."[33]

However, Cooke J noted that this approach presented its own pitfall for the appellant because on the basis of the evidence before the court, it was clear that not only had the appellant been apprehended and fingerprinted in the United Kingdom, but he had made an asylum application there and had stayed in England for a fortnight before abandoning the application and coming to Ireland. The court noted that in the information furnished by the appellant in his asylum application in the State, he stated that he had not claimed asylum in any other country before his arrival in Ireland. Cooke J commented "[t]here can be no doubt in the judgment of the

[32] At para.11.

[33] At para.12.

court that the concealment of the making of the asylum application in the United Kingdom is capable of coming within paragraph (h) of section 21(1) as a material particular which was false or misleading." [34] Accordingly, insofar as the Minister's decision was based section 21(1)(h), the court was satisfied that the non-disclosure of the UK asylum application meant that the information upon which the appellant obtained refugee status in Ireland was false and misleading in a material particular.

On behalf of the appellant it was argued that this was not sufficient to justify the revocation of the declaration and that the court must be satisfied that the information in question was not merely false, but that it was "decisive" to the grant of the declaration at the time. This argument was based on the submission that section 21(1) of the 1996 Act must be read in the light of regulation 11(2) of the European Communities (Eligibility for Protection) Regulations 2006 as set out above. The appellant contended that the combined effect of section 21 of the 1996 Act (as amended) and regulation 11(2)(a) of the 2006 Regulations was that the Minister was entitled to revoke on grounds of false or misleading information only where the information was decisive for the grant of the declaration, ie the facts relating to the fear of persecution and the other components of the definition of refugee. Cooke J rejected this narrow construction of the Minister's power to revoke, and held:

> "the expression 'decisive for the granting of refugee status' is used so as to require refugee status to be revoked where it is clear that the decision to grant it would not have been made had the true full facts been known. Thus, the provision covers the misrepresentation or omission of facts which are directly relevant to the assessment of the application for international protection."[35]

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[34] At para.15.

[35] At para.23.

Cooke J held that "the question to ask is whether the application for protection would have been determined differently had the information not been misrepresented or concealed."[36] Applying this test to the present case, it was held that the declaration of refugee status obtained in 2001 "was tainted by misrepresentation and omission of facts", and in those circumstances the court would not direct the respondent to withdraw the revocation decision. Whilst the decision in *Gashi* is to be welcomed insofar as it offers the first judicial pronouncement on the threshold for revocation of refugee status on the basis of false or misleading information, it is submitted that the decision is troubling insofar as Cooke J concluded that non-disclosure of a previous asylum application equated to the provision of false and misleading information in a material particular. Whilst such non-disclosure is clearly false and misleading, it could be argued that in order to comply with fundamental duty to protect refugees, the concept of a "material particular" ought to relate to an aspect of the core refugee narrative, and that the failure to disclose a previous asylum application falls short of the standard required to justify revocation.

In *Abramov v Minister for Justice, Equality and Law Reform*[37] the High Court considered the Minister's power to revoke refugee status on the grounds of national security or public policy. The appellant was a Russian national who claimed a fear of persecution if returned to Russia on grounds of his religious or ethnic origin by reason of the fact that he was Jewish. He was recognised as a refugee in 2002, but some eight years later received notice that the Minister had revoked his refugee status pursuant to section 21(1)(g) of the 1996 Act on the grounds of his "persistent involvement in criminal activities … resulting in numerous criminal convictions" for which he had been sentenced to terms of imprisonment. On the basis of these convictions, the Minister deemed the appellant as "a person whose presence in the State poses a threat to

[36] At para.25.

[37] [2010] IEHC 458.

national security or public policy" and therefore revoked his refugee status.

The appellant subsequently instituted proceedings appealing against the decision to revoke his refugee status. On behalf of the appellant, it was pointed out that under regulation 11(1) of the European Communities (Eligibility for Protection) Regulations 2006, the Minister is given power to refuse to grant or to renew or revoke a declaration that a person is a refugee where:

> "(a) There are reasonable grounds for regarding him or her as a danger to the security of the State, or
> (b) He or she having been convicted by final judgment of a particularly serious crime, constitutes a danger to the community of the State."

It was submitted that this provision implemented Article 14(4) of the Qualification Directive which provides that member states may revoke, end or refuse to renew refugee status where:

> "(a) there are reasonable grounds for regarding him or her as a danger to the security of the Member State in which he or she is present;
> (b) he or she, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that Member State."

Accordingly, it was submitted that these provisions of the Regulations and the Directive had supplanted section 21(1)(g) of the 1996 Act and that it was no longer permissible for the Minister to rely on para.(g) and the concepts of national security or public policy when, in the context of the present case, the appellant had not been convicted "by a final judgment" of anything which could be said to be "a particularly serious

crime" or that he thereby "constitutes a danger to the community of the State."

Cooke J noted at the outset that section 21(1)(g) of the 1996 Act remained in force and had not been repealed, notwithstanding the implementation of the 2006 Regulations and the transposition of the Qualifications Directive. Secondly, it was noted that the 1996 Act explicitly gave effect to the 1951 Convention on the Status of Refugees in national law and must therefore be construed in so far as possible so as to conform to the provisions of the Convention. Cooke J noted, however, that the Convention distinguishes between the concepts of "cessation" of refugee status pursuant to Article 1C of the Convention which occurs when international protection for the refugee is no longer necessary or justified; and, on the other hand, the expulsion of a refugee pursuant to Article 32 on the ground of national security or "ordre public." Cooke J held that there was "a flaw in the manner in which the 1996 Act has given effect to the Geneva Convention in this regard" and concluded:

> "revocation of the status of refugee is only appropriate and compatible with the terms of the Geneva Convention where one of the events provided for that purpose in Article 1C has occurred. If a Contracting State considers that in the absence of any such change of circumstance, the presence of the refugee in its territory has become intolerable because of the conduct of the refugee, the appropriate course of action lies under Article 32, namely, expulsion. Where the effect of the decision to expel is to return the refugee to the country of nationality, expulsion is only permissible in accordance with Article 33(2) of the Convention namely upon the ground that the refugee has been convicted by a final judgment of a particularly serious crime and thus constitutes a danger to the community of the country of refuge."[38]

[38] At para.22.

The court noted that if the Minister considered that the appellant's criminal record rendered his presence in the State no longer tolerable on grounds of public policy, then the appropriate course was expulsion, which could only be done by means of a decision to the effect that the appellant had been convicted of a particularly serious crime, such that he constituted the danger to the community. Accordingly, Cooke J allowed the appeal and directed the minister to withdraw his decision to revoke the appellant's refugee status. The decision in *Abramov* is noteworthy for its identification of a significant flaw in the provisions of section 21 of the 1996 Act, namely the conflation of cessation and expulsion, and offers welcome clarification of the limited circumstances in which a refugee may be expelled. It is also to be welcomed as an example of the judicial role in subjecting decisions to revoke refugee status to careful scrutiny, and insofar as a divergence was identified between the Convention and Irish law, the court resolved it in a manner compatible with the rights of the refugee.

