



IARMJ report

The quarterly newsletter of the
INTERNATIONAL ASSOCIATION OF REFUGEE AND MIGRATION JUDGES

Volume 4, No 1

www.iarmj.org

June 2024



The Philippines Supreme Court Special Committee on Facilitated Naturalization
for Refugees and Stateless Persons

The Inaugural NATIONAL REFUGEE DAY

Philippines, 20 June 2024

(full report, page 11)

Members of the Committee, from left: Atty Dexter Matias, Judge Maria Josefina San Juan Torres, Supreme Court Associate Justice Ramon Paul L. Hernando (Chair), UNHCR Philippines National Office Head Atty Maria Ermina Valdeavilla-Gallardo, Atty Melissa Dimson-Bautista, Atty Nashmyleen A. Marohamsic, Atty Melvin Suarez.

From the Editors,

Dear friends and colleagues,

Most of you will know the haka *Ka mate*, performed by the New Zealand All Blacks before a rugby match. Most of you probably think it is meant to intimidate and demoralise the enemy (*haka peruperu*) but it is, in fact, a *haka ngeri* – done to motivate oneself and to "summon up the blood".

Curiously, *Ka mate* has its origins in refuge and protection.

In about 1820, the chief Te Rauparaha (Ngāti Toa) needed to escape from pursuing Ngāti Maniapoto enemies. He sought refuge on Motuopihi Island in Lake Rotoaira, where Rangikoea, wife of the chief Te Wharerangi, hid him in a kumara pit which she straddled, to hide and protect him as Ngāti Maniapoto searched unsuccessfully. As Te Wharerangi lifted the cover and the light flooded in, Te Rauparaha wondered for a moment whether this was the end. On emerging from the pit into the sunlight and safety he was grateful to Rangikoea and Te Wharerangi, composing *Ka Mate* on the spot in his celebration at surviving.

Ka mate, ka mate! ka ora! ka ora!
Ka mate! ka mate! ka ora! ka ora!
Tēnei te tangata pūhuru hū
Nāna nei i tiki mai whakawhiti te rā
Ā, upane! ka upane!
Ā, upane, ka upane, whiti te rā!

It is death, it is death! it is life, it is life!
 It is death, it is death! it is life, it is life!
 Or do I see a hairy man
 who brought back the sun so it can shine on me once more?
 Then I will put one foot in front of the other —
 One foot, then the other — until the Sun shines on me!

I was reminded of this recently when talking with a member of an NGO which supports refugees. She wanted me to know the feelings of joy and relief she regularly witnessed when claimants received the news that their claim had been successful. For them, the path forward was, as with Te Rauparaha, into the sunlight.

One of the few pleasures we can take from what often feels like an unrelenting job is the thought that, for such people, from time to time we are the hairy man who brought back the sun.



Martin Treadwell
Co-Editor

Martin Treadwell

Co-Editor (and sadly, less of a hairy man each passing year)

CONTENTS (click for the article)		Page
President's Report		3
News from the Chapters -	Africa	4
	Americas	6
	Asia Pacific	9
	- National Refugee Day Launched in the Philippines	11
	Europe	12
Working Parties Update		15
	- Report from the Working Party on Membership of a Particular Social Group	18
In the Library – Recent Publications		20
Articles of Interest in the Media		21
Recent Case-Law of Interest From Around the World		22

HABARI KUTOKA NAIROBI

Update from the President

Greetings to you all,

The Africa Chapter holds its Conference in scenic Sharm El Sheikh, Egypt on 18-22, November 2024.



As preparations continue, I cannot help but reflect on Africa and its place in the realm of asylum seeking and migration.

The African continent has long been a region plagued by conflict, poverty, and political instability, forcing millions of individuals to flee their homes in search of safety and a better life. As a result, the issues affecting refugees and migrants in Africa are among the most pressing challenges of our time.

One of the key challenges faced by refugees and migrants in Africa is the lack of proper legal protection and support. Many African countries do not have robust asylum systems in place, making it difficult for refugees to access the rights and benefits afforded to them under international law. As a result, refugees and migrants often find themselves vulnerable to exploitation, discrimination, and violence.

