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The RESEARCHER

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Welcome to the October 2018 issue of *The Researcher.*

This issue of The Researcher features a significant review of case law for the first half of 2018 we are very grateful to John Stanley, deputy chairperson at the International Refugee Appeals Tribunal for this contribution.

Commenting on the recently published Country Guidance on Afghanistan, Maria Albertinelli of EASO discusses the development and importance of the country guidance in the implementation of the CEAS.

Noeleen Healy of the Law Centre, Smithfield writes on the Scope of the 1F Exclusion Clause and also shares with us a paper she presented at Refugee Rights in Records Symposium, UCD on a refugee's personal data rights.

David Goggins of the Refugee Documentation Centre investigates the Uyghurs of China, providing a glimpse into the ongoing difficulties they face.

UNHCR has provided edited versions of recent updates, positions and guidance notes regarding Afghanistan, Libya and Venezuela.

As always we are very grateful to all our contributors.

Elisabeth Ahmed
Refugee Documentation Centre (Ireland)

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2018 Review of Case Law on International Protection

John Stanley, Deputy Chairperson of the International Protection Appeals Tribunal

Below is a summary of the case law from the Irish Superior Courts and the Court of Justice of the European Union from January to June 2018 on matters relevant to international protection law.

Credibility Indicators and General Principles

The High Court provided useful guidance on "credibility indicators" in a number of cases. **It** accepted the use of internal inconsistency as a credibility indicator in ***SB v Minister for Justice and Equality*** **[2018] IEHC 235, High Court (Humphreys J.), 22 March 2018**. It confirmed **that** where there is contradiction between accounts offered by an applicant, it is a matter for the Tribunal to assess (***SA (Ghana and South Africa) v International Protection Appeals Tribunal*** **[2018] IEHC 97, Humphreys J., 1 February 2018).** It accepted the use of plausibility as a credibility indicator in ***CM (Zimbabwe) v The International Protection Appeals Tribunal*** **[2018] IEHC 35, Humphreys J., 23 January 2018.** In ***MS (Albania) v The Refugee Appeals Tribunal*** **[2018] IEHC 395, High Court, Humphreys J., 30 May 2018** the Court said thatthe Tribunal is in a better position than a court to make judgments relating to credibility, and in particular about the specificity of detail of a claim, contradictory evidence, inconsistencies, and evasiveness. (see also***MAC (Pakistan) v The Refugee Appeals Tribunal*** **[2018] IEHC 298, (Humphreys J.), 25 April 2018**).

The High Court judgment in ***SA (Ghana and South Africa) v International Protection Appeals Tribunal*** **[2018] IEHC 97, Humphreys J., 1 February 2018** provides the following guidance:

- If an applicant gives incredible testimony on any matter it is open to a decision-maker to draw inferences of lack of credibility generally.
- Where a decision is cumulative the decision-maker is not required to specify the weight to be attached to each and every individual element of the decision.
- UNHCR or IPAT guidelines are not expressly referred to in a decision does not mean that the Tribunal ignored them.
- Noting the statement in Beyond Proof: Credibility Assessment in EU Asylum Systems, UNHCR, May 2013 that decision-makers should "engage in self-assessment so that they recognise the extent to which their own emotional and physical state, values, views, assumptions, prejudices and life experiences influence their decision making", Humphreys J. stated that while the passages quoted are "no doubt desirable aspirational sentiments", this is not to be taken to require decision-makers to make a declaration that they have examined their prejudices.
- It is a matter for a decision-maker to decide whether an omission of an important matter goes to credibility, especially where the decision-maker sees and hears the applicant. It is not possible to lay down a rule that omission of matters in application forms cannot be considered.
- There is no obligation to give an overly detailed account of what individual items are being rejected if an applicant's credibility is being rejected generally.
- The Tribunal is required to consider documents and country reports capable of corroborating or otherwise supporting an applicant's claim.
- Where a decision maker has stated that all material was considered, the onus is on the applicant to displace that assumption.
- A decision-maker is not obliged to list every argument which he or she is rejecting or every fact the significance of which he is discounting.

AMC (Mozambique) v The Refugee Appeals Tribunal **[2018] IEHC 133, High Court (Humphreys J.), 8 March 2018** confirmed that a decision-maker is entitled to take evidence broadly, as a whole, and is not under an obligation to parse and analyse each element; that limited value is to be put on a medical report that is of the nature of a gloss on the subjective account of an applicant; and that where the Tribunal does not find it necessary to expressly reject the authenticity of a document, this means the Tribunal found that the appellant did not discharge the onus of proof in establishing his claim.

The High Court held that where an application has been validly rejected on a dispositive credibility basis, there is no obligation on the Tribunal to consider other points (***OMA (Sierra Leone) v The Refugee Appeals Tribunal*** **[2018] IEHC 370, High Court, Humphreys J., 12 June 2018**).

Country Information

The High Court in ***FM (DRC) v Minister for Justice and Equality*** **[2018] IEHC 274, High Court (Humphreys J.), 17 April 2018** warned against relying on judgments for their factual assessment of country conditions.
The applicant in ***SWIMS (Nigeria) v Minister for Justice and Equality*** **[2018] IEHC 257, High Court (Humphreys J.), 19 April 2018** contended that the Tribunal's decision was flawed because of its inadequate assessment of country material regarding state protection. In the judgment of the Court, however, "the Minister and his officials' working knowledge of whether particular countries have an operating rule of law must be taken into account and there must be some reality to the court's review of such matters." The Court said also that the statement in Case C-277/11 *MM*, ECLI:EU:C:2012:744, that if an applicant fails to produce appropriate material, the State must seek all the appropriate elements, does not mean that a decision must automatically be quashed if there is some shortcoming in the State's efforts to gather or analyse information not put before it by the applicant. Rather, "[t]he Minister must have a margin of appreciation. The extent of appreciation must be determined having regard to all the circumstances, and the failure of an applicant to make a point that is later relied on is one of those circumstances."

The High Court in ***IA (Pakistan) v The Minister for Justice and Equality*** **[2018] IEHC 273, Humphreys J., 20 April 2018** held that the principle whereby the credibility of an application for international protection is assessed by looking at the facts and circumstances enumerated in art.4(3) of the Recast Qualification Directive applies also in respect of the original Qualification Directive, in which Ireland participates. This, in the Court's judgment, implies that country material is to be considered first, followed then by an assessment of credibility in the light of that material.

The Court in ***MS (Albania) v The Refugee Appeals Tribunal*** **[2018] IEHC 395, High Court, Humphreys J., 30 May 2018** upheld an approach by the Tribunal whereby, having considered the country material, it found it did not need to discuss that material further, because it found the appellant to be incredible (see also***MAC (Pakistan) v The Refugee Appeals Tribunal*** **[2018] IEHC 298, (Humphreys J.), 25 April 2018**).

The High Court in ***OMA (Sierra Leone) v The Refugee Appeals Tribunal*** **[2018] IEHC 370, High Court, Humphreys J., 12 June 2018** stated that the requirement that country information documentation that contains conflicting information be resolved on a reasoned basis is not to be generalised into an obligation to narratively discuss country information.

AMC (Mozambique) v The Refugee Appeals Tribunal **[2018] IEHC 133, High Court (Humphreys J.), 8 March 2018** confirmed that there is no obligation on the tribunal to conduct an investigation into local country of origin material generated "within the entrails of the particular jurisdiction".

Nexus

AMC (Mozambique) v The Refugee Appeals Tribunal **[2018] IEHC 133, High Court (Humphreys J.), 8 March 2018** confirmed that where the Tribunal holds that there is no "nexus" in a claim, this allows rejection of the case irrespective of any other findings.

Internal Relocation

The High Court in ***AQ (Pakistan) v Minister for Justice and Equality*** **[2018] IEHC 276, High Court (Humphreys J.), 19 April 2018 applied**

the principle in *SBE v Minister for Justice and Equality* [2010] IEHC 133, High Court (Cooke J.), 25 February 2010 that "the issue of internal relocation is irrelevant unless that primary finding is shown to be defective". C.f., *MA v Minister for Justice and Equality* [2015] IEHC 287, unreported, High Court, MacEochaidh J., 6 May 2015.

Separate consideration for accompanied children?

The Court confirmed that where no separate claim is advanced on behalf of a minor applicant but is effectively based upon the claim made by a parent and which was rejected in an earlier decision, then the Tribunal is entitled to rely on that earlier finding and to reject any alleged claim of persecution based on the original claim of the parent. If, however, a separate and distinct claim is advanced on behalf of an applicant minor, then the Tribunal member is obliged to consider that claim (***FU (Nigeria) v The Minister for Justice, Law Reform and Defence*[2016] IEHC 339, High court (Stewart J.), 17 June 2018**).

Use of Panel for Conducting Investigation at First Instance

The applicants in ***IG v Refugee Applications Commissioner*** **[2018] IESC 25 (Dunne J., Clarke CJ, McKechnie, O'Donnell and O'Malley JJ. concurring), 16 May 2018** sought leave to appeal the High Court's refusal of leave to appeal the refusal of that Court to permit them to challenge by way of judicial review the manner in which the Commissioner operated his investigation under s.11 of the Refugee Act 1996, as amended.

The Court observed that there is a clear distinction between the power of delegation by the Commissioner in respect of an investigation under s.13 and the power of delegation in other legislative measures, and commented that whether the steps taken by the contractor in a s.13 investigation are ultimately found to amount to an unlawful delegation can only be determined on an application for judicial review. The Court was satisfied however that the applicant's case met the test provided for leave, and overturned the High Court on this point. The Supreme Court was critical of the High Court for refusing leave in circumstances where another judge of that Court had granted leave on the point previously. The Court could see no basis for the High Court in the instant matter refusing leave in circumstances where leave had already been granted on the same point in other cases. The Court thus allowed the appeal on this point also. (See also ***IG v Refugee Applications Commissioner***, Supreme Court, 16 May 2018, O'Donnell J.) Noted that although the Supreme Court judgments in *IG* relate to the administration of the investigation at first instance under the Refugee Act 1996, litigation on similar points under the International Protection Act 2015 is currently before the courts.

Withdrawal of application for asylum made originally under the "Hope Hanlon" Procedures

The administrative process for international protection that predated the Refugee Act 1996 came into focus, albeit in circumstances with current national security concerns, in ***XX v Minister for Justice and Equality*** **[2018] IECA 124, Court of Appeal (Hogan J., Peart and Irvine JJ. concurring), 4 May 2018.** The applicant, a Jordanian national of Palestinian extraction, applied for asylum in the State in 2000 under the Hope Hanlon procedures (before the Refugee Act 1996, as amended, came into operation). The applicant, on gaining residency in the State by reason of having an Irish born child asked to withdraw, his asylum application. A letter in reply from the Minister in August 2000 was to the effect that the application had been withdrawn.

The applicant's immigration history was fraught, involving as it did his deportation in 2016 on national security grounds due to his alleged involvement as a recruiter for ISIS. Before his deportation, however, the applicant had purported to apply *de novo* for asylum. The Refugee Applications Commissioner refused to accept this application on the basis that the applicant, if he wished to apply anew for asylum, first had to apply for the Minister's consent pursuant to s.17(7) of the 1996 Act. The applicant argued, essentially, that the Commissioner was incorrect because his earlier application had been withdrawn, but not refused, whether in 2000, or latterly by operation of the 1996 Act, as amended.

The Court of Appeal agreed (contrary to the High Court) that the applicant had withdrawn his previous asylum application before the commencement of the 1996 Act, and that his application was under the non-statutory scheme.

Thus, the Minister had not previously refused to grant the applicant a declaration of entitlement to asylum under s.17 of the 1996 Act. The applicant had withdrawn his claim in 2000, and no statutory provision then provided that where there is withdrawal, *"the Minister shall refuse to give the applicant a declaration"* (such provision only being introduced by amendment to the 1996 Act in 2003).

The High Court, in refusing the application, also relied on the provisions of the Procedures Directive in support of the conclusion that s.17(7) of the 1996 Act should be read purposively to apply to previous withdrawn applications made under the Hope Hanlon Procedures. The Court of Appeal held, however, that the applicant did not come within the definition in art.2 of that Directive re 'applicant for asylum' because no final decision was taken in his case pursuant to the provisions of the Qualification Directive.

The Court of Appeal ultimately upheld the High Court's refusal of the claim on the basis that the High Court proceedings amounted to an impermissible collateral attack on the Minister's decision under s.17(7) of the 1996 Act. It seemed to the Court of Appeal that the principal relief sought in the proceedings, namely a declaration that the applicant had filed a valid first-instance application for asylum in 2015, in substance amounted to a collateral challenge to the validity of the Minister's s.17(7) decision. For the Court, any challenge to the validity of that administrative decision had to be brought by way of judicial review proceedings. Thus, the Court of Appeal upheld the judgment of the High Court, albeit on the narrow ground that the proceedings amounted to a collateral attack on the s.17(7) decision.

Ending of refugee status

The High Court in ***MAM (Somalia) v Minister for Justice and Equality*** **[2018] IEHC 113*, High Court (Humphreys J.), 26 February 2018*** held that a refugee does not continue to be a refugee after acquiring Irish citizenship. In the Court's judgment, a refugee in the State automatically ceased to be a refugee by operation of law under s.2 of the Refugee Act 1996, on acquisition of Irish citizenship in that the definition of refugee in s.2 included the words *"is outside the country of his or her nationality"*, and no formal revocation of a declaration of refugee status was required (the relevant definition in s.2 of the International Protection Act 2015 being in similar terms, the Court's reasoning would seem to be equally applicable to that Act).

The applicant sought to appeal this judgment in ***MAM (Somalia) v Minister for Justice and Equality*** **[2018] IEHC 132, High Court (Humphreys J.), 13 March 2018.** The applicant argued that the Minister erred in failing to conduct an exercise to revoke the declaration of refugee status of the applicant's husband. The High Court had not accepted that there was an obligation to expressly revoke the declaration. Rather, in the Court's view, the cessation of that declaration seemed to be a necessary consequence of the applicant's husband ceasing to be a refugee. For this and other reasons, the Court concluded that there was no point of law of exceptional public importance for the purposes of s.5 of the Illegal Immigrant (Trafficking) Act 2000, as amended.