The most recent decision of the High Court addressing the issue of revocation of refugee status is *Ali v Minister for Justice, Equality and Law Reform.*[39] The appellant was a citizen of Sierra Leone who was recognised as a refugee in 2002. In 2008 the appellant was convicted of the offence of possession of drugs for sale and supply, for which he was sentenced to 18 months' imprisonment. The appellant was also convicted of the offence of possession of a false instrument, namely a false South African passport, for which he was sentenced to 12 months' imprisonment, both sentences to run concurrently. In 2009 the Minister informed the appellant that he proposed to revoke his refugee status pursuant to section 21(1)(g) of the 1996 Act on the basis that he was a person whose presence in the State posed a threat to national security or public policy. Representations were duly made on behalf of the appellant, but the Minister remained unpersuaded and subsequently informed the appellant that his refugee status had been revoked on the

[39] [2012] IEHC 149.

basis that there were reasonable grounds for regarding him as a danger to the security of the state, and that having been convicted by final judgment of a particularly serious crime, he constituted a danger to the community.

O'Keeffe J held that the appeal should be allowed as "having regard to the totality of the respondent's consideration (and that of his officials) of the proposal to revoke the refugee status of the applicant, it cannot stand as it is not a fair and accurate summary of the relevant admitted facts."[40] O'Keeffe J noted that there were a number of errors contained in the Minister's consideration of the matter, including erroneous references to multiple convictions, the nature of the applicant's drugs conviction, a suggestion that the appellant had also been found in possession of drug-dealing paraphernalia and a comment that he could be regarded as "a serious player in the drug scene" which was not supported by any evidence. In those circumstances, O'Keeffe J was "not satisfied that the respondent has acted in a reasonable manner in the preparation of the consideration of the appellant's claim ... the consideration has not been prepared in a reasonable and sufficient manner..."[41] Accordingly, the court made an order directing the Minister to withdraw the notification of revocation of the appellant's refugee status. The decisions in *Abramov* and *Ali* are to be commended for the restrictive view taken by the court in relation to the revocation of refugee status in a manner which, it is submitted, is entirely compatible with the Refugee Convention and the approach advocated by UNCHR. The decision in *Gashi* is somewhat more problematic, incorporating an element of indeterminacy into the revocation of refugee status on the basis of the provision of false and misleading information, by failing to draw strict parameters around the scope of the concept of "a material particular."

[40] At para.38.

[41] At para.41.

Exclusion - Article 1D, E and F of the Refugee Convention

In addition to the circumstances in which the Refugee Convention acknowledges that a person may lose his or her refugee status, the Convention also makes provision for the exclusion of certain persons from recognition as refugees at all. The Convention contains three exclusion clauses in Articles 1D, 1E and 1F; as UNHCR notes, "the first group (Article 1 D) consists of persons already receiving United Nations protection or assistance; the second group (Article 1 E) deals with persons who are not considered to be in need of international protection; and the third group (Article 1 F) enumerates the categories of persons who are not considered to be deserving of international protection."[42] In terms of the general interpretive approach to the exclusion clauses, UNHCR has stated:

> "As with any exceptions to provisions of human rights law, the exclusion clauses need to be interpreted restrictively. As emphasized in paragraph 149 of the Handbook, a restrictive interpretation and application is also warranted in view of the serious possible consequences of exclusion for the applicant..."[43]

Article 1D of the Refugee Convention

Article 1D provides:

> "D. This Convention shall not apply to persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance.
>
> When such protection or assistance has ceased for any reason, without the position of such persons being definitively settled in accordance with the relevant resolutions adopted by the General

[42] UNHCR Handbook *op cit* at para.140.

[43] UNHCR *The Exclusion Clauses: Guidelines on their Application* (December 1996) at para.8.

Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Convention."

Hathaway notes the origins of Article 1D as follows:

> "This clause of the Convention derives from parallel discussions leading to the adoption of the Statute of the Office of the High Commissioner for Refugees. At the time of the Statute's drafting, two specialised refugee relief agencies were already in existence: the UN Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) and the United Nations Korean Reconstruction Agency (UNKRA). In part, this exclusion clause was intended to prevent the overlapping of the mandates of UNHCR and these pre-existing agencies."[44]

However, Article 1D was also motivated in part by "the strongly held view of Arab states that because the plight of Palestinian refugees was the consequences of the establishment of the state of Israel by the United Nations itself, the UN should bear a more direct and obvious responsibility for their well-being."[45] This concern of Arab states that eligibility for Palestinian refugees might ultimately undermine the claim for repatriation of the Palestinian community coincided neatly with Western concerns in respect of a possible influx of Palestinian refugees once the Convention entered into force, thus clearly demonstrating the political dimension underpinning the Convention itself.[46]

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[44] Hathaway *op cit* at pp.205-206, citing Fowler "The Developing Jurisdiction of the United Nations High Commissioner for Refugees) (1974) 7 Human Rights Journal 119 at 126.

[45] *Ibid* at p.206.

[46] See, eg, statement of Mr Baroody of Saudi Arabia to the General Assembly (5 UNGAOR at 359, November 27, 1950): "If the General Assembly were to include the Palestine refugees in a general definition of refugees, they would become submerged and would be relegated to a position of minor importance. The Arab States desired that those refugees should be aided pending their repatriation, repatriation being the only real solution of their problem. To accept a general definition ... would be to renounce

Hathaway notes that Article 1D applies to all Palestinians *eligible* to receive assistance from UNRWA in their home region, not just those who are *in fact* in receipt of such assistance.[47] However, UNHCR has stated that if a person:

> "is outside UNRWA's area of operations, he or she is not 'at present receiving from organs or agencies other than [UNHCR] protection and assistance' within the meaning of paragraph 1 of Article 1D, and therefore 'such protection or assistance has ceased' within the meaning of paragraph 2 of Article 1D. The person is 'ipso facto entitled to the benefits of the [1951] Convention', provided of course that Articles 1C, 1E and 1F of the 1951 Convention do not apply. This would be the case even if the person has never resided inside UNRWA's area of operations."[48]

It is questionable whether such wholesale exclusion of an entire community accords with the fundamental principle of non-discrimination enshrined in Article 3 of the Refugee Convention itself.

Article 1E of the Refugee Convention

The second exclusion clause in the Refugee Convention is contained in Article 1E, which provides:

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insistence on repatriation". The concern of Western states can be seen, for example, in the following statement of the French delegate to the drafting conference: "the problems in [the Palestinian's] case were completely different from those of the refugees in Europe ... Contracting States could [not] bind themselves to a text under the terms of which their obligations would be extended to include a new, large group of refugees": (Statement of Mr Rochefort of France, UN Doc. A/CONF.2/SR.19 at 11, November 26, 1951). See further Hathaway at pp.206-207.

[47] *Ibid* at p.208.

[48] UNHCR *Revised note on the Applicability of Article 1D of the 1951 Convention Relating to the Status of Refugees to Palestinian Refugees* (October 2009) at para.8.

> "E. This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country."

Hathaway explains the rationale for this exclusion clause as follows:

> "If a refugee cannot resume the protection of her own state, the preferred surrogate is surely the acquisition of citizenship in another country which can effectively ensure her welfare. ... Thus, the Convention provides for the cessation of status when the refugee becomes a citizen of her asylum state or of some other country which is able to effectively protect her."[49]

UNHCR has cautioned that a strict test must be applied to the application of Article 1E, and that two conditions must be met in order to justify the application of this exclusion clause: the person who otherwise meets the definition of a refugee in Article 1A must (a) have taken up residence in the country where the application of Article 1E is being examined, and (b) be recognized by the competent authorities of that country as having the rights and obligations attached to possession of the nationality of that country.[50] Hathaway concludes that:

> "exclusion based on de facto nationality is truly an exceptional occurrence which implies the effective legal assimilation of the refugee to his or her host population. Because the clause requires residence in the state willing to confer effective nationality, neither an inchoate right to protection, nor indeed physical presence short of continued residence, is sufficient to warrant exclusion."[51]

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[49] *Op cit* at p.209.