Furthermore, the process of determining refugee status in Africa is riddled with difficulties. In many countries, there is a lack of trained personnel and resources to effectively assess and process asylum claims. This leads to delays in refugee status determination, leaving individuals in limbo for months or even years. Additionally, corruption and political interference often taint the asylum process, making it difficult for refugees to receive a fair hearing.

Moreover, the issue of internal displacement also poses a significant challenge for refugees and migrants in Africa. Many individuals are forced to flee their homes due to natural disasters, resource scarcity, and other non-conflict related reasons. However, these individuals often do not qualify for refugee status under international law, leaving them without legal protection or access to crucial services.

In light of these challenges, I repeat my continued call for the international community to come together to address the issues affecting refugees and migrants in Africa. Africans themselves must also wake up to the reality that it must deal with the root causes of migration and asylum seeking before reaching out to any other region or entity. The African Union and regional blocs should put these issues at the core of their conversations on a continuous basis.

We must also all work towards strengthening asylum systems, providing adequate resources and training to officials responsible for refugee status determination, and ensuring that all individuals forced to flee their homes are afforded the protection and support they deserve.

In conclusion, the issues affecting refugees and migrants in Africa are complex and multifaceted. It is our moral duty to stand in solidarity with these vulnerable populations and work towards finding sustainable solutions to their plight. Together, we can create a more inclusive and compassionate world for all individuals, regardless of their nationality or background.

With best wishes,

Isaac Lenaola
President, IARMJ

NEWS FROM THE CHAPTERS

In each issue, we report on developments and issues affecting the four chapters of the IARMJ

AFRICA CHAPTER

Dear friends and colleagues,

We continue to engage with relevant stakeholders to prepare for our upcoming Regional Conference in Sharm el Sheikh, in Egypt. I can confirm that the date for the conference has changed slightly to 17 to 21 November 2024. The conference will therefore end on Thursday 21 November, Friday being a non-working day in that country. We await confirmation of funding from a number of sources as well as from the Ministry of Justice to confirm arrangements regarding travel logistics for conference participants.



Judge President Dunstan Mlambo

I must also confirm that we were invited to convene a refugee and migration law panel discussion as part of the African Regional Judges Forum Conference currently taking place in South Africa. Justice Isaac Lenaola, our Global President, Justice Jody Kollapen and myself, hosted the panel discussion on topical Refugee and Migration law matters. The Conference is convened by the Southern Africa Litigation Centre and UNDP. We are also exploring a firmer cooperative relationship with the two organisations. Participating in the conference also provided us with an opportunity to engage with a group of judges from francophone Africa. This was to assist us to establish an understanding of the dynamics around the judiciary in francophone Africa.

Our English-speaking Centre of excellence Training Centre continues with its training programme. The mooted Refugee and Migration law colloquium which I mentioned in my March report, continues to be discussed. We are now at the stage where we must agree on the content of the discussions and which organisations to attend. In the meantime, Court rolls continue to balloon, with the cases of detained illegal foreigners, arrested for being in the country illegally and having failed to apply for asylum. This is a consequence of the amended provisions of the Refugees Act, which now lists illegal entry and stay as exclusionary provisions unless compelling reasons (good cause) are provided by the illegal foreigner.

The Refugee/Immigration White paper process in South Africa is temporarily halted whilst we await the finalisation of the seventh administration after the recent elections in this country.

We continue our discussions with UNHCR regarding our efforts to establish a Portuguese-speaking Centre of Excellence either in Maputo, Mozambique or Luanda, Angola. The university in Luanda has now made serious overtures to us to host our Lusophone Centre of Excellence in that city as opposed to Maputo in Mozambique.