Subsidiary Protection

Article 15(b) & health care in the country of origin

The Court of Justice in ***MP v Secretary of State for the Home Department (Case C-353/16)*** **(Grand Chamber), 24 April 2018** provided guidance in respect of the Article 15(b) ground for subsidiary protection where there is a health care concern in a country of origin. MP, a Sri Lankan national, sought asylum in the UK on the basis that he had been detained and tortured by Sri Lankan security forces because of his membership of the Liberation Tigers of Tamil Eelam, and in circumstances where he now evidenced serious mental health as a result of trauma, and showed suicidal tendencies. The UK authorities did not accept that he would be of interest to the Sri Lankan authorities in the future, and refused his claim on both asylum and subsidiary protection grounds on the basis, in effect, that the Qualification Directive was not intended to cover cases within the scope of Art.3 ECHR where the risk was to health or one of suicide.

The UK Upper Tribunal allowed the applicant's claim on Art.3 ECHR grounds on the basis that once returned to his country of origin he would be in the hands of the Sri Lankan mental health services, with the result that, in view of the severity of his mental health illness, and the fact that he would be unable to access appropriate health care, returning him would breach Art.3. This was upheld by the Court of Appeal. CP

claimed that the UK Upper Tribunal and Court of Appeal had construed the scope of the Directive too narrowly. Thus the UK Supreme Court asked the CJEU whether art.2(e), read with art.15(b), of the Qualification Directive covered a real risk of serious harm to the physical or psychological health of the applicant if returned to the country of origin, resulting from previous torture or inhuman or degrading treatment for which the country of origin was responsible.

The Grand Chamber of the CJEU commented, inter alia, that art.15(b) of the Qualification Directive had to be read consistently with Art.4 of the EU Charter; that the guarantees of Art.4 of the Charter corresponded to those of Art.3 of the ECHR. The Grand Chamber said also that the Convention Against Torture had be to taken into consideration, in particular art.14 thereof, and that while it was not possible, without disregarding the distinct areas covered by that Convention, on the one hand, and the Qualification Directive, on the other, for an applicant in a situation such as MP to be eligible for subsidiary protection as a result of every violation, by his State of origin, (the *M'Bodj*judgment notwithstanding) it was "… *for the national court to ascertain, in the light of all current and relevant information, in particular reports by international organizations and non-governmental human rights organizations, whether, in the present case, MP is likely, if returned to his country of origin, to face a risk of being intentionally deprived of appropriatecare for the physical and mental after-effects resulting from the circumstances where, as in the main proceedings, a third county national is at risk of committing suicide because of the trauma resulting from the torture he was subjected to by the authorities of his country of origin, it is clear that those authorities, notwithstanding their obligation under Article 14 of the Convention against Torture, are not prepared to provide for his rehabilitation. There will also be such a risk if it is apparent that the authorities of that country have adopted a discriminatory policy as regards access to health, thus making it more difficult for certain ethnic groups or certain groups of individuals, of which MP forms a part, to obtain access to appropriate care for the physical and mental after-effects of the torture perpetrated by those authorities"* (Para.57).

Thus, in the Court's judgment, arts 2(e) and 15(b) of the Qualification Directive meant that an applicant "… *who in the past has been tortured by the authorities of his country of origin and no longer faces a risk of being tortured if returned to that country, but whose physical and psychological health could, if so returned, seriously deteriorate, leading to a serious risk of him committing suicide on account of trauma resulting from the torture he was subjected to, is eligible for subsidiary protection if there is a real risk of him being intentionally deprived, in his country of origin, of appropriate care for the physical and mental after-effects of that torture, that being a matter for the national court to determine*" (Para.58) .

Article 15(c) and the UNCHR's jurisdiction

The relevance, or lack thereof, of UNHCR guidance to subsidiary protection was considered in ***EHGA (Venezuela) v The International Protection Appeals Tribunal*** **[2018] IEHC 396, High Court (Humphreys J.), 5 June 2018**. The Court rejected the argument that the Tribunal erred in finding that the *UNHCR Guidelines on International Protection No. 12: Claims for refugee status related to situations of armed conflict and violence under Article 1A(2) of the 1951 Convention*, related to asylum seekers, not subsidiary protection. In the Court's view, counsel's concession that the UNHCR did not have jurisdiction to deal with subsidiary protection was fatal to this argument.

The right to be heard in the pre-International Protection Act 2015 Act consecutive process

The consequences of the "bifurcated, or consecutive, system for determining international protection claims continued to yield significant judgments in early 2018. In ***MM v Minister for Justice and Equality*** **[2018] IESC 10, Supreme Court (O'Donnell J, Clarke CJ and McKechnie, MacMenamin and O'Malley JJ concurring), 14 February 2018**, the applicant, a Rwandan national, was unsuccessful in his application for subsidiary protection (under the European Communities (Eligibility for Protection) Regulations 2006). The applicant's claim for subsidiary protection was based on essentially the same grounds as his rejected application for asylum. The Minister's decision refusing subsidiary protection quoted extensively from the Tribunal's decision, and concluded that the applicant did not warrant the benefit of the doubt.

The High Court considered the principal issue to be whether the duty of cooperation imposed by Article 4(1) of the Qualification Directive imposed

a duty on the Minister to supply the applicant with a copy of any draft decision adverse to the applicant to allow the applicant to comment on such findings before a final decision. Finding that matter to be unclear, the High Court referred it to the Court of Justice of the European Union. The CJEU rejected the duty contended for the applicant, but then went on to observe:

> *"However, in the case of a system such as that established by the national legislation at issue in the main proceedings, a feature of which is that there are two separate procedures, one after the other, for examining applications for refugee status and applications for subsidiary protection respectively, it is for the national court to ensure observance in each of those procedures, of the applicant's fundamental rights and, more particularly, of the right to be heard in the sense that the applicant must be able to make known his views before the adoption of any decision that does not grant the protection requested. In such a system, the fact that the applicant has already been duly heard when his application for refugee status was examined does not mean that thatprocedural requirement may be dispensed with in the procedure relating to the application for subsidiary protection."*

Applying that judgment, the trial judge in the instant matter *"sought an intermediate course, and deduced that certain procedures were required which bore traces of Irish administrative law concepts."* As the Minister's process did not accord with those procedures, the Court quashed the Minister's decision. The Minister appealed that judgment to the Supreme Court, and the applicant counter-appealed. Faced with various proposed interpretations of the CJEU's judgment in respect of the meaning of *"right to be heard"*, the Supreme Court referred the matter to the CJEU again.

Although the Advocate General, and the EU Commission, in the second preliminary reference, took the position that an oral hearing typically was necessary (although there was difference of view between the AG and the Commission on what that meant), the CJEU decided a written procedure was not incompatible with the right to be heard in EU law. More particularly, the CJEU concluded:

> *"The right to be heard, as applicable in the context of [Directive 2004/83/EC] does not require, as a rule, that, where national legislation, such as that at issue in the main proceedings, provides for two separate procedures, one after the other, for examining applications for refugee status and applications for subsidiary protection respectively, the applicant for subsidiary protection is to have the right to an interview relating to his application and the right to call or cross-examine witnesses when the interview takes place.*
> *"An interview must nonetheless be arranged where specific circumstances, relating to the elements available to the competent authority or to the personal or general circumstances in which the application for subsidiary protection has been made, render it necessary in order to examine that application with full knowledge of the facts, a matter which is for the referring court to establish."*

In applying that reasoning to the instant case, the Supreme Court held that the CJEU made it clear that, in the bifurcated Irish system, it was permissible to make a decision on the basis of a written procedure, so long as the procedure adopted was sufficiently flexible to allow the applicant to make his case, and that this was plainly the case in the instant case. The Court said further that while, exceptionally, it may be necessary to permit an oral interview, this was not the case here as the submission seeking subsidiary protection identified only those matters already relied on in the claim for asylum.

The Court emphasised that there was a difference between a credibility finding in the *"classic"* sense, whereby a decision maker decides between disputed accounts and facts, and a credibility finding in the sense of deciding whether an asserted conclusion follows from the facts. In the Court's view, it may be important in a particular case to distinguish which of these meanings of credibility applies as the necessity for some oral procedure or personal process will be more pressing where the veracity of a witness is a central issue.

In *SJ v Minister for Justice and Equality* [2018] IESCDET 35, (Clarke CJ, MacMenamin and Dunne JJ concurring), 5 February 2018, the Supreme Courtgranted the applicant leave to appeal a judgment of the High Court, with the

central question being whether an applicant for international protection, who seeks to rely on the credibility of the same statement (or statements) for the purposes of both a refugee status application under the Refugee Act 1996, and a subsidiary protection application under the 2006 Regulations, had an unqualified entitlement to have the same credibility issue assessed twice separately in each procedure.

The High Court, in***M.L. (DRC) v Minister for Justice and Equality*****, unreported, High Court (McDermott J.), 20 June 2017** clarified the obligations of the Tribunal (under the pre-2015 Act regime) to invite appellants for subsidiary protection to comment on adverse credibility findings in the asylum process where such findings are relied on in the decision on subsidiary protection. In its judgment, the High Court was satisfied that the Minister failed to afford the applicants a fair opportunity to address credibility issues in their subsidiary protection applications. The Court found that the decision-makers failed to rely on any material outside the adverse credibility findings made by the Tribunal concerning the assertions of fact made by them in respect of their claims. The Court considered it essential that the applicants be given an opportunity to address the adverse credibility findings quoted in the subsidiary protection decisions from the Tribunal decisions, and a fresh opportunity to revisit the matters bearing on their claims for subsidiary protection.

The Minister sought to appeal this decision to the Supreme Court. In its determination ***(ML v Minister for Justice and Equality*** **[2018] IESCDET 68, Supreme Court (O'Donnell, McKechnie, Finlay Geoghegan JJ.), 15 May 2018)**, the Supreme Court stated that it was not satisfied that the High Court's decision involved a matter of general public importance meriting an appeal to that Court. However, the Court considered that if the appeal proceeded before the Court of Appeal there was a possibility the proceedings could become further fragmented and increasingly complex and tortuous. Accordingly, the Court found it was in the interests of justice that the appeal proceed before the Supreme Court.

Temporal restriction in applying for subsidiary protection

On the facts of ***AAF v The Refugee Applications Commissioner*** **[2018] IEHC 286, *High Court (Faherty J.), 23 February 2018***, the Refugee Applications Commissioner refused to process an application for subsidiary protection on the basis that he was precluded from accepting the application because the applicant was refused refugee status before the Irish Regulations giving effect to the Qualification Directive came into effect on 10 October 2006. The applicant argued that there was nothing in the Directive that imposed the temporal restriction in the Irish Regulations. In the Court's judgment, the applicant had his rights determined in a pre Qualification Directive determination, and to allow him to apply for subsidiary protection now would be to apply the Directive retrospectively, whereas nothing in the Directive admitted of a retrospective application.

Enmeshment of subsidiary protection with deportation

The High Court had quashed the Minister's decision refusing subsidiary protection in light of the *MM* ruling from the CJEU, but had dismissed the applicant's application for judicial review on the following ground:

> "By confining the right to apply for subsidiary protection to the circumstances in which the asylum seeker's entitlement to remain lawfully in the State pursuant to s.9(2) of the Refugee Act 1996, has expired and a decision has been taken to propose the deportation of the applicant under s.3(3) of the Immigration Act 1999, Regulation 4(1) of the 2006 Regulations in conjunction with s.3 of the said Act of 1999, has the effect of imposing a precondition or disadvantage upon a subsidiary protection applicant which is ultra vires Council Directive 2004/83/EC […], and is incompatible with general principles of European law."

The State sought to appeal the quashing order, and the appellant sought to cross-appeal the refusal of judicial review on the above ground. The Court considered it in the interests of justice that the litigation be determined in one court, and granted the Minister leave to appeal the quashing order, and said it would be disposed to granting leave to the appellant on the above ground so long as no other ground was pursued (see ***VJ v The Minister for Justice and Equality*** **[2018] IESCDET 69, Supreme Court (O'Donnell, McKechnie, Finlay Geoghegan JJ.), 15 May**

2018. See also *ML v The Minster for Justice and Equality* [2018] IESCDET 68 and *JCM v The Minister for Justice and Equality* [2018] IESCDET 70).

The Dublin III Regulation
Procedural issues in "take back" requests

The CJEU, in its judgment of 25 January 2018, in **Case C-360/16 Hasan**, clarified, *inter alia*:

- art.27(1) of the Dublin III Regulation does not preclude a legislative provision that may lead the court or tribunal hearing an action brought against a transfer decision to take into account circumstances that are subsequent not only to the adoption of that decision but also to the transfer of the person concerned.

- a Member State to which an applicant has returned after being transferred is not allowed to transfer that person anew to the requested Member State without respecting a take back procedure.

- a take back request must be submitted within the periods prescribed in Article 24(2) of the Dublin III Regulation, which begins to run from the time the requesting Member State becomes aware of the presence of the person concerned on its territory.

- a pending appeal procedure brought against a decision that rejected a first application for international protection is equivalent to lodging of a new application.

- In case the person concerned does not lodge a new asylum application, it remains open to the Member State on whose territory that person is staying to initiate a take back procedure.

The CJEU, in its ruling in Case C-670/16 *Mengesteab*, had clarified that art.27(1) of the Dublin III Regulation means that an applicant challenging a transfer decision may rely on the expiry of a period laid down in art.21(1) for a "take charge" request, even where the requested Member State is willing to take charge of the applicant (see Case C-670/16 *Mengesteab)*. The High Court in ***ZS v The Refugee Appeals Tribunal* [2018] IEHC 436, High Court (Faherty J.), 27 June 2018** clarified that the same applies to a "take back" request. Thus, the process for determining the Member State responsible must be carried out in accordance with the rules laid down in ch.VI of Dublin III as well, and an appellant may challenge a transfer decision where those rules are breached. In particular, note that the timeframe in art.23(2) of the Dublin III Regulation cannot be extended by art.5(2) of the Implementing Regulation, and a decision-maker cannot extend the time in which to make a take back or take charge request by construing a refusal to take charge or to take back as a request for further information.