[50] UNCHR *Note on the Interpretation of Article 1E of the 1951 Convention relating to the Status of Refugees* (March 2009).

[51] *Op cit* at p.212-213.

Article 1F of the Refugee Convention

Probably the most commonly invoked, and most frequently challenged, exclusion clause is that contained in Article 1F of the Refugee Convention, which provides:

> "F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

The rationale underpinning Article 1F has been explained as follows:

> "The decision to exclude such persons, even if they are genuinely at risk of persecution in their state of origin, is rooted in both a commitment to the promotion of international morality and a pragmatic recognition that states are unlikely to agree to be bound by a regime which requires them to protect undesirable refugees."[52]

As with Articles 1D and 1E, UNHCR advocates a strict approach to the application of Article 1F because of the seriousness of the consequences for a person who is excluded from refugee status.[53] However, it is clear that the evidential threshold for the application of Article 1F is quite

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[52] Hathaway *op cit* at p.214.

[53] UNHCR Handbook *op cit* at para.149.

generously stated – it is sufficient that there are "serious reasons for considering" that the person has committed an act falling within this exclusion clause, but there is no requirement of a formal charge or conviction.[54] It is sufficient that the decision-maker has "sufficient proof warranting the assumption of [the claimant's] guilt of such a crime."[55]

Article 1F(a) excludes from the Convention's protection those who are guilty of war crimes, a crime against peace or a crime against humanity. Express reference is made to the international instruments drawn up to make provision for such crimes; chief amongst these instruments are the 1945 London Agreement, the Charter of the International Military Tribunal and the 1998 Statute of the International Criminal Court which entered into force on 1 July 2002.[56] The London Charter defines a crime against peace as involving:

> "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing".

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[54] Grahl Madsen *The Status of Refugees in International Law* (Sijthoff 1966) at p.277.

[55] Robinson *The Convention Relating to the Status of Refugees: Its History, Contents and Interpretation* (1953) at p.67.

[56] Other instruments include the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention); the four 1949 Geneva Conventions for the Protection of Victims of War; the 1973 Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity; the 1977 Additional Protocol to the Geneva Conventions of 12 August 1949 Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I); the 1984 Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (the Convention against Torture); and the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda. See further UNHCR *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees* (2003) at paras.10-13.

It seems clear from the nature of this crime, that "it can only be committed by those in a high position of authority representing a State or a State-like entity."[57]

The UNHCR Guidelines on the application of Article 1F define war crimes as including "such acts as wilful killing and torture of civilians, launching indiscriminate attacks on civilians, and wilfully depriving a civilian or a prisoner of war of the rights of fair and regular trial" and note that war crimes may be committed in both international and non-international armed conflicts, depending on the nature of the conflict in question.[58] Crimes against humanity include acts such as genocide, murder, rape and torture as part of "a widespread or systematic attack directed against the civilian population".[59] Because crimes against humanity can be committed in peacetime as well as armed conflict, UNHCR notes that "this is the broadest category under Article 1F(a)."[60]

Article 1F(b) excludes from refugee status persons who have committed a serious non-political crime outside the country of refuge prior to admission to that country as a refugee. The concept of a "serious non-political crime" is not defined in the Refugee Convention itself, but UNHCR offers the following guidance on the interpretation of the phrase:

> "14. This category does not cover minor crimes nor prohibitions on the legitimate exercise of human rights. In determining whether a particular offence is sufficiently serious, international

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[57] UNHCR *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees* (2003) at para.11.

[58] *Ibid* at para.12.

[59] *Ibid* at para.13, although the guidelines note that "an isolated act can, however, constitute a crime against humanity if it is part of a coherent system or a series of systematic and repeated acts".

[60] *Ibid* at para.14.

rather than local standards are relevant. The following factors should be taken into account: the nature of the act, the actual harm inflicted, the form of procedure used to prosecute the crime, the nature of the penalty, and whether most jurisdictions would consider it a serious crime."[61]

Grahl Madsen interpreted this clause to mean that only crimes punishable by several years' imprisonment are of sufficient gravity to offset a fear of persecution,[62] while UNHCR defined the class of crimes included in Article 1F(b) by reference to crimes which involve significant violence against persons, such as homicide, rape, child molesting, wounding, arson, drugs traffic, and armed robbery.[63]

Hathaway notes that there is frequently confusion between the exclusion of serious, common law criminals under Article 1F of the Convention, and the right of a state to expel or return dangerous refugees pursuant to Article 33(2):

"Article 1F, inserted at the insistence of countries which perceived themselves to be vulnerable to large flows of refugees, is designed to afford the possibility of pre-admission exclusion on the basis of a relatively low standard of proof and without recourse to a formal criminal trail to assess the charge. The expedience of this recourse is balanced against its very narrow scope: it applies only to persons believed to have committed serious, pre-entry crimes which remain justiciable and the gravity of which outweighs that of the anticipated persecution.

Article 33(2) on the other hand, is the original and more broadly applicable criminality provision. It provides the means for states

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[61] *Ibid* at para.14.

[62] *Op cit* at p.297.

[63] See Goodwin Gill *The Refugee in International Law* (OUP 1983) at p.62.

> to expel or return refugees who, for example, commit crimes in a state of refuge, or whose past record of criminality in that country or elsewhere is believed to make them undesirable residents, even if they face extremely serious forms of persecution. Its standard of proof, however, is more exacting; it requires conviction by a judgment of a particular serious crime rather than simply 'serious reason for considering' that a person may be a criminal. It is not enough that the crime committed was 'serious' but rather must be 'particularly serious' and sustain the conclusion that the offender 'constitutes a danger to the community.'"[64]

Finally, Article 1F(c) excludes from refugee status persons who have committed acts which are contrary to the principles and purposes of the United Nations. The intended scope of application of this exclusion clause in the light of the foregoing paragraphs of Article 1F is unclear; indeed, some commentators have suggested that Article 1F(c) is tautologous or superfluous.[65] The UNHCR Handbook suggests that this exclusion clause should be understood as encompassing:

> "in a general way such acts against the purposes and principles of the United Nations that might not be fully covered by the two preceding exclusion clauses. Taken in conjunction with the latter, it has to be assumed, although this is not specifically stated, that the acts covered by the present clause must also be of a criminal nature."[66]

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[64] *Op cit* at pp.225-226.

[65] Thus, the UNHCR Handbook states of Article 1F(c) "It will be seen that this very generally-worded exclusion clause overlaps with the exclusion clause in Article 1F(a); for it is evident that a crime against peace, a war crime or a crime against humanity is also an act contrary to the purposes and principles of the United Nations": *op cit* at para.162. See also Hathaway, who notes, "The independent utility of this exclusion clause is … somewhat elusive.": *op cit* at p.229.

[66] UNHCR Handbook *op cit* at para.162.

However, UNHCR notes that there are very few instances of this exclusion clause being applied in practice, which is largely "due to its very general character", as a result of which caution should be exercised in its application.

Exclusion from refugee status in EU law

Article 12(1) of the Directive provides for exclusion from refugee status as follows:

> "1. A third country national or a stateless person is excluded from being a refugee, if:
> (a) he or she falls within the scope of Article 1 D of the Geneva Convention, relating to protection or assistance from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees. When such protection or assistance has ceased for any reason, without the position of such persons being definitely settled in accordance with the relevant resolutions adopted by the General Assembly of the United Nations, these persons shall ipso facto be entitled to the benefits of this Directive;
> (b) he or she is recognised by the competent authorities of the country in which he or she has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country; or rights and obligations equivalent to those."[67]

It is clear that Article 12(1)(a) of the Qualification Directive corresponds with Article 1D of the Refugee Convention, while Article 12(1)(b) correlates to Article 1E of the Convention.