On the case law front, the long-running ZEP case, mentioned in my previous reports, has now been finally dealt with by the Constitutional Court. As mentioned earlier, this case involves some 178,000 Zimbabweans who now live and work in South Africa. The Department's appeal was refused by the Constitutional Court and it's back to the drawing board for the Department of Home Affairs. A case that has recently been decided in South Africa, by the Supreme Court of SA, is that of *I and another vs Director of Asylum Seeker Management and others*, Case number 821/2022. There, the Supreme Court of Appeal upheld an appeal by two Burundian citizens to be allowed to apply afresh for asylum based on changed circumstances in their countries after their initial failed applications for asylum. The Court found that they were *sur place* asylum seekers. It referred to caselaw predominantly from the US, Canada and Europe. For a fuller account, see the "Case Law" section later in this newsletter.

Mlambo JP

President, Africa Chapter



THE AFRICA CHAPTER BIENNIAL REGIONAL CONFERENCE

Sharm El Sheikh
EGYPT

17-21 NOVEMBER 2024



AMERICAS CHAPTER

Dear friends and colleagues,

First, I welcome the newest members to the IARMJ, including decision-makers from Canada's Immigration and Refugee Board (the "IRB") and Federal Court, as well as members from other countries. It has been tremendous to see the Americas Chapter's population grow.

In my last report, I discussed the case of *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 ("*Mason*"), which provided insights into the interaction between Canadian administrative and immigration law, as well as international law's place in this interaction.

In this report, I provide a snapshot of the law of refugee cessation.

In Canada, the Minister of Citizenship and Immigration (the "Minister") or a delegate thereof can apply to the Refugee Protection Division (the "RPD") of the IRB to cease a refugee's previously-granted protection under the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"). As I will discuss, these cessation provisions are the subject of ongoing scrutiny.

Cessation generally

A fundamental purpose of refugee protection is to protect vulnerable people who are denied state protection. However, such protection is not absolute. During the drafting of the *1951 Convention Relating to the Status of Refugees* (the "Convention"), the first United Nations High Commissioner for Refugees ("UNHCR"), Gerrit Jan van Heuven Goedhart, famously stated that refugee status should "not be granted for a day longer than was absolutely necessary". Article 1(C) of the Convention was therefore included to define the conditions where a refugee ceases to be a refugee such that protection is no longer afforded.

In Canada, subsection 108(1) of the *IRPA* establishes five grounds for cessation of refugee protection:

108 (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances:

- (a) the person has voluntarily reavailed themselves of the protection of their country of nationality;
- (b) the person has voluntarily reacquired their nationality;
- (c) the person has acquired a new nationality and enjoys the protection of the country of that new nationality;
- (d) the person has voluntarily become re-established in the country that the person left or remained outside of and in respect of which the person claimed refugee protection in Canada; or
- (e) the reasons for which the person sought refugee protection have ceased to exist.

The Minister may apply to the RPD under any of these grounds to cessate a refugee's status. Under paragraph 108(1)(a), the initial burden of proof rests with the Minister to prove reavailment on a balance of probabilities (*Li v Canada (Citizenship and Immigration)*, 2015 FC 459 at para 42). However, once the Minister establishes that a presumption of reavailment exists, the burden of proof reverses and the onus is on the refugee to adduce sufficient evidence to rebut the presumption. If the refugee fails to do so, they lose various rights of appeal.

The *United Nations Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* ("UNHCR Handbook") provides guidance on interpreting the cessation provisions. Canada's Federal Court has adopted this guidance in assessing cessation applications on judicial review (*Canada (Public Safety and Emergency Preparedness) v Bashir*, 2015 FC 51 at paras



Justice Shirzad Ahmed
President,
Americas Chapter

44-47). In particular, the Court has held the cessation provisions are exhaustive and should be interpreted restrictively (UNHCR Handbook at para 116, cited in *Canada (Citizenship and Immigration) v Gezik*, 2015 FC 1268).

On December 15, 2012, the *Protecting Canada's Immigration System Act*, SC 2012, c 17 came into force and amended the *IRPA* to add sections 40.1 and 46(1)(c.1) to the *IRPA*. While these amendments did not change the substantive elements of cessation described above, they did impose harsher consequences for those whose status was ceased.