Procedural issues under Article 34 of Dublin III
The applicants in ***BS v The Refugee Appeals Tribunal* [2018] IESCDET 91, Supreme Court (Clarke C.J. MacMenamin and Dunne JJ.), 29 June 2018** complained that the erstwhile Refugee Applications Commissioner did not comply with arts 34(2), (4) and (9) of the Dublin III Regulation. When the Commissioner made an information request to the UK, in respect of the applicant and a number of other persons, under the Regulation, it supplied their fingerprints. The applicants submitted that the information received was obtained as part of an 'en masse' disclosure to the UK of the applicants' personal data, and that such use of their fingerprints breached data protection legislation as the purpose of obtaining the fingerprints was under the separate provisions of the Eurodac Regulation.

The Supreme Court usefully summarised the effects of the provisions in question at para.9 of its determination:

> 'Article 34(4) provides that any request for information shall only be sent in the context of an "individual application for international protection". Such request shall set out the grounds on which it is based, and where its purpose is to check whether there is a "criterion that is likely to entail the responsibility of the requested Member State, shall state on what evidence … or on what specific and verifiable part of the applicant's statements it is based". Art.34(8) imposes a duty to ensure that such information is up-to-date. Art.34(9) provides that the applicant shall have the right to be informed of any data that is processed concerning him or her. If the applicant finds that the data have been processed in breach of this Regulation, or of Directive

95/46/EC, an entitlement to have them "corrected or erased" shall accrue.'

The Court of Appeal had dismissed the applicants' appeal in its judgment of 14 June 2017. The Court of Appeal majority judgment held that there had been no breach of art.34 and, even if there had been such a breach, art.34 did not confer any rights on the applicants. Hogan J., dissenting, however, deemed the matter an open one properly referable to the CJEU.

The Supreme Court, having regard to Case C-670/16 *Mengesteab*, Case C-155/15 *Karim*, and Case C-63/15 *Ghezelbash*, concluded that the issues arising were not acteclair, and that the question raised was one of general public importance such that determination of the issues was in the interests of justice. Thus, the Court granted leave to appeal, asking that it hear the parties on, inter alia, the scope of the ground of appeal which should be permitted to be pursued, having regard to the manner in which the case was fought in the High Court, and whether a preliminary reference to the CJEU was necessary.

Timing of Transfer Decision

In ***Adil Hassan v Préfet du Pas-de-Calais* (Case 647/16) (Second Chamber), 31 May 2018** a French Administrative Court asked the CJEU, essentially, whether art.26(1) of the Dublin III Regulation precluded a Member State from adopting a transfer decision and notifying it to the subject of the decision before a requested Member State gives its explicit or implicit agreement. The Court's answer was that it was clear from the wording, history and objective of the Dublin III Regulation that a transfer decision must be adopted and notified to the person concerned only after the requested Member State has, explicitly or implicitly, agreed to take the person back. The Court observed that were this not the case, the scope of a person's effective remedy would be restricted, and transfer could take place before the requested Member State had given its consent for the transfer.

Right to choose country of asylum?

The High Court (O'Regan J.) refused an applicant leave to seek to argue in the context of a judicial review that the Dublin III Regulation breached the applicant's right to choose the country in which he could make an application for asylum. The applicant appealed that decision to the Court of Appeal. The Court of Appeal rejected the appeal, concluding that while Article 31 of the Refugee Convention conferred an element of choice on those seeking refugee status as to the country in which they will make their application, that choice is largely confined "to those applicants who are en route to a particular destination and whose choice of country of refuge is not nullified simply because they did not make an application in a Contracting State where they were simply stopping over or transiting." Moreover, in the Court's view, in the EU, Article 31 of the Refugee Convention is "supplemented and developed" by the Dublin III Regulation, and it cannot be said that a system expressly authorised by the Treaties, as Dublin III is by Article 72(2)(e) TFEU, could be unlawful on the ground that it is contrary to an international treaty which is not in itself part of EU law. See ***MIF v The International Protection Appeals Tribunal* [2018] IECA 36, Court of Appeal (Hogan J, Irvine and Whelan JJ concurring), 19 February 2018**

Article 17(1) "sovereign" discretion

The "sovereign discretion" of art.17(1) of Dublin III was the subject of several judgments in early 2018.In ***HN v The International Protection Appeals Tribunal* [2018] IECA 102, Court of Appeal (Hogan J., Peart and Irvine JJ. concurring), 18 April 2018, t**he Court of Appeal was of the view that given the judgment of the CJEU in Case C-578/16 PPU, *CK*, EU:C:2017:127, it seemed to follow, in the light of the Tribunal's findings in the instant case, that the Tribunal was under an obligation to consider exercising the art.17(1) discretion and, where necessary examine whether the applicant's mental health was sufficiently robust to withstand transfer to the UK, and to take account of all significant and permanent consequences flowing from the transfer. Thus, in the Court's view, it was arguable for the purposes of leave that the Tribunal was obliged to consider exercising the art.17(1) jurisdiction.

The applicant in ***U v The Refugee Appeals Tribunal* [2018] IESCDET 62, Supreme Court (Clarke CJ, Dunne and O'Malley JJ concurring), 26 April 2018** sought to "leapfrog" to the Supreme Court his appeal against the decisions of the High Court of 26 June 2017 and 24 October 2017. The Supreme Court, in its determination, observing that one of the factors which the Court will take into account in

assessing whether the criteria necessary for leapfrog leave have been made out Is the extent to which it might be considered that the case would benefit from greater clarification arising from an appeal to the Court of Appeal even in circumstances where it might transpire that the case might ultimately come to the Supreme Court by way of a further appeal. In the Court's view, that criterion was particularly important in this case where the notice of application for leave was diffuse and lengthy such that it appeared to the court that there was a very real prospect that a consideration of all the issues by the Court of appeal would lead to greater clarity about the issues, even if there was to be a further appeal to the Supreme Court.

The High Court, in *obiter* comments in ***ME (Libya) v The Refugee Appeals Tribunal (No 2)*** **[2018] IEHC 300, High Court (Humphreys J.), 14 May 2018** suggested that the Oireachtas give serious consideration to clarifying the art.17 matter if the Department does not prepare regulations to do so.

Dublin III as basis for an effective remedy of a subsidiary protection claim

The applicant in***ASB (Guinea) v Minister for Justice and Equality*** **[2018] IEHC 224, High Court (Humphreys J.), 23 March 2018** sought to appeal a refusal of subsidiaryprotection under the European Communities (Eligibility for Protection) Regulations 2006 after he was transferred back to the State under a Dublin III transfer order.The applicant's claim, it would seem, was based on the proposition that the applicant enjoyed rights under art.18 of the Dublin III Regulation such that the State had to provide him with an effective remedy against a refusal of subsidiary protection where the State took him back under the Dublin system. The applicant accepted however that he was not an applicant for the purposes of s.70 of the International Protection Act 2015. As the Court noted, however, prior applications, such as the applicant's, are dealt with under the Dublin II Regulation, not Dublin III. Thus, the applicant's case did not fall under art.18(1)(d) of the Dublin III Regulations. And, as the Court observed, the European Union (Dublin System) Regulations 2014 (giving effect to Dublin III) did not apply.

Rights of Applicants for International Protection

The Court of Appeal, in *Agha (a minor) v The Minister for Social Protection* [2018] IECA 155 (Hogan J., Peart and Irvine JJ. concurring), 5 June 2018 held that the statutory exclusion of an Irish citizen child, resident in the State, from eligibility for child benefit prior to the grant of refugee status to her mother, was in breach of the principle of equality under Art.40.1 of the Constitution of Ireland. In the Court's judgment, insofar as s.246(6) and (7) of the Social Welfare Consolidation Act 2005 prevented the payment of child benefit in respect of an Irish child resident in the State solely by reason of the immigration status of the parent claiming such benefit, those provisions were unconstitutional. The Court also clarified, however, that the statutory requirement that a qualifying parent of a child refugee resident in the State must also have a legal entitlement to reside in the State was not unconstitutional.

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Country Guidance: fostering convergence in the implementation of the CEAS

Maria Albertinelli, EASO

EASO published the first common analysis and guidance note on a country of origin, the 'Country Guidance: Afghanistan', on 21 June 2018.[1]

The 'Country guidance: Afghanistan' is the product of a pilot exercise in joint assessment of the situation in a particular country of origin and a milestone in the efforts to develop and effectively implement the Common European Asylum System (CEAS). It builds on, and adds to, a 'package', which already includes common training, common practical guides and tools, common country of origin information (COI); and it takes the next step towards meaningful convergence: it provides a common assessment and, essentially, common policy on a particular country of origin. It is primarily intended for asylum decision-makers in the EU.

Following the publication of the 'Country Guidance: Afghanistan', EASO and EU Member States are currently preparing the development of country guidance on Nigeria and Iraq, as well as the update of the guidance on Afghanistan, all expected to be published in 2019.

[1] The 'Country Guidance: Afghanistan' (June 2018) and additional information about its development, aim, scope and structure, are publicly available at https://www.easo.europa.eu/country-guidance.

Pilot development

Why we started it and how we went about it?

On 21 April 2016, the Council of the European Union agreed on the creation of a network of senior-level national policy officials, in order to carry out a joint assessment and interpretation of the situation in main countries of origin. EASO was tasked with the coordination of this network. The Council further called for a pilot exercise focusing on Afghanistan.[2] Shortly thereafter, the concept of country guidance was incorporated in the Proposal for the Regulation of the EU Agency for Asylum, making it an integral part of the enhanced mandate of the Agency.[3]

The pilot process required the design of a new working process and a horizontal framework for this new type of document. It also required an agreement on the criteria for the practical implementation of the EU asylum acquis, and a common understanding of the relevant jurisprudence of the Country of Justice of the EU (CJEU) and, in some cases, the European Court of Human Rights (ECtHR), to a level of specificity that had not been attempted before. Only on the basis of this, Member States could take the next step and assess the situation in Afghanistan.

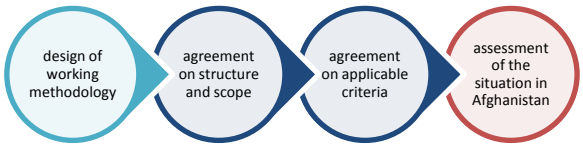

Figure 1. Elements of the pilot development.

The country of origin itself posed a number of challenges: applicants from Afghanistan present a multiplicity of different claims and complex protection considerations; and a considerable amount of additional COI needed to be produced in order to assess the applicability of the criteria for qualification for international protection. In addition, the starting point was that of a wide

[2] Council of the European Union, Outcome of the 3461st Council meeting, 21 April 2016, 8065/16, available at http://www.consilium.europa.eu/media/22682/st08065en16.pdf.

[3] COM (2016) 271: Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010, available at https://eur-lex.europa.eu/procedure/EN/2016_131.

variation in the recognition rates for applicants from Afghanistan.
The pilot development on Afghanistan started in September 2016 and was completed with the endorsement of the guidance note, accompanied by the common analysis, by the EASO Management Board in June 2018. The pilot is currently being evaluated in order to feed into a consolidated methodology for the sustainable and efficient development, review and update of country guidance.

Development process

Who is involved in the development of country guidance and how do we approach it?

The country guidance is the product of Member States' efforts, coordinated and facilitated by EASO. It also takes into account the input of stakeholders such as the European Commission and UNHCR.

The EASO Country Guidance Network, a network of senior-level policy officials from Member States and associated countries (EU+ countries), was set up for the purposes of this new task. The work of the Country Guidance Network is supported by Drafting Teams. For each development, a team of national experts is selected on the basis of their experience and expertise. The Drafting Team prepares the documents for review, discussion and approval by the Country Guidance Network.
EASO organises and coordinates the work, and supports it by providing objective and up-to-date COI, produced in line with EASO COI methodology,[4] as well as relevant horizontal guidance, i.e. general guidance on the criteria for qualification for international protection.[5] Thus, ensuring that the two components that form the basis for the country-specific assessment meet the necessary quality criteria.

Figure 2. Factual and legal basis for the development of country guidance.

Each development requires significant preparation. It is based on an overview of the current caseload in EU+ countries (e.g. encountered profiles of applicants, main reasons for applying for international protection), which defines the scope of the analysis and, respectively, the COI produced for its purposes. The production of COI for the assessment of the situation in the country of origin in terms of international protection needs is the next and most effort-intensive step in the preparation of country guidance. Each development is based on COI regarding the security situation in the country, the profiles which are targeted and the actors, the available protection, and the key socio-economic indicators and mobility, assessed in relation to the availability of internal protection alternative.

The country guidance development process itself includes a number of meetings at Drafting Team and at Country Guidance Network level, as well as written consultations.

The European Commission and UNHCR are also consulted and provide valuable input throughout the process.

The final text of the common analysis and the guidance note are agreed by the Country Guidance Network and the guidance note is endorsed by the EASO Management Board.

Fostering convergence

What is the aim?

A common understanding of the legal framework together with common COI, are the fundamental requirements for convergence in decision-making. Common country guidance, i.e. a joint assessment of the situation in the country of origin, is the next step, which builds on this legal and factual basis and adds the elements of analysis, assessment and guidance.

[4] For more information on EASO COI methodology and reports, see https://www.easo.europa.eu/country-origin-information.
[5] For more information on EASO horizontal guidance, see in particular the Practical Tools, available at https://www.easo.europa.eu/practical-tools.

The pilot development of country guidance played an important role in understanding Member States' policies and practice and possible reasons for the existing variation in recognition rates. Furthermore, it provided a discussion platform, where Member States reached key agreements. The pilot development of country guidance resulted in a common approach to the application of the EU asylum acquis requirements to the particular situation of Afghanistan.

It is early to assess the impact of the first country guidance on national policies and practice and its potential to foster convergence. The guidance is non-binding, Member States are invited to take it into account, without prejudice to their competence to take decisions on individual applications. However, being a common product of senior-level policy officials from EU+ countries, endorsed by the EASO Management Board, and having a practical nature, oriented to the needs of the asylum decision-maker, it is expected that the country guidance will contribute significantly to the aim of a coherent implementation of the CEAS. For Member States, which have their own detailed national guidance and policy, the expectation is that those will be reviewed and possibly adjusted in light of the common analysis and guidance. For Member States, which have no or limited national guidance or policy, it can be expected that decision-makers will be able to apply the country guidance directly in their daily work.