Article 12(2) of the Qualification Directive provides:

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[67] The provisions of Article 12 were not amended by the Recast Qualification Directive.

"2. A third country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that:

(a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee; which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as serious non-political crimes;

(c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations."

Article 12(2) is based on the exclusion clauses in Article 1F of the Refugee Convention, but it is immediately apparent that there are significant differences as between the Directive and the Convention. As Storey notes, Article 12(2)(b) contains additional wording when compared to Article 1F, whose existence "arguably gives rise to a distinct, expanded and self-standing definition of exclusion on the basis of commission of a serious non-political crime."[68]

[68] Storey "EU Refugee Qualification Directive: A Brave New World?" (2008) 20(1) International Journal of Refugee Law 1 at 10. For a discussion of the interrelationship between the Refugee Convention and the Qualification Directive, see Lambert "The EU Asylum Qualification Directive: Its Impact on the Jurisprudence of the United Kingdom and International Law" (2006) 55(1) International and Comparative Law Quarterly 161 at 171, 174-175.

Exclusion from refugee status in Irish law

The exclusion clauses in Irish law are inextricably linked with the definition of a refugee in section 2 of the Refugee Act 1996, which provides:

> "In this Act "a refugee" means a person who, owing to a well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country; or who, not having a nationality and being outside the country of his or her former habitual residence, is unable or, owing to such fear, is unwilling to return to it, but does not include a person who—
>
> (a) is receiving from organs or agencies of the United Nations (other than the High Commissioner) protection or assistance,
>
> (b) is recognised by the competent authorities of the country in which he or she has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country,
>
> (c) there are serious grounds for considering that he or she—
>
> (i) has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes,
>
> (ii) has committed a serious non-political crime outside the State prior to his or her arrival in the State, or
>
> (iii) has been guilty of acts contrary to the purposes and principles of the United Nations."

Given the separate statement of the definition of a refugee in Article 1A of the Refugee Convention, and the exclusion clauses as expressed in

Articles 1D, E and F, this interpolation of the exclusion clauses into the definition of a refugee might be regarded as inappropriate or unhelpful.

The provisions of section 2 of the 1996 Act on exclusion must also now be read in the light of the provisions of the European Communities (Eligibility for Protection) Regulations 2006, Regulation 12 of which provides:

> "12. An applicant is excluded from being a refugee if he or she has instigated or otherwise participated in the commission of the acts or crimes mentioned in section 2(c) of the 1996 Act."[69]

Regulation 12 appears to offer a clarification of the level of culpability required for the application of the exclusion clauses, but nothing further; it might thus be said that the Regulations do not appear to fully transpose the provisions of Article 12 of the Directive, particularly the additional provision contained in Article 12(2)(b) as discussed above. It remains to be seen whether Ireland will therefore be found to have failed to adequately transpose the Qualification Directive in accordance with EU law.[70] To the extent that there is divergence between the domestic law on exclusion, and the provisions of the Directive, it is furthermore noted that this potentially undermines the rule of law by reason of divergence and lack of certainty in the correct approach to be adopted to this crucial issue.

It would appear that the application of the exclusion clauses has been considered in only one case in Ireland to date, *AB v Refugee Appeals Tribunal.*[71] The applicant was an Afghan national who sought leave by

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[69] It might be noted that Regulation 13 provides for exclusion from subsidiary protection on more extensive grounds, but a consideration of subsidiary protection falls outside the scope of the present discussion.

[70] See, eg, *Case 96/81 Commission v Netherlands* [1982] ECR 1791.

[71] [2011] IEHC 198 (decision of Hogan J on leave application); [2011] IEHC 412 (decision of Cooke J on substantive application).

way of judicial review to challenge a decision of the Refugee Appeals Tribunal refusing his refugee appeal. The core issue for determination was, in the words of Hogan J, "whether by reason of his combat activities as a regional commander for the Taliban forces (or, more strictly, one of its factions, Hezb-i-Islami) in opposing the NATO-led International Security Assistance Force ("ISAF") in Afghanistan the applicant can be regarded as having forfeited his right to seek asylum."[72]

In his determination of the leave application, Hogan J began by considering the status of the Refugee Convention in Irish law, noting that pursuant to Article 29.6 of the Constitution, no international agreement shall have the force of law in the State "save as may be determined by the Oireachtas". Hogan J noted that the long title of the Refugee Act 1996 describes that Act as being intended "to give effect to" the Refugee Convention, a statement falling short of direct incorporation into Irish law, nonetheless concluding that "the 1996 Act is the legislative instrument designed to give effect in Irish legislative form to the obligations of that Convention ... [and] should be construed accordingly."[73] However, Hogan J also noted that the provisions of the Refugee Act 1996 "may have to be interpreted in the light of the obligations placed on this State by the Qualifications Directive as transposed into our domestic law by the European Communities (Eligibility for Protection) Regulations 2006 (S.I. No. 518 of 2006)."[74]

Hogan J then turned to the specific provisions of the 1996 Act, noting that the statutory exclusions contained in section 2 "replicate more or less verbatim the language of the exclusion clause of Article 1F of the Geneva Convention",[75] which exceptions are also reflected in Article 12(2)(a) of the Qualification Directive, before concluding:

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[72] [2011] IEHC 198 at para.1.

[73] *Ibid* at para.16.

[74] *Ibid* at para.17.

[75] At para.19.

> "in view of the fact that the exclusionary provisions of section 2 of the 1996 Act mirror almost completely the language of Article 1F and the clear intent of the Oireachtas to give effect to the Convention, it follows, therefore, that the international jurisprudence dealing with Article 1F is directly relevant to the construction of section 2 and, specifically, to the exclusionary provisions of (c)(i), (ii) or (iii)."[76]

In that regard, Hogan J noted that a comprehensive analysis of Article 1F issue was to be found in three recent judgments, namely of the UK Supreme Court in *R. (JS) v Secretary of State for the Home Department*,[77] the New Zealand Supreme Court in *Attorney General v Tamil X*[78] and the decision of the Court of Justice of the European Union in *Joined Cases C-57/09 and C-101/09 Bundesrepublik Deutschland v B und D.*[79] It was noted that the United Kingdom Supreme Court in *R (JS)* had set aside the Secretary of State's determination that the applicant was excluded from both refugee status and subsidiary protection as a result of his membership of the Tamil Tigers on the grounds of a failure to determine individual culpability or personal responsibility for the conduct giving rise to the exclusion. In relation to *B und D,* it was noted that the Court of Justice of the European Union held:

> "95. Before a finding can be made that the grounds for exclusion laid down in Article 12(2)(b) and (c) of Directive 2004/83 apply, it must be possible to attribute to the person concerned – regard being had to the standard of proof required under Article 12(2) – a share of the responsibility for the acts committed by the organisation in question while that person was a member.

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[76] *Ibid* at para.20.

[77] [2010] UKSC 15, [2010] 2 WLR 766.

[78] [2010] NZSC 107.

[79] [2010] ECR I-01493.