A practical tool for decision-makers

How should it be used?

The common analysis and the guidance note are designed for the asylum case officer. They follow all elements of the examination of an application for international protection, from actors of persecution or serious harm; through refugee status and the analysis of the protection needs of particular profiles of applicants encountered in practice; and the assessment of subsidiary protection needs, including a detailed assessment of indiscriminate violence per province in Afghanistan; through actors of protection and the availability of internal protection alternative, to exclusion.

The analysis is detailed and clearly stipulates its legislative and case law basis. It provides summary of the relevant COI, assessment of this COI, and guidance, in the form of conclusions.

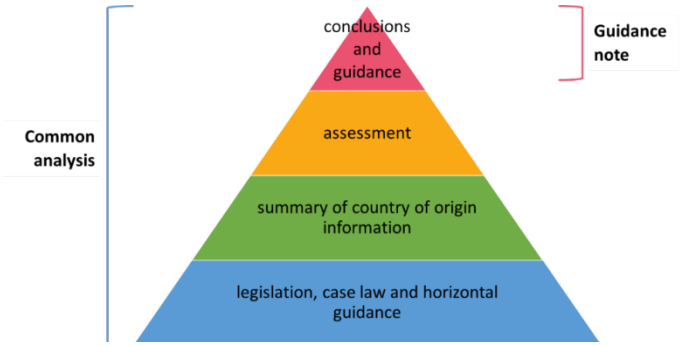

Figure 3. Structure and approach of the country guidance.

This transparency of approach and reasoning is considered an important quality of country guidance, which adds value from the perspective of both: national policy-makers (who can evaluate national guidance in light of the detailed reasoning) and decision-makers (who can examine the individual case, informed by the outlined considerations).

The country guidance is, in its essence, a practical tool for decision-makers. It does not, and cannot, replace the individual assessment of the application for international protection. It also does not substitute training for case officers, who need to be knowledgeable of the general criteria for qualification for international protection. Moreover, while the common analysis is based on and references COI, it is certainly not COI and cannot replace it.

What the country guidance provides is a starting point for the individual assessment of applications for international protection; one that has been developed in a process which ensures the use of quality COI and the correct application of the EU legal acquis. Having this common starting point has the potential to foster convergence in a way which ultimately contributes to fair and efficient asylum procedures.

THE SCOPE OF THE 1F EXCLUSION CLAUSE

Noleen Healy, Law Centre, Smithfield

1. International protection

International protection includes two discrete types of protection: refugee protection and subsidiary protection. Both are defined in section 2 of the International Protection Act 2015 (hereafter referred to as 'the 2015 Act'). A refugee is defined as follows.

> "'refugee' means a person, other than a person to whom section 10 applies, who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside his or her country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to it."

In respect of subsidiary protection, the following is set out at section 2.

> ""person eligible for subsidiary protection" means a person—
>
> (a) who is not a national of a Member State of the European Union,
>
> (b) who does not qualify as a refugee,
>
> (c) in respect of whom substantial grounds have been shown for believing that he or she, if returned to his or her country of origin, would face a real risk of suffering serious harm and who is unable or, owing to such risk, unwilling to avail himself or herself of the protection of that country, and
>
> (d) who is not excluded under section 12 from being eligible for subsidiary protection"

Serious harm is further defined in section 2.

> "(a) death penalty or execution,
>
> (b) torture or inhuman or degrading treatment or punishment of a person in his or her country of origin, or
>
> (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in a situation of international or internal armed conflict."

The concept of refugee protection is derived from international law and specifically the Geneva Convention relating to the Status of Refugees done at Geneva on 28 July 1951 and the Protocol relating to the Status of Refugees done at New York on 31 January 1967 (hereafter referred to 'the Geneva Convention'). Subsidiary protection is derived from EU law, specifically Council Directive 2004/83/EC of 29 April 2004 (hereafter referred to as 'the Qualification Directive').

2. Exclusion from protection statuses

As provided by the foregoing definitions, applicants can be excluded from being declared refugees or granted subsidiary protection even in circumstances where the feared persecution or serious harm they are likely to face fits the legal definitions. Of relevance for the purposes herein, section 10 of the 2015 Act provides, *inter alia*, as follows in respect of exclusion from refugee status.

> "(2) A person is excluded from being a refugee where there are serious reasons for considering that he or she—

> (a) 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) has committed a serious non-political crime outside the State prior to his or her arrival in the State, or
>
> (c) 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.
>
> (3) A person is excluded from being a refugee where there are serious reasons for considering that he or she has incited or otherwise participated in the commission of a crime or an act referred to in subsection (2)."

The foregoing gives effect to article 1F of the Geneva Convention. The UNHCR handbook and guidelines on the procedures and criteria for determining refugee status, which has been cited as authoritative in this jurisdiction in, inter alia, *K.D. [Nigeria] v. Refugee Appeals Tribunal* [2013] IEHC 481, offers the following guidance for decision makers.

> "For these clauses to apply, it is sufficient to establish that there are "serious reasons for considering" that one of the acts described has been committed. Formal proof of previous penal prosecution is not required. Considering the serious consequences of exclusion for the person concerned, however, the interpretation of these exclusion clauses must be restrictive." [para.149]

In *Bundesrepublik Deutschland v. B & D* (cases C-57/09 and C-101/09), preliminary references from Germany, the Court of Justice of the European Union (hereafter referred to as 'the CJEU') determined that a case by case analysis is an essential element in determining whether to apply an exclusion clause.

> "The fact that person has been a member of an organisation which, because of its involvement in terrorist acts…and that the person has actively supported the armed struggle waged by that organisation does not automatically constitute a serious reason for considering that that person has committed "a serious non-political crime" or "acts contrary to the purposes and principles of the United Nations". A finding that there are such serious reasons for considering that a person has committed such a crime or been guilty of such acts is "conditional on an assessment on a case-by-case basis of the specific facts with the view to determining whether the acts committed by the organisation concerned meet the condition laid down in those provisions and whether individual responsibility for carrying out those acts can be attributed to the person concerned […]"

The logical behind this approach was explained by Cooke J in *A.B. (Afghanistan) v. Refugee Appeals Tribunal* [2011] IEHC 412.

> "The rationale of the approach to the exclusion clause adopted by the Court of Justice [in B & D] 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." [para. 13]

Stewart J, in citing with approval the above passage, went on to conclude the following in *I.H. (Afghanistan) v. Refugee Appeals Tribunal* [2016] IEHC 14.

> "Without a clear determination of the applicant's status in the organisation and the specific reference to the acts he is alleged to have carried out, the imposition of the 1F exclusion clause cannot stand." [para.19]

However, a recent case from the CJEU highlights what might be a future position for the Court in respect of the expulsion of EU citizens and their family members in cases where the applicants had been deemed to fall within scope of the article 1F exclusion clause. In *K. v. Staatssecretaris van Veiligheid en Justitie*(C 331/16) and *H. F. v. BelgischeStaat* (C 366/16), a joint judgment of the Grand Chamber, delivered on 2 May, 2018, the Court held.

> "[A] restriction imposed by a Member State on the freedom of movement and residence of a Union citizen or a third-country national family member of such a citizen, who has been the subject, in the past, of a decision excluding that person from refugee status under Article 1F of the Geneva Convention or Article 12(2) of Directive 2011/95, may fall within the scope of the concept of 'measures taken on grounds of public policy or public security', within the meaning of the first subparagraph of Article 27(2) of Directive 2004/38." [para. 47]

The grounds for exclusion from subsidiary protection, set out in section 12 of the 2015 Act, are broadly similar to that of refugee status with, however, one addition. An applicant may be excluded from subsidiary protection if she has committed any serious crime or if there are serious reasons for considering that she has incited or otherwise participated in the commission of a serious crime. The CJEU confirmed in *Shajin Ahmed v. BevándorlásiésMenekültügyiHivatal*(Case C‑369/17), a request for a preliminary ruling by Hungary with judgment delivered on 13 September, 2018, that consideration of whether an applicant is to be excluded from subsidiary protection on account of the commission of a serious crime, still requires an individual assessment of the circumstances of the particular applicant. The CJEU ruled, in *Shajin Ahmed*, that it was not permissible to have blanket exclusion policies based upon sentence imposed for the crime.

3. Refoulement

A determination that an applicant is excluded from refugee status or subsidiary protection will not result in an applicant being returned to her country of origin in circumstances where there is evidence that an applicant will be subjected to persecution or serious harm. Section 50 of the 2015 Act prohibits refoulement. Section 50(1) defines it as follows.

> "A person shall not be expelled or returned in any manner whatsoever to the frontier of a territory where, in the opinion of the Minister—
>
> (a) the life or freedom of the person would be threatened for reasons of race, religion, nationality, membership of a particular social group or political opinion, or
>
> (b) there is a serious risk that the person would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."

The foregoing gives effect to the state's international legal obligations under, *inter alia*, article 3 of the ECHR and the UN Convention against Torture. Even where it is determined that an applicant is excluded from international protection, the state cannot remove the applicant to a state where he would face, for example, torture. There is no balancing exercise and there are no public policy considerations. The conduct of the applicant is irrelevant (*Soering v. United Kingdom* (app. no. 14038/88)). The obligation goes no further than providing for the right not to be returned to face persecution or serious harm. The host state is under no obligation to provide access to the labour market or social welfare system.

The test to be applied by the Minister in analysing whether there is a risk of treatment contrary to article 3 of the European Convention on Human Rights (hereafter referred to as 'the ECHR') in the country of origin was set out by the European Court of Human Rights (hereafter referred to as 'the ECtHR') in *Saadi v. Italy* [2009] 49 EHRR 30.

> "[T]he Court has frequently indicated that it applies rigorous criteria and exercises close scrutiny when assessing the existence of a real risk of ill-treatment […]

> in the event of a person being removed from the territory of the respondent State by extradition, expulsion or any other measure pursuing that aim. Although assessment of that risk is to some degree speculative, the Court has always been very cautious, examining carefully the material placed before it in the light of the requisite standard of proof […] before indicating an interim measure under Rule 39 or finding that the enforcement of removal from the territory would be contrary to Article 3 of the Convention." [para.142]

The above test was followed by the ECtHR in a 2010 case, *Daoudi v. France* (app no. 19576/08), which involved a national of Algeria who was involved in so-called Islamic terrorism. The applicant was convicted of preparing to commit terrorist acts in France and the French state thereafter sought his removal to Algeria after the expiry of his prison sentence. The applicant claimed that he would be subjected to treatment contrary to article 3 at the hands of the Algerian regime if returned. Even in circumstances where the applicant had been convicted of terrorist related activities, the Court held that the French state was precluded from expelling the applicant where there was evidence that he would be subjected to torture if returned to Algeria. In the case of *J.K. v. Sweden* (app. no. 59166/12) the ECtHR ruled that it was for the applicant to provide evidence that he would be subjected to torture if returned, in that case, to Iraq.

In *X.X. v. Minister for Justice* [2018] IECA 124 the applicant, a national of Jordan, withdrew his asylum claim in 2000 upon the grant of residency based upon his parentage of an Irish citizen child. Lately, his Irish citizen son had left the jurisdiction and had been imprisoned in Jordan. The applicant claimed that he would be tortured if returned to Jordan. The Minister claimed that the applicant was an organiser for the *Daesh*/ Islamic State group. The pertinent aspects of the High Court decision, for the purposes herein, were not subject to appeal. In the High Court decision, *X.X.* [2016] IEHC 377, Humphreys J approved of the test set out above in, *inter alia*, *Saadi* (supra), and stated as follows.

> "The onus is on the applicant in the first instance to adduce evidence to show a real risk (*Saadi*, para. 129). If he succeeds in doing so then it is for the government to dispel that risk. It is clear from the Strasbourg case law that the evidence must normally show a connection between the country of origin information and the applicant's personal circumstances, save where the applicant is a member of a group that is exposed to systematic ill-treatment.
>
> There is nothing to support the proposition that the Jordanian authorities currently know anything at all about this applicant. There is a fundamental evidential gap at the heart of the application. There is no evidence to show any risk personal to him." [para. 127-128]

The Minister's decision to deport the applicant to Jordan was upheld.

In *Y.Y. v. Minister for Justice* [2017] IESC 61 the applicant, a national of Algeria, was granted refugee status in the state in 2000. He was later convicted of terrorism related offences in France and the Irish state went about revoking the refugee status. He returned to Ireland and applied for subsidiary protection. In the tribunal decision, it was decided that he would be at risk of treatment contrary to article 3 and would qualify for subsidiary protection but he was excluded on the basis of the convictions. The Minister then went on to make a deportation order but did not follow the reasoning of the tribunal. The Minister determined that there was no risk of treatment contrary to article 3. Humphreys J determined, in *Y.Y.(no.1)* [2017] IEHC 176, that it was open to the Minister to come to a different conclusion to that of the tribunal in the context of subsidiary protection. The decision was appealed, in a leapfrog appeal, to the Supreme Court. However, leave was not granted on the foregoing point. The Supreme Court, in *Y.Y.* [2017] IESC 61 granted leave and upheld the High Court determination that the Minister is not obliged to notify an applicant of generally available country information and reports he intends to rely upon in determining whether an applicant is at risk of torture if returned to his country of origin.

4. Conclusions

If an applicant claims to be at risk of persecution if returned to her country of origin on account of her race, religion, nationality, political opinion or due to her membership of a particular social group, then she could qualify for refugee status. If she is

not at risk for any of the foregoing reasons but is still at risk of serious harm, then she may qualify for subsidiary protection. If her claim is accepted as being credible and substantiated by country of origin information, the applicant could still be subject to the 1F exclusion clause, and refused protection, if it is deemed that the applicant is not deserving of protection. As the case law clearly demonstrates, to apply an exclusion clause, the decision maker must engage in a case specific analysis. Membership or support of a proscribed organisation is not sufficient to meet the test. The support would have to be material. A difficulty will arise for legal representatives in cases of this nature in respect of the documentation and information which will be furnished by the Minister. A file is usually provided containing all information relied upon by the international protection officer upon receipt of a negative recommendation at first instance. If, however, material relied upon is claimed to be pertinent to national security, this is unlikely to be provided to the applicant and her legal representatives. It is essential, therefore, the applicant is made aware of this possible deficiency in information provision.