96. That individual responsibility must be assessed in the light of both objective and subjective criteria.

97. To that end, the competent authority must, inter alia, assess the true role played by the person concerned in the perpetration of the acts in question; his position within the organisation; the extent of the knowledge he had, or was deemed to have, of its activities; any pressure to which he was exposed; or other factors likely to have influenced his conduct.

98. Any authority which finds, in the course of that assessment, that the person concerned has – like D – occupied a prominent position within an organisation which uses terrorist methods is entitled to presume that that person has individual responsibility for acts committed by that organisation during the relevant period, but it nevertheless remains necessary to examine all the relevant circumstances before a decision excluding that person from refugee status pursuant to Article 12(2)(b) or (c) of Directive 2004/83 can be adopted."[80]

On the question of whether the Taliban could be said to have committed crimes against humanity in Afghanistan, Hogan J was satisfied that the country of origin information indicated that there were many common features of the Taliban's insurgency which constituted crimes against humanity for the purposes of section 2 of the 1996 Act as interpreted in accordance with Article 7 of the Rome Statute:[81]

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[80] *Ibid.*

[81] Article 7(1)(a) of the Rome Statute defines "crimes against humanity" as meaning any of the listed proscribed criminal acts, including murder, "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack". Article 7(2) provides that "[a]ttack directed against any civilian population" means a course of conduct involving the multiple commission of the proscribed acts against a civilian population pursuant to or in furtherance of a state

> "The country of origin information plainly shows that it is the policy of the Taliban to sponsor and encourage the tactic of suicide bombing, a tactic which inevitably involves the targeting of places such as markets, squares and routine security posts, often with hideous numbers of civilian deaths and casualties. This is plainly an 'attack directed against any civilian population' within the meaning of Article 7(2). There clearly has been 'widespread or systemic use' of suicide bombing within the meaning of Article 7(1), so that by sponsoring such activities the Taliban are guilty of crimes against humanity within the meaning of Article 7."[82]

Applying these legal principles to the present case, Hogan J concluded that the applicant had established substantial grounds for challenging the Tribunal's decision on that basis that it failed to conduct the individualised assessment of the applicant's complicity in the Taliban's crimes against humanity in the manner required by the Court of Justice in *B und D*.

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or organisational policy to commit such attack. Hogan J noted at para.28 of his judgment in *AB* that:

"Article 29.9 of the Constitution (as inserted by the 23rd Amendment of the Constitution Act 2001) allows Ireland to ratify the Rome Statute. The phrases "crime against humanity" and "war crime" have been ascribed the same meaning for the purposes of the domestic jurisdiction of the Irish courts in respect of offences otherwise coming within the International Criminal Court's jurisdiction as in Article 7 and Article 8(2) respectively of the Rome Statute: see s. 6(1) of the International Criminal Court Act 2006 ("the 2006 Act"). Even though the Rome Statute and, for that matter, the new Article 29.9 and 2006 Act, all post-date the Geneva Convention and, indeed, the 1996 Act, it would be unreal not to have regard to a major international treaty dealing with this very topic in seeking to elucidate the meaning of these words. In any event, s.2 of the 1996 Act expressly envisaged that the definition of the terms "war crime, or a crime against humanity" would be that as defined in "international instruments drawn up to make provision in respect of such crimes" and the Rome Statute is, par excellence, one such instrument."

[82] At para.34.

The substantive application for judicial review was subsequently determined by Cooke J.[83] Having summarised the facts of the applicant's case and the grounds upon which Hogan J granted leave, Cooke J turned to the decision of the Court of Justice in *B und D*, noting:

> "The rationale of the approach to the exclusion clause adopted by the Court of Justice is obvious. A finding that the exclusion applies to an individual is a finding that the individual was at least complicit in atrocities of the most serious kind which attract universal condemnation. A finding to that effect should only therefore be made where there are genuinely serious reasons based upon specific evidence for considering that the individual in question bears a degree of responsibility for the acts alleged and ought not therefore to be entitled to evade accountability for them as a refugee. Known terrorist organisations may be splintered into a variety of factions each pursuing different means of achieving one or more common aims. Thus, mere membership of an organisation does not create a presumption that a particular individual can be fixed with the necessary degree of involvement and responsibility which will exclude him from refugee status without an examination of the nature, extent, duration and level of responsibility of his involvement."[84]

However, Cooke J ultimately concluded that the applicant's challenge to the Tribunal decision in respect of the determination in respect of the exclusion clauses was not well founded, on the basis that the Tribunal Member's comment on this issue was "an expressly *obiter* observation on a secondary issue". Cooke J was satisfied that the basis for the Tribunal's refusal of the applicant's appeal was that the applicant was fleeing prosecution and not persecution, and it was on this basis that he did not qualify as a refugee. Whilst Cooke J concluded that it was not

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[83] [2011] IEHC 412.

[84] *Ibid* at para.13.

possible to quash the Tribunal decision for this reason, it was accepted that a finding, albeit an obiter finding, that the exclusion clause of Article 1F applies "is a finding of immense importance to any individual and one capable of causing severe prejudice unless made soundly in accordance with the requirements of law and particularly on the basis of an individualised assessment by reference to one or more of the classes of crime or act which the article covers."[85] Accordingly, Cooke J concluded:

> "that it is just and appropriate for it to exercise its discretion to grant the applicant declaratory relief the object of which is to remove any implication that the final outcome of the asylum process in this case had any basis in a consideration that the exclusion clause of Article 1F of the Geneva Convention applied to the applicant. The declaration will be in the following terms:
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> > 'The observations as to the possible application of Article 1 F of the Geneva Convention to the applicant's asylum claim contained in the appeal decision of the first named respondent dated 16th April 2008, are to be construed as conditional and as obiter to the determination of that appeal; and as constituting no operative part of the definitive adjudication of that appeal.'"[86]

The decisions of both Hogan and Cooke JJ in *AB* are of considerable significance in that they represent the first engagement by the Irish judiciary with the exclusion clauses under Article 1F of the Refugee Convention and Article 12 of the Qualification Directive. Whilst the decision of Cooke J ultimately concluded that the Tribunal's determination of the applicant's appeal did not turn on the issue of the exclusion clauses, the decisions in respect of both the leave and substantive applications offer considerable analysis of the scope of

[85] At para.27.

[86] At para.28.

application of the exclusion clauses in Irish law and in particular the need for a careful assessment of the individual culpability and responsibility prior to a determination that an individual should be excluded from refugee status, an approach which is fully consistent with that articulated by UNHCR.

Conclusion

It might be said that the cessation clauses in Article 1C seek to exclude from refugee status those who are no longer in need of protection as a refugee, the exclusion clauses in Articles 1D and E exclude those who are already in receipt of protection from either UNRWA or a substitute form of protection from a host member state, whilst the exclusion clauses contained in Article 1F seek to exclude those deemed unworthy of refugee protection by reason of their conduct. The issues involved in the application of both the cessation and exclusion clauses involve complex matters of international, European Union and domestic law and it is clear that there are considerable difficulties in achieving the correct application of these clauses whilst also recognising the rights of those who continue to be entitled to protection as refugees. To the extent that European Union law omits the compelling reasons proviso, and imposes a mandatory duty to revoke, it can be said to be at variance with the applicable international law norms, to the detriment of the clarity and certainty of the law in this field.