If the tribunal member on appeal decides to apply the exclusion clause and, therefore, exclude the applicant from international protection, the Minister is still precluded from removing the applicant to her country of origin, if there is evidence that he could be subjected to persecution or serious harm. However, it is open to the Minister to conclude that an applicant would not be subjected to persecution or serious harm, if returned, even in circumstances where the tribunal came to a different conclusion.

A REFUGEE'S PERSONAL DATA RIGHTS

Paper presented by Noeleen Healy at the Refugee Rights in Records Symposium, UCD
9 August, 2018

1. THE RECORDS KEPT

International protection applicants must claim protection from within the jurisdiction. Applicants usually make their applications at the port of entry or at the International Protection Office in Dublin, a body under the auspices of the Department of Justice charged with determining claims. A preliminary interview is undertaken where the applicant provides extremely sensitive and personal details including information about her family, medical information, travel details and a narrative of the issues giving rise to her claiming protection. Passports and any other documents are taken by officials at this interview. Biometric details are also taken from the applicant. Fingerprints and other personal details are then sent to a central database in Luxembourg to determine whether the applicant had a visa, claimed protection or travelled through another European country. If a match is found, the applicant risks being subject to the Dublin procedures[6] and transferred to another European country to have her claim determined.

The applicant is provided with a questionnaire at the first short interview, a document running to over sixty pages. The applicant is required to provide personal information spanning her entire life, including, for example, the primary school attended and every position of employment ever held. The applicant has usually registered with the Legal Aid Board by now and a consultation is set up so that the applicant may be assisted with the questionnaire. Thereafter, the legal advisor holds a file containing sensitive personal data in respect of the applicant. After submitting the questionnaire, the applicant is later interviewed by the International Protection Office. This substantive interview can often last a number of hours and an applicant can be asked anything about her life. A written note of the interview is retained on the file.

2. CLASSIFICATION OF THE RECORDS AND LEGAL PROTECTIONS

The foregoing highlights the nature of the records held in respect of an applicant prior to a declaration of refugee status. There is no other group in the community with such all-encompassing records held by a government department. However, refugees are fully entitled to the protection provided by data protection law. The right to data protection is a human right. Article 8 of the Charter of Fundamental Rights of the European Union enshrines the right to protection of personal data.

[6] Dublin Regulation (Regulation No. 604/2013)

1. "Everyone has the right to the protection of personal data concerning him or her.

2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified."

The above is not an absolute right and can be limited where necessary to, for example, protect another right. A further layer of protection is provided by the General Data Protection Regulation (hereafter referred to as 'the GDPR'). The GDPR provides for additional protections where sensitive personal data is being processed. Article 9(1) of the GDPR prohibits the processing of sensitive personal data, subject to the exemptions at article 9(2).

> "Processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation shall be prohibited."[7]

The exceptions provided by article 9(2) of the GDPR can be summarised as follows.

1. Explicit consent has been provided by the data subject

2. Processing is necessary for the purposes of carrying out the obligations and exercising specific rights of the controller or of the data subject in the field of employment and social security and social protection law

3. Processing is necessary to protect the vital interests of the data subject where the data subject cannot give consent

4. Processing is carried out by a foundation, association or any other not-for-profit body with a political, philosophical, religious or trade union aim and is not made public

5. The data subject has already made the information public

6. Processing is necessary for the establishment, exercise or defence of legal claims

7. Processing is necessary for reasons of substantial public interest

8. Processing is necessary for the purposes of preventive or occupational medicine

9. Processing is necessary for reasons of public interest in the area of public health

10. Processing is necessary for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes

The ten exceptions are wide and clearly legitimise the processing of the sensitive personal data of refugees, subject to safeguards being in place. These safeguards are provided for at article 5 of the GDPR and can be summarised as follows. Personal data shall be:

1. Processed lawfully, fairly and transparently

2. Collected for specific, explicit and legitimate purposes and not further processed[8]

3. Adequate, relevant and limited to what is necessary

4. Accurate and kept up-to-date; erased or rectified without delay

5. Stored for only as long as is necessary

6. Secure and confidential

Evidently, the safeguards are hugely important where the data being processed involves such sensitive personal information.

[7] article 9(1) GDPR

[8] This is subject to the exception of processing for archiving purposes, which is dealt with below.

3. HOW CAN THE REFUGEE'S PERSONAL INFORMATION BE USED?

The International Protection Office provides the following information on how it will process and retain a refugee's sensitive personal data.

> "We may use the personal data you provide to the International Protection Office for the purpose of assessing your eligibility for international protection and, if appropriate, permission to remain at first instance in line with the relevant statutory framework. This includes the data you provide in the Application for International Protection Questionnaire (IPO 2) and any other personal data you may provide to the IPO by any other form or means. If required, the IPO and the Irish Naturalisation and Immigration Service/Department of Justice and Equality may also use the personal data you provide in the IPO 2 and in associated correspondence as part of any future consideration regarding your immigration or citizenship status."[9]

The information taken throughout the process may be retained by the Department of Justice until such a time as the refugee becomes a naturalised citizen.

4. FURTHER JUSTIFICATIONS FOR USE OF THE REFUGEE'S PERSONAL DATA

Recognising the public interest in maintaining archives, article 89, as well as the exception contained in article 9(2), of the GDPR allows for the processing of a refugee's sensitive personal data. This justification is subject to the implementation of measures to protect from the disclosure of the refugee's identity and a requirement that only the necessary data is processed and no more. This justification is based upon the public importance of maintaining archives. Because the data maintained should be subject to the principle of data minimisation,[10] it is unlikely to cause risk to the rights and freedoms of the refugee.

There are other justifications which are warranted in the public interest. These justifications primarily centre on criminal justice and public protection. When personal data is processed by public authorities for criminal justice purposes, for example, it is the Police and Criminal Justice Authorities Directive (Directive (EU) 2016/680) that applies rather than the GDPR.[11] Protections are still afforded and data must be processed in a manner that is lawful, fair and transparent. However, the primary focus of the Directive is public security rather than that of protection of individual rights.

As mentioned briefly above, the right to protection of one's personal information is a human right and protected by, *inter alia*, article 8 of the Charter of Fundamental Rights. There is wide scope for derogation where the justification is public security. That is, of course, a legitimate reason for derogation when used appropriately. It should not be used too widely or risks being ruled as contrary to EU law.[12]

5. REVOCATION OF REFUGEE STATUS

A refugee's status can be revoked by the Minister in circumstances where it is found that the status was granted based upon some form of misrepresentation by the refugee. Section 52(1) International Protection Act 2015 allows for the revocation of refugee status in circumstances where:

> "(c) misrepresentations or omission of facts, whether or not including the use of false documents, by the person was decisive in the decision to give the person a refugee declaration."

The legislation governing the area until December 2016, the Refugee Act 1996 (as amended), provided for a similar process for revocation at section 21(1)(h).

> "[I]f the Minister is satisfied that a person to whom a declaration has been given [...] 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 Appeals Board which

[9] International Protection Office, Privacy notice available at http://www.ipo.gov.ie/en/ipo/pages/data_protection

[10] In accordance with article 89 of the GDPR

[11] Both have been transposed into Irish law by the Data Protection Act 2018

[12] See, for example, *Digital Rights Ireland Ltd v Minister for Communications* (8 April, 2014, C-293/12 and C-594/12), where the CJEU struck down the Data Retention Directive (Directive 2006/24/EC) because the retention of records was not proportionate to the aims of the legislation.

> was false or misleading in material particular, the Minister may, if he or she considers it appropriate to do so, revoke the declaration."

Neither of the above pieces of legislation provides a definition for the terms 'decisive in the decision' or 'false or misleading in material particular'. It is for the Minister to later decide whether a decision maker would have come to a different decision had this information been before her.

Aside from the obvious difficulties with the subjectivity of the above subsections, it is unclear, from a data retention perspective, whether it is justifiable to hold the entire contents of the records for an indeterminate amount of time in case further information comes to light which could justify the revocation process. If this is the case, a fundamental safeguard of data protection law, that personal information will only be stored for only as long as is necessary, is meaningless for refugees. It is worth recalling that the nature of the information provided is extremely sensitive and includes each and every personal detail related to the individual.

In the case of *Huber v Germany*[13], for example, the applicant challenged the legality of the German state's registry of non-citizen, EU nationals. The CJEU determined that it was legitimate to hold a registry but that the data stored should be proportionate and limited to what was necessary.

6. CASE STUDY

In December 2005, two unaccompanied minors arrived in Ireland. They informed the authorities that they were sixteen-year-old cousins from Somalia. They claimed to be of the Bajuni tribe, spoke the Kibajuni dialect and had a geographical knowledge of the region. They did not have identity documents, as is the case for many Somali nationals. They stated that they travelled from Somalia to Mombasa, and on to Nairobi. From Nairobi, they travelled to Ireland, through a location unknown to them. In July 2006, they were granted refugee status.

When, in 2011, one of the appellants applied for Irish citizenship, his fingerprints were sent to the central database in Luxembourg usually used when an applicant arrives in the state and to determine whether another European state is responsible for determining a claim under the Dublin procedures.[14] A match resulted and the second appellant's fingerprints were also sent through the central database. Another match resulted. It appeared from the results that they were Tanzanian brothers who applied for British visas in Dar es Salaam in 2005. The Minister went about revoking both refugee statuses based upon section 21 of the Refugee Act 1996 (as amended).

The appellants appealed claiming that they were forced to travel on false documents because, as Somalis, they had no access to travel documents. The judgment of the High Court[15] provides extensive details of the correspondence between the British and Irish governments in 2011, the failures in the British visa processing system in Dar es Salaam at the time, including the fact that it was open to abuse, and the explanations offered by the two appellants. For the purposes herein, the judgment details the extent of record retention and what appears to have been the use of biometric data outside the permissible scope. The governing regulation at that time allowed for fingerprints to be held for a period of ten years or as soon as the person becomes a naturalised citizen.[16]

The permissible use of the central fingerprint system in Luxembourg is limited to identifying which European state is responsible for the determination of the claim for protection under the Dublin regulations. The Irish state's legal basis for the use of the central fingerprint database in the context of the naturalisation application, and later as a justification for revocation, is unclear. The Department of Justice's data protection policy states as follows in respect of personal data uses.

> "DJE will be fully transparent in relation to how personal data collected is used, in particular ensuring that the data is not used in a way that a data subject would not expect. DJE will provide the required information to data subjects when the personal data is collected […]

[13] (16 December, 2008, C-524/06)

[14] Dublin Regulation (Regulation No. 604/2013)

[15] *SAS & AAS v Minister for Justice and Equality* [2017] IEHC 163

[16] Council Regulation (EC) (No 2725/2000) of 11 December 2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention

> DJE processes personal data only for the purposes for which it is collected."[17]

Notably, this is a recitation of the one of the six GDPR safeguards, set out above. It was also an underlying principle of the Data Protection Directive[18], the predecessor to the GDPR and operative at the time the two appellants' fingerprints were sent to Luxembourg for comparison. The explanation offered by appellants, that someone else secured the visas and that the unknown location they travelled through could have been Dar es Salaam, was not accepted by the High Court. The appeal was not successful at the High Court and the Minister's revocation was upheld.

The argument in respect of the data protection irregularities was not run due to a procedural deficiency. They appealed to the Court of Appeal and the case was heard on 3 July. The judgment is awaited. If the High Court decision is upheld, the appellants' refugee status will be confirmed as revoked and their position in the state will be precarious. The case study provides a useful example of a situation where a purported breach of data protection principles can have very serious ramifications for a refugee.

7. CONCLUSIONS

The retention of archives is hugely important in the public interest. The GDPR requires that the archives maintained should be held subject to the principle of data minimisation. Further, it is also justifiable for the state to hold a record of non-citizens present in the jurisdiction. Because of the sensitive and extensive nature of the personal data held in respect of refugees, it is vital that the retention of the records should comply with the data protection safeguards. The safeguards are in place to ensure the refugee maintains her right to the protection of her personal information, as balanced against the legitimate public interest in maintaining records.

[17] Department of Justice and Equality, Data protection policy, May 2018 at page 5, available at http://www.justice.ie/en/JELR/Pages/Data_Protection

[18] Data Protection Directive (EU Directive 95/46/EC)

Who are the Uyghurs? RDC Researcher David Goggins Investigates:

David Goggins, Refugee Documentation Centre

Introduction

The Uyghurs are a Turkic ethnic group who live mainly in Xinjiang province, an autonomous region in the west of China. Xinjiang borders eight countries and has an area of 1,600,000 square kilometres, making it larger than France, Germany, Spain and Great Britain combined.[19] About 80% of Uyghurs in Xinjiang live in the Tamsin Basin region in the south of the province. Many Uyghurs reject the name Xinjiang, which means "new frontier", preferring to use the name East Turkestan for the province.[20] The Uyghurs of Xinjiang enjoyed a brief taste of independence in the 1940s but this was suppressed following the occupation of the region by Communist forces in 1949.

A Separate Identity

Uyghurs regard themselves as being ethnically nearer to other central Asian nations than to the Han Chinese majority. Their distinct culture includes their Turkic language, traditional dress, traditional music and their unique cuisine. Most Uyghurs are Sunni Muslims and it is their religion which above all gives them their separate identity.

[19] Far West China (14 August 2017) 10 Crazy, Little-Known Facts about Xinjiang

[20] Minority Rights Group International (November 2017) World Directory of Minorities and Indigenous Peoples – China: Uyghurs

The desire of the Uyghur people to maintain a separate identity has brought them into conflict with the ruling Communist Party of China, which has imposed severe restrictions on their human rights, especially the right to practice their religion, and which is currently making every effort to absorb the Uyghurs into mainstream Chinese society. This includes mass immigration of Han Chinese into Xinjiang, which has resulted in the Uyghurs becoming a minority within the province.