In relation to the cessation clauses, it seems clear that the provision of section 21 of the Refugee Act 1996 and Regulation 11 of the European Communities (Eligibility for Protection) Regulations 2006 are unsatisfactory insofar as they conflate issues of cessation and exclusion. Furthermore, it would seem from decisions such as *Abramov* and *Gashi* that the threshold for the application of the cessation clauses may be set too low, or perhaps more accurately the Minister's perception of that threshold. Given the emphasis placed by UNHCR on the need for restrictive application of these clauses in order to uphold the rights of refugees, the willingness of the High Court in these cases to reverse the

decision of the Minister, apparently without hesitation, owes much to a substantive conception of the judicial role in the vindication of the rights of refugees.

Finally, in relation to the exclusion clauses, there remains considerable doubt as to whether the provisions of section 2 of the Refugee Act 1996 and Regulation 12 of the European Communities (Eligibility for Protection) Regulations 2006 fully or correctly transpose the provisions of Article 12 of the Qualification Directive and it remains to be seen whether Ireland will be found to be in breach of its obligations in EU law in this regard. Furthermore, the interrelationship between the Qualification Directive and the Refugee Convention remains to be clarified, and given the differences in the context of exclusion clauses arising between those two instruments, it may well be that these complex questions of international law fall to be determined in this particular context. Much will also depend in this regard on the approach adopted by the Court of Justice, and whether it abides by the narrow, formalist construction of the judicial role, or seeks to assert its role in the substantive protection of the rights of refugees.

Conclusions

This thesis has sought to set out for the first time a comprehensive, contemporary account of the rights of refugees in Irish law. As the sixtieth anniversary of Ireland's accession to the Refugee Convention approaches, the core question posed was concerned with the extent to which the rights of refugees are respected under Irish law. This question was examined through the lens of the rule of law, in order to assess the extent of Ireland's compliance with the obligations assumed on accession to the Convention, in order to determine whether Irish law and practice complies with the principle of good faith implementation as required by Article 26 of the Vienna Convention on the Law of Treaties.

Refugee discourse in Ireland has undergone a radical transformation in a very short period of time. The dominant narrative has undergone a dramatic shift from the "paternalistic discourses of the deserving, right-bearing refugee … to discourses of the undeserving, fraudulent and criminal asylum seekers."[1] Many will recall the sight of hundreds of asylum seekers queuing outside the offices of the Refugee Applications Commissioner in the late 1990s as the limited infrastructure then in place for processing applications sought to cope with the increase in numbers. This in turn fed a narrative of a system under pressure, being exploited and abused by "bogus asylum

[1] Moreo "The Horn of Africa People's Aid" in Lentin and Moreo (eds) *Migrant Activism and Integration from Below in Ireland* (Palgrave Macmillan 2012) at p.161.

seekers."[2] The Secretary General of the Department of Justice was publicly quoted around this time saying that the vast majority of asylum seekers were economic migrants, who were "invariably lying through their teeth."[3]

Of course, Ireland is not the first country to experience a rapid increase in the numbers seeking asylum, and the dominant discourse emphasising the need for "protection of the integrity of the asylum system" is a familiar refrain from many industrialised states.[4] States have adopted a wide variety of responses to such concerns, whose general aim is to restrict access to the asylum process; as Kneebone notes:

> "the common trend of industrialised receiving states is to erode the notion of international refugee protection and state responsibility by restrictive measures aimed at deterring or deflecting asylum seekers. Such measures include denying asylum seekers access to territory to claim asylum and denying access to refugee status determination procedures."[5]

The ingenuity of states in the development of new practices to deflect responsibility for refugees has been breathtaking; from "requiring

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[2] See eg "Refugee Rapists on the Rampage' The Irish Daily Star, 13 June 1997, "'Refugees; Police Act to Smash Gang" Evening Herald, 6 June 1997, "Asylum Seekers and Homeless Vie for Shelter, Agency'" Irish Times, 9 May 1997; "Refugees get £20 million payments" Evening Herald, 6 June 1997, "Refugee Tried to Bite Me to Death" Sunday World, February, 2000, "Free Cars for Refugees; Cash Grants Buy BMWs" Irish Daily Mirror, December 16 2002, all cited in NCCRI/Equality Authority *Media Coverage of Asylum Seekers and Refugees in Ireland* (2003).

[3] "This Week They Said", The Irish Times, June 24, 2006.

[4] See eg "Minister Announces Measures to Speed Up Asylum and Deportation Process" Press Release, January 24, 2004 when Minister Michael McDowell referred to the introduction of a number of measures "critical to the protection of the integrity of the asylum system" including manifestly unfounded procedures and fast-track deportation.

[5] Kneebone *op cit* at p.3.

visas from 'refugee-producing' countries and then denying visas to anyone deemed likely to make a claim; imposing liability on air and marine carriers who transport undocumented or improperly documented migrants"[6] to more high profile practice of interdiction and pushback of vessels bearing refugees on the high seas and the tragic consequences which have become a sadly familiar sight.[7] Yet there are other, less public means by which the rights of refugees may be frustrated; as Macklin notes:

> "it is not the 'law' determining who falls within the refugee definition, but rather those who apply it (administrative decision makers ...) and those who control access to the system (the government) who determine, in these two ways, whether and how an asylum seeker will be heard."[8]

Combining measures which restrict asylum seekers' ability to access the refugee determination process, with a procedure replete with obstacles to recognition, can result in wholesale denial of the rights of refugees. As Legomsky notes:

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[6] Macklin "Asylum and the Rule of Law in Canada: Hear the Other (Side)" in Kneebone (ed) *op cit* at p.105. See further Feller "Carrier Sanctions and International Law" (1989) 1(1) International Journal of Refugee Law 48, Hailbronner "New Techniques for Rendering Asylum Manageable" in Hailbronner et al (eds) *Immigration Controls* (Berghahn 1998) Vol.4, p.59, Byrne, Noll and Vested-Hansen (eds) *New Asylum Countries? Migration Control and Refugee Protection in an Enlarged European Union* (Kluwer 2002) and Legomsky *Immigration and Refugee Law and Policy* (Foundation Press 2004) at p.1095.

[7] For the American experience of interdiction see Legomsky "The USA and the Caribbean Interdiction Program" (2006) 18(3-4) International Journal of Refugee Law 677; for the Australian experience, see Magner "A Less than 'Pacific' Solution for Asylum Seekers in Australia" (2004) 16(1) International Journal of Refugee Law 53; and most recently, the EU experience, see Gammeltoft-Hansen "The Refugee, the Sovereign and the Sea: EU Interdiction Policies in the Mediterranean" Danish Institute for International Studies, Working Paper No.6, 2008.

[8] Macklin *op cit* at p.94.

> "an unfair procedure necessarily produces an unjustifiably high risk of violating the individual's substantive rights. Thus, a fair refugee status determination is one essential complement of the … prohibition on refoulement…"[9]

In recent years, the asylum system in Ireland has been dogged by controversy across a range of areas; from allegations concerning breach of refoulement at air and sea ports, to the most serious concerns about transparency and independence of some decision-makers, to fundamental questions about the quality of decisions in the refugee context. It was against this background that this thesis sought to explore the rights of the refugee in Irish law.

Chapter one commenced with an overview of the origins and evolution of the definition of a refugee in international law. This was necessary not just from an historical perspective, but because traces of the early regimes of refugee protection may still inform and influence the modern refugee regime. The drafting of the Refugee Convention, still the cornerstone of the international framework for refugee protection, was addressed, in addition to contemporaneous and subsequent developments such as the establishment and expansion of the UNHCR and regional refugee regimes. Particular focus was placed on the European asylum acquis in the light of Ireland's obligations thereunder (albeit that the liberal use of Ireland's opt out has somewhat limited the extent of such obligations in more recent times.)[10]

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[9] Legomsky "Second Refugee Movements and the Return of Asylum Seekers to Third Countries: The Meaning of Effective Protection" (2003) 14 International Journal of Refugee Law 567.