A BBC News report refers to the consequences of government policy in the region as follows:

"Xinjiang has received huge state investment in industrial and energy projects, and Beijing has been keen to highlight these as major steps forward. But many Uighurs complain that the Han are taking their jobs, and that their farmland has been confiscated for redevelopment."[21]

Violence in Xinjiang

The policies of the Chinese government have provoked violence in the region, as is commented upon in a Minority Rights Group report which states:

"Resentment of and resistance to government-supported migration or support of Han Chinese to the detriment of Uyghurs, restrictions on their religious and cultural practices and loss of land have periodically caused eruptions of violence in the region."[22]

The 2018 Human Rights Watch report for China states:

"The Chinese government has long conflated peaceful activism with violence in Xinjiang, and has treated many expressions of Uyghur identity, including language and religion, as threatening. Uyghur opposition to government policies has been expressed in peaceful protests but also through violent attacks. However, details about protests and violence are scant, as authorities severely curtail independent reporting in the region."[23]

[21] BBC News (30 April 2014) Who are the Uighurs?
[22] Minority Rights Group International (November 2017) World Directory of Minorities and Indigenous Peoples – China: Uyghurs
[23] Human Rights Watch (18 January 2018) World Report 2018 - China

The Urumqi Riots

A particularly serious outbreak of violence occurred in July 2009 when rioting broke out in the city of Urumqi. The Uyghurs and the government blamed each other for the resulting mayhem, which according to reports included nearly 200 dead and about 1700 injured. A Human Rights Watch report on these events states:

"The protests of July 5-7, 2009, in Urumqi, the capital of Xinjiang, were one of the worst episodes of ethnic violence in China in decades. Information about the Xinjiang protests and their aftermath remains fragmentary. On July 5, protests by Uighurs, an ethnic minority group, against the killing of Uighur workers at the Guangdong toy factory appear to have begun peacefully. It remains unclear how the protest turned violent, with Uighur sources blaming the riot police for the excessive use of force against the protestors."[24]

Human Rights Watch reported the arrest of hundreds of Uyghurs in the aftermath of the violence, with dozens of them being "disappeared". Other sources allege that thousands of Uyghurs were arrested. BBC News reported that nine rioters were executed, eight of who were Uyghurs.[25]

The continuing repression of the Uyghurs and the absence of any means of peaceful protest resulted in numerous violent incidents since 2009. This included an attack on civilians in Kunming Railway Station in March 2014 by eight knife-wielding terrorists who were subsequently identified by the Chinese authorities as Uyghur separatists.

The Pretext of Terrorism

The Chinese government has sought to link the actions of Uyghur separatists with international terrorist groups such as al-Qaeda or Islamic State. This issue is addressed in a BBC News report which states:

"More than 20 Uighurs were captured by the US military after its invasion of Afghanistan. They

[24] Human Rights Watch (20 October 2009) "We Are Afraid to Even Look for Them": Enforced Disappearances in the Wake of Xinjiang's Protests
[25] BBC News (9 November 2009) Nine executed over Xinjiang riots

were imprisoned at Guantanamo Bay for years without being charged with any offence and most have now been resettled elsewhere. Since the 9/11 attacks in the US, China has increasingly portrayed its Uighur separatists as auxiliaries of al-Qaeda, saying they have received training in Afghanistan. Little evidence has been produced in support of these claims."[26]

See also BBC News report which states:

"China says it's dealing with a threat from separatist Islamist groups, and while some Uighur Muslims have joined the Islamic State militant group, rights groups say violence in Xinjiang stems from China's oppression of people there."[27]

Various sources have noted that Uyghurs involved in violent attacks are usually armed only with knives rather than the firearms that would be available to international terrorists.

The Chinese government has been accused of exaggerating the threat of terrorism to justify a heavy-handed crackdown on the Uyghur population of Xinjiang. In its most recent terrorism report for China the US Department of State notes that:

"China's first comprehensive counterterrorism law came into effect on January 1, 2016. This law explicitly endorses China's longstanding counterterrorism efforts, which are sometimes difficult to distinguish from suppression of individuals and groups, most often ethnic Uighurs, who the Chinese Communist Party deems politically subversive."[28]

Suppression of "Extremism"

"In March, the XUAR enacted the 'De-extremification Regulation' that prohibits a wide range of behaviours labelled 'extremist', such as spreading 'extremist thought', denigrating or refusing to watch public radio and TV programmes, wearing burkas, having an 'abnormal' beard, resisting national policies, and publishing, downloading, storing or reading articles, publications or audio-visual materials containing 'extremist content'

In April, the government published a list of prohibited names, most of which were Islamic in origin, and required all children under 16 with these names to change them.[29]

Religious Discrimination

Perhaps the greatest difficulty besetting the Uyghurs is their continued adherence to Sunni Islam in the face of strenuous efforts by the atheist Communist regime to stamp out the faith. Regarding Uyghur religious belief a document compiled by ACCORD quotes from the 2015 book "China's Forgotten People" by Nick Holdstock as follows:

"In press reports and articles that feature Uyghurs the main fact supplied about them is that they are Sunni Muslims. Though accurate, this statement needs to be qualified. Both the degree of religious belief and participation vary greatly among Uyghurs, to the point that for some Uyghurs the notion of being 'Muslim' is more of a cultural marker than a description of faith."[30]

Explaining the apparent inconsistent attitude of the authorities regarding religious tolerance a report from the US-based NGO Freedom House states:

"In many parts of China, ordinary believers do not necessarily feel constrained in their ability to practice their faith, and state authorities even offer active support for certain activities. At the other extreme, Chinese officials have banned holiday celebrations, desecrated places of worship, and employed lethal violence. Security forces across the country detain, torture, or kill believers from various faiths on a daily basis. How a group or individual is treated depends in large part on the level of perceived threat or benefit to party interests, as well as the discretion of local officials."[31]"

However, any tolerance shown towards other faiths does not extend towards Uyghur Muslims. A report published by the Department of Foreign Affairs and Trade of Australia states:

"Chinese law restricts expressions of the Islamic faith, and officials apply the law rigorously in

[26] BBC New (30 April 2014) Who are the Uighurs?
[27] BBC News (1 October 2018) China Uighurs: All you need to know on Muslim 'crackdown'
[28] US Department of State (19 July 2017) Country Reports on Terrorism 2016 - China (Hong Kong and Macau)
[29] Amnesty International (22 February 2018) Amnesty International Report 2017/18 - China
[30] ACCORD (April 2016) China: Situation of Uyghurs
[31] Freedom House (February 2017) The Battle for China's Spirit

relation to Uighur Muslims. In 2017, restrictions which had been in place for some time were formalised in law, including bans against wearing full veils, growing beards, use of religious names for Muslim newborns, and marrying only in a religious ceremony."[32]

This report also states:

"Chinese law prohibits people under the age of 18 from attending prayer at mosques, fasting by government officials or students during Ramadan, and private religious education. In 2016 and 2017, officials in Xinjiang actively policed Ramadan observance, reportedly forcing people to eat during the day."[33]

Other Forms of Discrimination

Xinjiang Uyghurs also suffer discrimination in both education and employment. A prominent critic of government policies is IlhamTothi, an Uyghur intellectual and professor in a Beijing university and a member of the Communist party, who has said that:

"Given the absence or non-enforcement of national ethnic policies, the primary cause of employment difficulties among minority university students is blatant ethnic discrimination in hiring."[34]

On the subject of education IlhamTothi has said.

"Besides unemployment, the issue that provokes the most intense reaction within Xinjiang's Uighur community is the issue of bilingual education. In practice, 'bilingual education' in Xinjiang has essentially become 'monolingual education' (i.e. Mandarin-only education.) Within the Uighur community, there is a widespread belief that the government intends to establish an educational system based on written Chinese and rooted in the idea of 'one language, one origin.' Suspicions abound that the government is using administrative means to exterminate Uighur culture and accelerate ethnic and cultural assimilation."[35]

In 2014 IlhamTothi was sentenced to life imprisonment for his views after what Amnesty International has condemned as an unfair trial. Regarding this sentence a BBC News report states:

"What is so extraordinary about the sentence is that IlhamTohti was not an independence activist, far less a terrorist, but an outspoken advocate of building bridges between the two communities."[36]

Re-education Camps

In 2017 the Chinese government drastically increased its efforts to subjugate the Uyghurs and to completely assimilate them into mainstream culture. The most distressing aspect of this programme is the wholesale internment of the Uyghur population by means of so-called re-education camps.

Regarding the detention of Uyghurs a report from the US government funded Radio Free Asia states:

"Since April 2017, members of the mostly Muslim Uyghur ethnic group suspected of separatist views have been detained in camps throughout Xinjiang, where Uyghurs have long complained of pervasive discrimination, religious repression and cultural suppression under Chinese rule. Central government authorities in China have not publicly acknowledged the existence of re-education camps in Xinjiang, and the number of inmates kept in each facility remains a closely guarded secret."[37]

Regarding the number of Uyghurs imprisoned in these camps an Associated Press report states:

"The new internment system was shrouded in secrecy, with no publicly available data on the numbers of camps or detainees. The US State Department estimates those being held are 'at the very least in the tens of thousands.' A Turkey-based TV station run by Xinjiang exiles said

[32] Australian Government: Department of Foreign Affairs and Trade (21 December 2017) DFAT Country Information Report – People's Republic of China, p.16
[33] Australian Government: Department of Foreign Affairs and Trade (21 December 2017) DFAT Country Information Report – People's Republic of China, p.16
[34] Tothi, Ilham (23 April 2015) Present-Day Ethnic Problems in Xinjiang Uighur Autonomous Region: Overview and Recommendations (1) – Unemployment
[35] Tothi, Ilham (23 April 2015) Present-Day Ethnic Problems in Xinjiang Uighur Autonomous Region: Overview and Recommendations (2) – Bilingual Education
[36] BBC News (23 September 2014) China jails prominent Uighur academic IlhamTohti for life
[37] Radio Free Asia (27 April 2018) Thousands M arch in Brussels to Protest Mass Detentions of Uyghurs

almost 900,000 were detained, citing leaked government documents. Adrian Zenz, a researcher at the European School of Culture and Theology, puts the number between several hundreds of thousands and just over 1 million."[38]

The confinement of Uyghurs in re-education camps has come to the attention of the US government, as noted in a Radio Free Asia report which states:

"Citing credible reports, lawmakers Marco Rubio and Chris Smith, who head the bipartisan Congressional-Executive Commission on China, said recently that as many as 500,000 to a million people are or have been detained in the re-education camps, calling it 'the largest mass incarceration of a minority population in the world today.'"[39]

Treatment of Detainees

A report from Al Jazeera states:

"State –backed media referred to the camps as 'counter-extremism training centres', while critics call them 'concentration camps'[40]

That Uyghurs detainees are being tortured in the camps is maintained in a report from the American financial news website Business Insider which states:

"Uyghurs who have survived internment in the camps have contended that they were subjected to both physical and mental torture. This includes allegations made by former internees interviewed in a BBC documentary broadcast in August, one of whom stated that:

'It was dinnertime. There were at least 1,200 people holding empty bowls in their hands. They had to sing pro-Chinese songs to get food.'"[41]

To ensure complete control of Uyghur life the state has set up "burial management centres" in addition to the re-education camps. A Radio Free Asia report quotes an Uyghur business man now residing in Turkey as saying:

"Having a burial management center in every village is a way to control the services for the dead, because when a person dies in detention or a prison, the authorities usually do not return the corpse to the family."[42]

Separation of Families

A consequence of the internment of adult Uyghurs is the separation of children from their parents. The fate of these children is revealed in an article from American magazine The Atlantic which states:

The mass internment system doesn't only affect the Uighurs incarcerated in it. It also involves family separation, which impacts thousands of children. When Uighur parents are sent to the camps, their children are often taken away to state-run orphanages, which are proliferating to accommodate the growing demand."[43]

Home Stays

In early 2018 the Chinese government dispatched more than a million Communist party officials to live with Uyghur Muslim families in western Xinjiang. The purpose of these so-called "home visits" is revealed in a report from CNN which states:

"Government statements and state media reports show that families are required to provide detailed information during the visits on their personal lives and political views. They are also subject to 'political education' from the live-in officials--whose stays are mandated to be at least one week per month in some locations."[44]

"At present, the new administration in Xinjiang is relying on increased economic investment and improvements in citizens' livelihoods to quell ethnic tensions. These policies will likely have a positive short-term effect, but because they do not address deep-seated problems, we cannot afford

[38] Associated Press (17 May 2018) 'Permanent cure' : Inside the re-education camps China is using to brainwash Muslims
[39] Radio Free Asia (16 July 2018) Authorities Force Uyghur Students to Return to Xinjiang From Mainland For Propaganda Drive
[40] Al Jazeera (10 September 2018) Escape from Xinjiang: Muslim Uighurs speak of China persecution
[41] Business Insider (1 September 2018) What it's like inside the internment camps China uses to oppress its Muslim minority, according to people who've been there
[42] Radio Free Asia (10 April 2018) China: Xinjiang authorities use 'burial management centers' to subvert Uyghur funeral traditions
[43] The Atlantic (4 September 2018) China's Jaw-Dropping Family Separation Policy
[44] CNN (14 May 2018) Chinese Uyghurs forced to welcome Communist Party into their homes

to be sanguine about Xinjiang's future, nor can we be certain that violence will not erupt again."[45]

"There are no Uighurs who have not been affected in some way by the current crackdown. Inside East Turkestan (The Uighur term for Xinjiang), elsewhere in China, and even beyond Chinese borders, regardless of social status, gender, generation or profession, all have suffered under the current campaign of repression."[46]

Seeking Asylum

The current situation in Xinjiang has led many Uyghurs to leave China and seek asylum anywhere that they can. Commenting on their prospects of success a report from Amnesty International states:

"Uighurs overseas also fear what might happen to them if they return to the XUAR. Those with the right to reside in other countries at least have the ability to stay where they are. But students on short-term visas or people seeking asylum in other countries do not always have that option. In 2017, more than 200 Uighur students were detained in Egypt, of whom at least 22 were forced to return to China. To date, there is no news of their whereabouts. Even amid growing reports of the ongoing repression in the XUAR, an immigration panel in Sweden initially denied asylum to a Uighur family of four who were seeking to rebuild their lives in safety there."[47]

A Final Note: Uyghur or Uighur

As noted in the various reports quoted above there appears to be some confusion as to what this ethnic group should be called. In fact there are no fewer than seven different spellings, with Uighur and Uyghur being the two most common variants. Virtually all western media and human rights sources use the former spelling, with ACCORD[48] being a notable exception. But as a Radio Free Asia report explains members of this group overwhelmingly prefer the latter version. Gardner Bovingdon, a professor of Uyghur studies at Indiana University states:

"I use the 'Uyghur' spelling because it's the most faithful to the way the word is written in the Uyghur script today."[49]

It is also noteworthy that official Chinese news outlets use "Uyghur" when referring to this group in English language reports.