[10] Pursuant to Articles 1, 2 and Article 4a(1) of the Protocol on the Position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the Treaty on the European Union and the Treaty on the Functioning of the European Union.

Having considered the origins and evolution of the international refugee regime, chapter 2 proceeded to focus on the core elements in the definition of a refugee, namely the well-founded fear of persecution for reasons of race, religion, nationality, political opinion and particular social group. This discussion was necessary in order to inform the discussion of the Irish framework of refugee protection, which is ultimately derived from the 1951 Convention. Certainty and predictability in the application of the law are key indicators of a system which complies with the rule of law, so the discussion in this chapter highlighted areas where vagueness in the formulation of key concepts may negatively impact on refugees' ability to access protection, such as for example over the precise scope of the concept of persecution, and the failure of the Refugee Convention to stipulate a standard of proof to be applied in the assessment of asylum applications.

Chapter three then moved into the Irish domain, beginning with a brief historical consideration of the Irish refugee experience from the middle ages to more recent times. The movement from a relatively informal, non-statutory framework to deal with the small number of applicants, to the legislative framework established by the Refugee Act 1996 was analysed, together with subsequent developments including the amendments affected by reason of the obligation to transpose the Qualification Directive into Irish law. From the perspective of the rule of law, much of the focus in this chapter was on the principle of certainty, and the extent to which the provisions of Irish law concerning the substantive definition of a refugee comply with this requirement. The role of the judiciary in the interpretation of core norms was emphasised, with a particular focus on decisions embodying the substantive or "thick" approach to judicial review which have as their core concern the protection of the rights of refugees.

The centrality of a fair and functioning refugee determination system for the recognition of refugees has previously been highlighted.

Chapter four thus addressed the refugee status determination procedure in Ireland in detail, charting the progress of a refugee applicant through the procedure from the first instance application through to the appeal stage. This incorporated a discussion of the concepts of safe first countries, safe third countries and the manifestly unfounded procedure, not just from the statutory perspective but also as addressed by decisions of both the Irish superior courts and the Court of Justice of the European Union. Drawing on the common themes of the rule of law of certainty, consistency, independence and transparency, this chapter highlighted a number of grounds for significant concern in the Irish procedural framework governing refugee applications. Given the emphasis on credibility findings within the process, a number of decisions of the High Court in this context were critiqued, not just to enable a consideration of the role of the judiciary in the protection of refugee rights but also to demonstrate that the nature and extent of the reliance on credibility findings by some refugee decision-makers in this jurisdiction pose a real threat to the rule of law. The chapter concluded by pointing to some recent developments which have the potential to address some of the historical concerns regarding independence and transparency in the refugee determination process in Ireland, although it is nonetheless recommended that these matters should ultimately be addressed by way of statutory reform in order to properly underpin and cement these reforms by providing a clear legislation commitment to the rule of law in the refugee process.

Chapter five then considered the rights of refugees, commencing with the rights regime contained in the Refugee Convention itself (pointing to related human rights instruments where these may be called in aid of the refugee rights regime), before moving to a discussion of the rights of refugees in Irish law. The extensive rights and entitlements of refugees and asylum seekers were canvassed, including the right to freedom of religion, freedom of association, access to the courts, the right to work, public relief and social welfare, rights of residence and travel, citizenship and the right to family reunification. The analysis

was again informed by the rule of law perspective, highlighting instances where lack of clarity, independence and transparency give rise to concern. From an institutional perspective, the policy of direct provision gives rise to the most serious cause for concern insofar as denial of fundamental human rights are endemic to this system. In other areas, breaches in the rights of refugees were identified as arising not from the legal or institutional frameworks, but rather from administrative practices, as in the case of the overly restrictive approach which has been adopted in the family reunification context. Once again, the willingness of the courts to intervene in order to ensure respect for the rights of refugees is identified as an essential component in upholding the rule of law.

The final chapter considered the loss and denial of refugee status, again deriving from the provisions of both the Refugee Convention and the Qualification Directive. The rules regarding cessation of refugee status were considered, with a focus on certain aspects of the European and Irish frameworks which were found to fall short of the standards required by the Convention. Grounds for exclusion from refugee status were also assessed from a similar perspective, and in respect of both cessation and exclusion a number of recent decisions of the Irish courts and the Court of Justice were analysed with a view to identifying the areas of divergence and its consequences for the rule of law and the rights of refugees.

What conclusions can then be drawn regarding the rights of refugees in Irish law? The substantive framework concerning the definition of a refugee is broadly consistent with Ireland's obligations under both the Refugee Convention and the European Union asylum acquis, although in respect of the latter it is important to note the limited ambition of the European measures which broadly concern minimum standards, and to that extent could not be described as a best practice model. It is also important to acknowledge the positive elements of the Irish system, such as the fact that Irish law does not provide for routine or systematic detention of those seeking asylum, a welcome fact indeed

when one reflects on the punitive detention regimes in operation in other industrialised countries, some of which permit indefinite detention in clear violation of human rights norms.[11]

However, it is equally if not more important to draw attention to those aspects of Irish law which do not comply with international and European law, in some instances representing a threat to the rule of law and the rights of refugees. The system of direct provision is a powerful example, a model of social control operated without statutory basis or independent oversight, and which has a significant negative impact on the people who live within that system. The legacy of this system is likely to be seen and felt for many years to come. The primary concern identified in respect of the Irish framework of refugee law relates to the lack of a clear commitment to core norms at the heart of the concept of the rule of law, including the right to a fair hearing before an independent and impartial body. Recommendations for appropriate reforms which should be included in the long anticipated Immigration, Residence and Protection Bill were also made.

Resort to the courts by way of judicial review is a clear consequence of the various deficiencies in the Irish refugee process. The rate of judicial review in the asylum context has increased in tandem with the numbers seeking asylum in this country, a matter which has been the subject of at times disapproving comments from the superior courts.[12]

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[11] See generally Kneebone "The Australian Story: Outside the Law" in Kneebone (ed) *op cit* at pp.171-227.

[12] Thus, for example, in *Meadows v Minister for Justice, Equality and Law Reform* [2010] 2 IR 701; [2011] 2 ILRM 157 Hardiman J stated: "Judicial review of administrative action is a very significant part of the workload of the High Court and of this court on appeal. Asylum and immigration matters account in turn for a very significant portion of judicial review applications: between 2004 and December 2008 the percentage of judicial review matters represented by asylum and immigration cases varied from 47% the first year to 54% in the last, and in two years, 2006 and 2007, constituted almost 60% of the total judicial review workload (59% in each year). This seems to suggest, though no figures appear to be available,

This thesis suggests that there is a correlation between the deficiencies in the refugee process and the purportedly high rates of judicial review.[13] A key theme which has been developed throughout the analysis is the role of the courts on judicial review in enforcing both the rights of refugees, and ultimately the rule of law. There are numerous instances of the courts adopting a substantive, rights-based conception of the judicial role in the determination of such proceedings in order to ensure respect for the rights of refugees; from decisions on the scope of persecution based on a compelling human rights analysis,[14] to decisions which limited the nature and scope of the manifestly unfounded procedure,[15] the judiciary in Ireland at times has played a vital role in upholding the rights of refugees. Yet other decisions evince a more restrictive, narrowly conceived judicial role in which undue deference is shown to administrative decision-makers, as can be seen in the decisions on the concept of systemic persecution[16] and the right to asylum for those who would be persecuted owing to their status as failed asylum seekers in the event of their forced return.[17]

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that a very high percentage of applications for asylum which are decided unfavourably to the applicant, and/or subsequent deportation orders, rapidly become the subject of judicial review applications": at p.755.