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

[45] Tothi, Ilham (23 April 2015) Present-Day Ethnic Problems in Xinjiang Uighur Autonomous Region: Overview and Recommendations (1) – Unemployment

[46] World Politics Review (13 September 2018) China's Uighur Crackdown is Turning Xinjiang Into a Police State

[47] Amnesty International (24 September 2018) Report on mass detentions in the Xinjiang Uighur Autonomous Region (case examples; detention / education camps)

[48] Austrian Centre for Country of Origin & Asylum Research and Documentation

[49] Radio Free Asia (10 September 2010) 'Uyghur' or "Uighur'?

UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan (30 August 2018)

http://www.refworld.org/docid/5b8900109.html

These Eligibility Guidelines provide an update of and replaces the *UNHCR Eligibility Guidelines for assessing the International Protection needs of asylum-seekers from Afghanistan* published in April 2016.[50] The Eligibility Guidelines are issued against a background of continuing concerns about the security situation and widespread human rights abuses.

The security situation in Afghanistan remains volatile, with civilians continuing to bear the brunt of the conflict.[51] The number of civilian casualties has increased every year between 2009 and 2017 and the overall security situation has reportedly continued to deteriorate,[52] in what has been described as an "eroding stalemate".[53]

As of January 2018, the Taliban was reported to control or contest 43.7 per cent of all districts in Afghanistan.[54] The Taliban have intensified their attacks in Kabul and other major urban areas, and have demonstrated a growing focus on attacking Afghan security forces, causing high numbers of casualties.[55] Islamic State[56] has reportedly

[50] UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*, 19 April 2016, HCR/EG/AFG/16/02, http://www.refworld.org/docid/570f96564.html.

[51] UNSG, *The Situation in Afghanistan and Its Implications for International Peace and Security: Report of the Secretary-General*, 27 February 2018, A/72/768–S/2018/165, http://www.refworld.org/docid/5ad73b254.html, paras 14-18, 55; ICG, *The Cost of Escalating Violence in Afghanistan*, 7 February 2018, http://www.refworld.org/docid/5a9d1f864.html; UNSG, *The Situation in Afghanistan and its Implications for International Peace and Security*, 15 December 2017, A/72/651–S/2017/1056, http://www.refworld.org/docid/5a56465c4.html, para. 16; UNSG, *Special Report on the Strategic Review of the United Nations Assistance Mission in Afghanistan*, 10 August 2017, A/72/312– S/2017/696, http://www.refworld.org/docid/599301c49.html, paras 9, 16. See also, ACAPS, *Humanitarian Overview: An Analysis of Key Crises in 2018*, https://www.acaps.org/sites/acaps/files/slides/files/acaps_humanitarian_overview_analysis_of_key_crises_into_2018.pdf, pp. 6-8.

[52] Human Rights Watch (HRW), "*No Safe Place" Insurgent Attacks on Civilians in Afghanistan*, 8 May 2018, https://www.hrw.org/sites/default/files/report_pdf/afghanistan0518_web_1.pdf, pp. 8-11; UNSG, *The Situation in Afghanistan and its Implications for International Peace and Security*, 27 February 2018, A/72/768–S/2018/165, http://www.refworld.org/docid/5ae879b14.html, para. 17. "The Security Council reiterates its concern over the continuing threats to the security and stability of Afghanistan posed by the Taliban, including the Haqqani network, as well as by Al-Qaida, ISIL (Da'esh) affiliates and other terrorist groups, violent and extremist groups, illegal armed groups, criminals, and those involved in the production, trafficking or trade of illicit drugs." UNSC, *Statement by the President of the Security Council*, 19 January 2018, S/PRST/2018/2, http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27- 4E9C-8CD3-CF6E4FF96FF9%7D/s_prst_2018_2.pdf, pp. 1-2. See also, HRW, *World Report 2018*: Afghanistan, 18 January 2018, http://www.refworld.org/docid/5a61eeac4.html; UNSG, *The Situation in Afghanistan and its Implications for International Peace and Security*, 15 September 2017, A/72/392–S/2017/783, http://www.refworld.org/docid/59c3a9f64.html, para. 20; UNSG, *Special Report on the Strategic Review of the United Nations Assistance Mission in Afghanistan*, 10 August 2017, A/72/312–S/2017/696, http://www.refworld.org/docid/599301c49.html, para. 14; Pajhwok Afghan News, *Rebel Groups in Afghanistan: A Run Through*, 11 April 2017, http://peace.pajhwok.com/en/armed-group/rebel-groups-afghanistan-run-through.

[53] Security Council Report, *March 2018 Monthly Forecast*, 28 February 2018, http://www.securitycouncilreport.org/monthly-forecast/2018- 03/afghanistan_24.php. "The overall security situation has deteriorated over the past few years, as the Taliban have been able to influence and, to some extent, control ever larger parts of the country. […] The situation has been described as an eroding stalemate in which the Taliban have increased the territory they are able to contest and, in some areas, have begun to consolidate their hold." UNSG, *Special Report on the Strategic Review of the United Nations Assistance Mission in Afghanistan*, 10 August 2017, A/72/312–S/2017/696, http://www.refworld.org/docid/599301c49.html, para. 14.

[54] Special Inspector General for Afghanistan Reconstruction (SIGAR), *Quarterly Report to the United States Congress*, 30 April 2018, https://www.sigar.mil/pdf/quarterlyreports/2018-04-30qr.pdf, p. 86.

[55] HRW, "*No Safe Place", Insurgent Attacks on Civilians in Afghanistan*, 8 May 2018, https://www.hrw.org/report/2018/05/08/no-safeplace/insurgent-attacks-civilians-afghanistan, pp. 1, 14-26. "For some years already, insurgents have used increasingly sophisticated equipment and, in some places, engaged Afghan forces in direct – as opposed to asymmetric – confrontation." ICG, *A Dangerous Escalation in Afghanistan*, 31 January 2018, https://www.crisisgroup.org/asia/south-asia/afghanistan/dangerous-escalation-afghanistan.

[56] In different sources and at different times the militant group has been variously referred to as Islamic State in Iraq and the Levant-Khorasan Province (ISIL-KP), or ISKP (Islamic State Khorasan Province), or *Daesh* (a loose acronym of al-Dawla al-Islamiya al-Iraq al-Sham, the Arabic for Islamic State of Iraq and the Levant), or simply ISIS (Islamic State in Iraq and Syria), or ISIL (Islamic State in Iraq and the Levant), or Islamic State. This document generally uses Islamic State. It should be noted that UNAMA in recent reports uses the term *Daesh*/ISIL-KP, and in addition recognizes a category of "self-identified Daesh/ISIL-KP fighters" to refer to situations where AGEs identify or claim to be 'Daesh' but where there is no factual information supporting a formal link to

remained resilient despite intensified international and Afghan military operations and conducted attacks against military and foreign military targets and the civilian population.[57] A proliferation of anti-government elements (AGEs) with various goals and agendas, has further complicated the security situation. Pro-government armed groups[58] are also reported to undermine the government's authority in their areas of influence and are associated with human rights violations.[59] A non-international armed conflict continues to affect Afghanistan, posing the Afghan National Defence and Security Forces (ANDSF) supported by the international military forces against a number of AGEs.[60]

In summary, UNHCR recommends that all claims lodged by asylum-seekers from Afghanistan need to be considered on their own merits according to fair and efficient status determination procedures and up-to-date and relevant country of origin information.

Risk Profiles

UNHCR has maintained the same risk profiles in the 2018 Eligibility Guidelines as were contained in the 2016 Eligibility Guidelines and considers that individuals falling into one or more of the following risk profiles may be in need of international refugee protection, depending on the individual circumstances of the case:

1. Individuals associated with, or perceived as supportive of, the Government and the international community, including the international military forces;

2. Journalists and other media professionals;

3. Men of fighting age, and children in the context of underage and forced recruitment;

4. Civilians suspected of supporting AGEs;

5. Members of minority religious groups, and persons perceived as contravening Sharia law;

6. Individuals perceived as contravening AGEs' interpretation of Islamic principles, norms and values;

7. Women with certain profiles or in specific circumstances;

8. Women and men who are perceived as contravening social mores;

Daesh/ISIL-KP in Nangarhar province or the broader Islamic State organization. UNAMA, *Afghanistan: Annual Report on the Protection of Civilians in Armed Conflict 2017*, February 2018, http://www.refworld.org/docid/5a854a614.html, p. 4. See also, AAN, *Battle for Faryab: Fighting Intensifies on One of Afghanistan's Major Frontlines*, 12 March 2018, https://www.afghanistan-analysts.org/battle-for-faryab-fighting-intensifies-on-one-of-afghanistans-majorfrontlines/; UNSG, *Special Report on the Strategic Review of the United Nations Assistance Mission in Afghanistan*, 10 August 2017, A/72/312–S/2017/696, http://www.refworld.org/docid/599301c49.html, para. 17.

[57] UNSG, *The Situation in Afghanistan and its Implications for International Peace and Security*, 27 February 2018, A/72/768–S/2018/165, http://www.refworld.org/docid/5ae879b14.html, para. 17; UNSG, *The Situation in Afghanistan and its Implications for International Peace and Security*, 15 December 2017, A/72/651–S/2017/1056, http://www.refworld.org/docid/5a56465c4.html, para. 20; UNSG, *The Situation in Afghanistan and its Implications for International Peace and Security*, 15 September 2017, A/72/392–S/2017/783, http://www.refworld.org/docid/59c3a9f64.html, para. 20; UNSG, *The Situation in Afghanistan and its Implications for International Peace and Security*, 15 June 2017, A/71/932–S/2017/508, http://www.refworld.org/docid/5a2563924.html, paras 16-17. See also, ABC News, *Suicide Bombers Strike in Afghan Capital, 6 Wounded*, 9 May 2018, https://abcnews.go.com/International/wireStory/official-taliban-capture2nd-district-compound-days-55032977.

[58] UNAMA defines pro-government armed groups as "an organized armed non-State actor engaged in conflict and distinct from Government Forces, rebels and criminal groups. Pro-Government armed groups do not include the Afghan Local Police, which fall under the command and control of the Ministry of Interior. These armed groups have no legal basis under the laws of Afghanistan, though in some cases, armed groups receive direct/indirect support of the host Government or other States. This term includes, but is not limited to, the following groups: 'national uprising movements', local militias (ethnically, clan or otherwise based), and civil defence forces and paramilitary groups (when such groups are clearly not under State control)." UNAMA, *Afghanistan: Annual Report on the Protection of Civilians in Armed Conflict 2017*, February 2018, http://www.refworld.org/docid/5a854a614.html, p. 51.

[59] AAN, *Battle for Faryab: Fighting Intensifies on One of Afghanistan's Major Frontlines*, 12 March 2018, https://www.afghanistananalysts.org/battle-for-faryab-fighting-intensifies-on-one-of-afghanistans-major-frontlines/; UNAMA, *Afghanistan: Annual Report on the Protection of Civilians in Armed Conflict 2017*, February 2018, http://www.refworld.org/docid/5a854a614.html, p. 52

[60] UNAMA, *Afghanistan: Annual Report on the Protection of Civilians in Armed Conflict 2017*, February 2018, http://www.refworld.org/docid/5a854a614.html, p. 56; UNSG, *Special Report on the Strategic Review of the United Nations Assistance Mission in Afghanistan*, 10 August 2017, A/72/312–S/2017/696, http://www.refworld.org/docid/599301c49.html, para. 9.

9. Individuals with disabilities, including in particular mental disabilities, and persons suffering from mental illnesses;

10. Children with certain profiles or in specific circumstances;

11. Survivors of trafficking or bonded labour and persons at risk of being trafficked or of bonded labour;

12. Individuals of diverse sexual orientations and/or gender identities;

13. Members of (minority) ethnic groups;

14. Individuals involved in blood feuds; and

15. Business people and other people of means and their family members.

Depending on the specific circumstances of the case, family members or other members of the households of individuals with these profiles may also be in need of international protection on the basis of their association with individuals at risk.

Internal Flight, Relocation or Protection Alternative

In light of the available evidence of serious and widespread human rights abuses by AGEs in areas under their effective control, as well as the inability of the State to provide protection against such abuses in these areas, UNHCR considers that an internal flight or relocation alternative (IFA/IRA) is not available in areas of the country that are under the effective control of AGE. It is also not available in areas of the country affected by active combat between pro-government forces and AGEs, or between different AGEs.

The Eligibility Guidelines also provides specific guidance relating to the IFA/IRA assessment for Kabul. Given the current security, human rights and humanitarian situation in Kabul, UNHCR considers an IFA/IRA is generally not available in this city.

Exclusion from International Refugee Protection

Due to the serious human rights abuses and violations of international humanitarian law during Afghanistan's long history of armed conflicts, exclusion considerations under Article 1F of the 1951 Convention may arise in individual claims by Afghan asylum-seekers. Careful consideration needs to be given in particular to the following profiles:

1. Former members of the armed forces and the intelligence/security apparatus, including KhAD/WAD agents, as well as former officials of the Communist regimes;

2. Former members of armed groups and militia forces during and after the Communist regimes;

3. (Former) members and commanders of AGEs;

4. (Former) members of the Afghan National Security Forces (ANSF), including the National Directorate of Security (NDS), the Afghan National Police (ANP) and the Afghan Local Police (ALP);

5. (Former) members of paramilitary groups and militias; and

6. (Former) members of groups and networks engaged in organized crime.