[13] However, the assumption that "a very high percentage of applications for asylum" result in judicial review applications ought not go unchallenged; at its peak, there were just under one thousand applications for judicial review in the asylum context. While this might seem high on first impression, when placed in the context of the fragmented statutory framework in Ireland governing not just the asylum process, but also applications for subsidiary protection, family reunification, visas, deportation orders and revocation of deportation orders, which would likely generate thousands of decisions a year, the rate of judicial review might not seem quite so high.

[14] *ED v Refugee Appeals Tribunal* [2011] IEHC 262.

[15] *Moyosola v Refugee Applications Commissioner* [2005] IEHC 218 and *SUN v Refugee Applications Commissioner* [2012] IEHC 338.

[16] *MK v Refugee Appeals Tribunal* [2008] IEHC 294.

[17] *FV v Refugee Applications Commissioner* [2009] IEHC 268 and *Gidey v Refugee Appeals Tribunal* Unreported, Clark J, 26 February 2008.

It is perhaps in the context of the rights of refugees which were explored in chapter 5 that the Irish judiciary have demonstrated the greatest commitment to the rule of law. Across a range of rights, from naturalisation[18] to family reunification,[19] to the basic right to fair procedures,[20] the superior courts have demonstrated at times a commendable willingness and commitment to upholding the rights of refugees. In some instances, this has led to decisions of systemic importance not just for refugees, but with wider implications for the legal system generally, as occurred in relation to the standard of review on grounds of unreasonableness,[21] and the right to a reasoned decision.[22] The High Court is currently hearing a challenge to the fundamental legality of the much maligned direct provision system; it is to be hoped that the court's proud tradition of defending the rights of refugees is reflected in the final decision in that case.

However, even the most substantive, rights-based judicial approaches have their limits; sometimes as a result of the separation of powers,[23] and sometimes because strategic settlement of litigation deprives the courts of the ability to remedy a grave wrong.[24] The courts cannot, and should not, be the sole bearers of the immense responsibility of ensuring respect for the rights of refugees throughout the process. The lack of a Treaty body or other enforcement mechanism under the Refugee Convention has had a negative impact on the ability to ensure that States live up to their duty to implement in good faith their international obligations, including the duties deriving from the

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[18] *Mallak v Minister for Justice* [2012] 3 IR 297; [2013] 1 ILRM 73.

[19] *Sharif v Minister for Justice, Equality and Law Reform* [2014] IEHC 57.

[20] *Zgnatev v Minister for Justice* [2002] 1 IR 135.

[21] *Meadows v Minister for Justice, Equality and Law Reform* [2010] 2 IR 701; [2011] 2 ILRM 157.

[22] *Mallak v Minister for Justice* [2012] 3 IR 297; [2013] 1 ILRM 73.

[23] *In re Article 26 and the Illegal Immigrants Trafficking Bill 1999* [2000] 2 IR 360.

[24] *Nyembo v Refugee Appeals Tribunal* unreported, High Court, October 6, 2006; unreported, Supreme Court, June 19, 2007.

Refugee Convention.[25] With the expanded role of the Court of Justice of the European Union in the asylum context since the Lisbon Treaty, some commentators expressed high hopes that the first supranational court with jurisdiction over refugee law matters might have a significant impact on the development of the law in this area. The review in this thesis of the limited number of decisions of the Court of Justice in the asylum arena to date suggest that in some instances at least, those hopes may not be realised,[26] thus serving to further emphasise the need for a rigorous independent monitoring mechanism.

As the Irish Refugee Council's "Difficult to Believe" report noted:

> "many of the challenges that are now faced by asylum applicants bubble beneath the surface, less likely to raise the grand conceptual debates that for so long preoccupied asylum adjudicators. Instead, it is the day to day assessments of credibility or availability of protection that function as the primary gatekeepers in asylum adjudication. Assessing credibility requires adjudicators to cross many barriers - cultural, socio-economic, religious, and geographical. The adjudicator is required to position herself or himself in the place of an asylum applicant, with whom very little of life's experiences are shared....

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[25] See "Roundtable on the Future of Refugee Convention Supervision" Journal of Refugee Studies (2013) 26(3) Journal of Refugee Studies 327, O'Byrne "Is there a Need for Better Supervision of the Refugee Convention?" (2013) 26(3) Journal of Refugee Studies 330, Whiteman and Nielsen "Lessons from Supervisory Mechanisms in International and Regional Law" (2013) 26(3) Journal of Refugee Studies 360 and Blackham "A Proposal for Enhanced Supervision of the Refugee Convention" (2013) 26(3) Journal of Refugee Studies 392.

[26] Such as the narrow, formalist approach adopted in *Bundesrepublik Deutschland v Y and Z (Joined Cases (C-71/11 and C-99/11)* unreported, judgment of 5 September 2012.

> The consequences of an error in the asylum adjudication process may threaten the liberty, security and even the life of an asylum applicant. It is to be hoped that this report will lead to urgent and much needed reforms within the asylum process. A first step, and one that will be critical to sustaining reform, will be greater transparency and public scrutiny of the asylum process at all levels. Such transparency and scrutiny has been lacking to date, and it is a gap that raises serious questions of accountability in the asylum process. It is also a gap that undermines the quality of decision-making and may significantly increase the potential for error."[27]

When states are faced with what are perceived as unacceptably high numbers of asylum seekers, this sometimes gives rise to political rhetoric about the need to protect the integrity of the asylum system. As this thesis demonstrates, the ultimate threat to the rule of law can sometimes arise not from those seeking access to refugee protection, but from those who seek to deny it.

[27] Irish Refugee Council *Difficult to Believe: The Assessment of Asylum Claims in Ireland* (2012) at p.(ii).

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- Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers
- Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted
- Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status
- Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national
- Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)

- Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)
- European Communities (Asylum Procedures) Regulations 2011 (SI No.51 of 2011)
- Parliamentary Assembly of the Council of Europe "Recommendation 1236 (1994) on the Right of Territorial Asylum" 12 April 1994
- Parliamentary Assembly of the Council of Europe "Recommendation 773 (1976) on the Situation of de facto Refugees" 26 January 1976
- Parliamentary Assembly of the Council of Europe "Resolution 1765 (2010) on Gender-Related Claims for Asylum" 8 October 2010
- Parliamentary Assembly of the Council of Europe, "Recommendation 1088 (1988) on the Right to Territorial Asylum", 7 Oct. 1988
- Refugee Act 1996 (Asylum Procedures) Regulations 2011 (SI No.52 of 2011)
- Refugee Act 1996 (Asylum Procedures) Regulations 2011 (SI No.52 of 2011)
- Refugee Act 1996 (Safe Countries of Origin) Order 2003 (SI No.422 of 2003)
- Refugee Act 1996 (Safe Countries of Origin) Order 2004 (SI No.714 of 2004)
- Regulation (EU) No.604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)
- UN General Assembly Resolution 1839 (XVII) of 19 December 1962

- UN General Assembly Resolution 2100 (XX) of 20 December 1965
- UN General Assembly Resolution and 2203 (XXI) of 16 December 1966 concerning a declaration on the right of asylum
- Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity, March 2007