UNHCR Guidance Note on the Outflow of Venezuelans (March 2018)

http://www.refworld.org/docid/5a9ff3cc4.html

Venezuela continues to experience a significant outflow of Venezuelans to neighbouring countries and countries further afield. While individual circumstances and reasons for these movements vary, international protection considerations have become apparent for a very significant proportion of Venezuelans.[61]

Against this background, UNHCR calls on States receiving and/or already hosting Venezuelans to allow them access to their territory, and to continue to adopt appropriate and pragmatic protection-oriented responses. UNHCR is ready to work with States to devise appropriate international protection arrangements in line with national and regional standards, in particular the 1951 Convention relating to the Status of Refugees.

UNHCR encourages States to consider protection-oriented arrangements to enable legal stay for Venezuelans, with appropriate safeguards. These could include various forms of international protection, including under:

1. Temporary protection or stay arrangements;[62] or

2. Visa or labour migration arrangements that would offer access to legal residence and to a standard of treatment akin to international protection.[63]

Implementation of such arrangements would be without prejudice to the right to seek asylum, notably in expulsion or deportation proceedings or in the case of non-renewal of residency permits.
In view of the current situation in Venezuela, UNHCR calls on States to ensure that holders of complementary forms of protection, temporary protection, or stay arrangements, or visa or labour migration arrangements will not be deported, expelled, or in any other way forced to return to Venezuela, consistent with international refugee and human rights law. This guarantee would need to be assured either in the official identity document received or through other effective means, such as clear instructions to law enforcement agencies.

The solutions outlined above are without prejudice to the right to seek asylum. Fair and efficient asylum systems provide the necessary safety net to ensure that individuals with international protection needs are recognized as such and are protected from refoulement. All decisions on asylum claims need to take into account relevant, reliable and up-to-date country of origin information.

[61] Information available to UNHCR on the basis of border monitoring interviews conducted with Venezuelan nationals.
[62] UNHCR, *Guidelines on Temporary Protection or Stay Arrangements*, February 2014, http://www.refworld.org/docid/52fba2404.html.
[63] Such standards include: appropriate reception arrangements; recognized and documented permission to stay; protection against arbitrary or prolonged detention; access to housing, education, health care and other basic services; freedom of movement, except as may be warranted by national security, public order or public health considerations; the registration of births, deaths and marriages; physical security, including protection against sexual and gender-based violence and exploitation; special care for separated and unaccompanied children, guided by the best interests of the child; respect for family unity and tracing, and opportunities for reunification with separated family members; particular attention and special arrangements for persons with special needs, including persons with disabilities; self-sufficiency or work opportunities; and access to UNHCR and, as appropriate, other relevant international organizations and non-governmental organizations and civil society. See UNHCR, *Guidelines on Temporary Protection or Stay Arrangements*, February 2014, http://www.refworld.org/docid/52fba2404.html, in particular paragraphs 13, 16-18.

UNHCR Position on Returns to Libya: Update II (September 2018)

http://www.refworld.org/docid/5b8d02314.html

The position provides an update of and replaces the UNHCR Position on Returns to Libya (Update I) published in October 2015.[64] It contains guidance relating to returns of nationals and habitual residents of Libya, as well as on returns of third country nationals who may have lived in or transited through Libya.

The current situation in Libya is characterized by political and military fragmentation, hostilities between competing military factions, the proliferation of armed groups and a general climate of lawlessness, as well as a deteriorating human rights situation.[65]

Since 2014, armed conflict between rival armed groups has resulted in large numbers of civilian casualties,[66] displaced hundreds of thousands of people, disrupted people's access to basic services and livelihoods, and destroyed vital infrastructure. As of March 2018, 1.1 million people were estimated to be in need of life-saving humanitarian assistance and protection, including 378,000 children and 307,000 women of reproductive age.[67] There are consistent reports of the widespread use of prolonged arbitrary and unlawful detention and endemic human rights abuses in prisons and detention facilities nominally under the control of state institutions but partially or fully under the control of armed groups,[68] as well as in facilities run by armed groups with no formal connection to state institutions or with affiliation to the unrecognized "Interim Government" and affiliated institutions in eastern Libya.[69] The vast majority of detainees in official facilities are reportedly held in pre-trial detention.[70]

Asylum-seekers, refugees, and migrants, including children, are reportedly systematically subjected to or are at very high risk of torture and other forms of ill-treatment, including rape and other forms of sexual violence,[71] forced labour as

[64] UNHCR, *UNHCR Position on Returns to Libya (Update I)*, October 2015, http://www.refworld.org/docid/561cd8804.html.

[65] Council on Foreign Relations (CFR), *Civil War in Libya*, updated 29 August 2018, https://on.cfr.org/2xoLOG7; Small Arms Survey, *Capital of Militias – Tripoli's Armed Groups Capture the Libyan State*, June 2018, https://bit.ly/2m0lWfQ; Office of the United Nations High Commissioner for Human Rights (OHCHR), *Statement by UN High Commissioner for Human Rights ZeidRa'ad Al Hussein at the End of Visit to Libya*, 12 October 2017, http://www.refworld.org/docid/5b6414484.html. The Global Peace Index 2018 ranked Libya as the 7th most dangerous country in the world; *Global Peace Index 2018: Measuring Peace in a Complex World*, June 2018, https://bit.ly/2sK6cR3, p. 9.

[66] Between 1 January and 31 July 2018, the United Nations Support Mission in Libya (UNSMIL) documented the killing and injuring of 127 and 308 civilians, respectively. In 2017, UNSMIL documented 160 civilian deaths and 177 injuries. Given limitations on access to and information flow from conflict-affected areas, the actual casualty figures are likely to be significantly higher. Leading causes of civilian casualties reportedly include explosive remnants of war, gunfire, airstrikes, shelling and improvised explosive devices; see UNSMIL, *Human Rights Report on Civilian Casualties*, available at: https://bit.ly/2n7tgXu. According to the Armed Conflict Location and Event Data Project (ACLED), 1,654 people were killed in 2017. The highest numbers of casualties were recorded in the provinces of Benghazi, Sirte and Tripoli; Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD), Liby*a, Year 2017: Update on Incidents According to the Armed Conflict Location & Event Data Project (ACLED)*, 18 June 2018, https://bit.ly/2ttcMvB.

[67] UNICEF, *Libya Humanitarian Situation Report Mid-Year 2018*, 27 July 2018, http://www.refworld.org/docid/5b6ac2124.html, pp. 1, 2; OCHA, *Libya HNO 2018*, 1 March 2018, http://www.refworld.org/docid/5b6429ad4.html, p. 5.

[68] These reportedly include: Prisons under the Judicial Police of the Ministry of Justice; facilities under the Ministry of Interior; prisons under the Ministry of Defence; and facilities run by intelligence agencies affiliated to State institutions, such as the General Intelligence Service (GIS) under the oversight of the Presidency Council; OHCHR, *Arbitrary and Unlawful Detention in Libya*, April 2018, http://www.refworld.org/docid/5b5590154.html, p. 11.

[69] "*Some 6,400 individuals were held in 26 official prisons under the Ministry of Justice, an estimated 75 to 80 per cent of them in pretrial detention. Thousands of others were held in facilities nominally under the control of the Interior or the Ministry of Defence, as well as facilities directly run by armed groups*"; UN Security Council, *United Nations Support Mission in Libya*, 24 August 2018, http://www.refworld.org/docid/5b8d31bc4.html, para. 31. See also, OHCHR, *Arbitrary and Unlawful Detention in Libya*, April 2018, http://www.refworld.org/docid/5b5590154.html, p. 11; HRW, *World Report 2018 – Libya*, 18 January 2018, http://www.refworld.org/docid/5a61ee53a.html.

[70] UN Security Council, *United Nations Support Mission in Libya*, 7 May 2018, http://www.refworld.org/docid/5b4c65d64.html, para. 38; HRW, *World Report 2018 – Libya*, 18 January 2018, http://www.refworld.org/docid/5a61ee53a.html. See also, OHCHR, *Arbitrary and Unlawful Detention in Libya*, April 2018, http://www.refworld.org/docid/5b5590154.html, p. 9.

[71] "*Migrant women and girls were raped and otherwise sexually abused during their journeys through Libya, in both official and unofficial migrant detention centres. Survivors described being taken away from cells shared with others by armed men, including guards of the Department for Combating Illegal Migration, and being raped repeatedly by multiple perpetrators. Those who tried to resist were beaten, threatened at gunpoint, and denied food and water*"; OHCHR, *Situation of Human Rights in Libya*, 21 February 2018, http://www.refworld.org/docid/5b4c64fd4.html, para. 35. See also, UN Security Council, *United Nations Support Mission in Libya*, 24 August 2018,

well as extortion,[72] both in official and unofficial detention facilities.[73]

In view of the poor and volatile security situation[74] as well as the widely reported violations and abuses of international human rights and humanitarian law,[75] UNHCR does not consider it appropriate for States to designate or apply in practice a designation of Libya as a so-called "safe third country".

Even before the current unrest and insecurity, UNHCR considered that Libya should not be regarded as a safe third country in light of the absence of a functioning asylum system, the widely reported difficulties and abuses faced by asylum-seekers and refugees in Libya, the absence of protection from such abuses and the lack of durable solutions.[76] UNHCR calls on States not to channel applications for international protection from third-country nationals into an accelerated procedure or declare them inadmissible, merely on the basis of the fact that they previously resided in or transited through Libya.

In such a context, UNHCR urges all States to suspend forcible returns to Libya until the security and human rights situation has improved considerably. UNHCR considers that in the current circumstances the relevance and reasonableness criteria for an internal flight or relocation alternative are unlikely to be met.[77] Suspension of forcible returns of nationals and habitual residents to Libya serves as a minimum standard and should not replace international refugee protection for persons found to meet the criteria for refugee status under the 1951 Convention and the 1969 OAU Convention. This advice is valid until such time as the security and human rights situation in Libya has improved sufficiently to permit a safe and dignified return.

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http://www.refworld.org/docid/5b8d31bc4.html, para. 39; OHCHR, *Returned Migrants Are Being Robbed, Raped and Murdered in Libya*, 8 September 2017, http://www.refworld.org/docid/5b5598dd4.html.

[72] "*In a lawless country, refugees and migrants have become a resource to be exploited – a commodity around which an entire industry has grown, as the shocking footage of a migrants [sic] being sold, aired in November 2017 highlighted*"; Amnesty International, *Abuses Against Europe-Bound Refugees and Migrants*, 11 December 2017, http://www.refworld.org/docid/5a2fa1cb4.html, p. 6. See also, Jamestown Foundation, Libya's *Rogue Militias Keep the Country from Tackling Human Trafficking*, Terrorism Monitor Volume: 16 Issue: 4, 26 February 2018, https://bit.ly/2LTQqeu; Euro-Med Monitor, Libya: Dozens of Refugees Kidnapped by Armed Gangs, 22 February 2018, https://bit.ly/2CfpC7t; OHCHR, *Libya Must End "Outrageous" Auctions of Enslaved People, UN Experts Insist*, 30 November 2017, http://www.refworld.org/docid/5b5593324.html; CNN, *People for Sale*, 15 November 2017, https://cnn.it/2FX902f.

[73] Amnesty International, *Abuses Against Europe-Bound Refugees and Migrants*, 11 December 2017, http://www.refworld.org/docid/5a2fa1cb4.html, p. 22. "*In recent weeks, UNHCR has witnessed a critical worsening in conditions in detention centres, due to the increasing overcrowding and lack of basic living standards. As a consequence, riots and hunger strikes by refugees inside detention centres are taking place, demanding a resolution to their bleak living conditions*"; UNHCR, *UNHCR Flash Update Libya (17 - 24 August 2018)*, 24 August 2018, https://bit.ly/2NxY9A9.

[74] UN Security Council, *United Nations Support Mission in Libya*, 24 August 2018, http://www.refworld.org/docid/5b8d31bc4.html, paras 4, 10-17. See also, ACCORD, *Libya, Year 2017: Update on Incidents According to the Armed Conflict Location & Event Data Project (ACLED)*, 18 June 2018, https://bit.ly/2ttcMvB. For an overview of the security situation in the different parts of the country, see successive reports by the UN Secretary-General, available at: https://bit.ly/2AyUDDG.

[75] "*Despite regular announcements of investigations into allegations of war crimes and other violations by the Presidency Council and the Libyan National Army, no member of an armed group was brought to justice for committing crimes under international law, to the best of the Mission's knowledge*"; UN Security Council, *United Nations Support Mission in Libya*, 7 May 2018, http://www.refworld.org/docid/5b4c65d64.html, para. 54. See also, OHCHR, *Oral Update of the United Nations High Commissioner for Human Rights on Libya Pursuant to Human Rights Council Resolution 34/38*, 20 March 2018, http://www.refworld.org/docid/5b55b92c4.html (hereafter: OHCHR, *Oral Update of the United Nations High Commissioner for Human Rights on Libya*, 20 March 2018, http://www.refworld.org/docid/5b55b92c4.html).

[76] UNHCR, *UNHCR Intervention before the European Court of Human Rights in the Case of Hirsi and Others v. Italy*, March 2010, Application No. 27765/09, http://www.refworld.org/docid/4b97778d2.html.

[77] The decision-maker bears the burden of proof of establishing that an analysis of relocation is relevant to the particular case. If considered relevant, it is up to the party asserting this to identify the proposed area of relocation and provide evidence establishing that it is a reasonable alternative for the individual concerned. See: UNHCR, *Guidelines on International Protection No. 4: Internal Flight or Relocation Alternative" Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, HCR/GIP/03/04, 23 July 2003, http://www.refworld.org/pdfid/3f2791a44.pdf, and paras 33-35. For an IFA/IRA to be relevant, the proposed area of relocation must be practically, safely and legally accessible. Further, where the claimant has a well-founded fear of persecution at the hands of the State and its agents, there is a presumption that consideration of an IFA/IRA is not "relevant" for areas under the control of the State. If the applicant fears persecution by a non-state agent of persecution, the ability to pursue the claimant in the proposed area and the State's ability to provide protection there must be considered, see paras 9-21. UNHCR considers that a similar analysis would apply when the applicability of IFA is considered in the context of determining eligibility for subsidiary protection.