Moving forward, refugees whose protection is ceased under paragraphs 108(1)(a) to (d) of the *IRPA* lose any permanent resident status that they may have had and become inadmissible to Canada for an indeterminate period. Per subsection 48(2) of the *IRPA*, their removal is enforced as soon as possible. They are also unable to seek a Pre-Removal Risk Assessment or an application for permanent residence on humanitarian and compassionate grounds for at least one year (*Li v Canada (Citizenship and Immigration)*, 2023 FC 792 at para 16).

Recent case law

The jurisprudence on cessation has rapidly developed since 2012 as the Minister brought forward hundreds of applications for cessation. The effect is that refugees, some of whom spent over a decade in Canada and even acquired permanent resident status, lost their protection and became subject to removal.

Commonly, the Minister makes an application for cessation for grounds including those under paragraph 108(1)(a) of the *IRPA*. These capture situations where a refugee makes a return visit to their home country for whatever reason (*Canada (Citizenship and Immigration) v Galindo Camayo*, 2022 FCA 50 ("*Camayo*") at para 72). In such circumstances, the refugee is often found to have voluntarily, intentionally, and actually "reavailed" themselves of the protection of their home country (*Nsende v Canada (Minister of Citizenship and Immigration)*, 2008 FC 531 at paras 12-14).

The presumption of reavailment arises when a refugee applies for and obtains a passport from their country of nationality (UNHCR Handbook at para 121; *Camayo* at para 63). It does not matter if the refugee makes only a very short visit to their home country, or used their newly acquired passport only to travel to countries outside of their home country. Nor does it matter if the refugee applied only for a new passport but did not travel on it; that alone is sufficient to raise the presumption that they intended to reavail.

The RPD is tasked with determining whether a refugee rebutted the presumption, and courts will be attuned to assessing if the RPD paid due regard to the factors set by the Federal Court of Appeal in *Camayo* at paragraph 84. These include, among others, the state of the refugee's knowledge with respect to the cessation provisions, their personal attributes, the identity of the agent of persecution, the frequency and duration of the travel, what the refugee did while in his home country including any precautionary measures he took, and whether his actions demonstrated that he no longer had a subjective fear of persecution in his home country. Though no factor is determinative, they assist in uncovering the refugee's intention.

Challenges to cessation

The consequences of cessation are severe, including the loss of permanent residence status under paragraphs 108(1)(a)-(d). Some justices, myself included, have found that the RPD must consider paragraph 108(1)(e) adequately before assessing if any other grounds for cessation apply (*Meer v Canada (Citizenship and Immigration)*, 2024 FC 9 ("*Meer*") at para 28; *Wang v Canada (Citizenship and Immigration)*, 2024 FC 632 at para 17). If paragraph 108(1)(e) is the only ground for cessation (*i.e.*, where the reasons the refugee sought protection no longer exists due to a change of circumstances), that person may retain their permanent resident status and does not become inadmissible (*Ravandi v Canada (Citizenship and Immigration)*, 2020 FC 761 at para 46). This is a development in the law which previously found that the RPD had the discretion under subsection 108(2) of the

IRPA to apply grounds not raised in the Minister's application, or select which grounds to apply amongst those raised (*Canada (Citizenship and Immigration) v Al-Obeidi*, 2015 FC 1041; *Tung v Canada (Citizenship and Immigration)*, 2018 FC 1224). Such a development keeps the jurisprudence in line with the principles emphasized in *Mason*, particularly responsive justification (*Meer* at para 28).

Refugees have taken to challenging the constitutionality of the cessation regime, particularly arguing that the automatic loss of permanent resident status under paragraph 46(1)(c.1) of the *IRPA* breaches the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 (the "*Charter*").

The issue was first raised in the courts in *Yuan v Canada (Citizenship and Immigration)*, 2015 FC 923, though it had been put before the RPD on several prior occasions (who declined to answer citing lack of jurisdiction). In *Norouzi v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 368 ("*Norouzi*"), the Federal Court held that the cumulative effect of sections 40.1, 46(1)(c.1), and 108(1) of the *IRPA* do not breach the *Charter*.

Most recently, certain public interest groups have brought a motion to intervene on a *Charter* challenge to the consequences flowing from paragraphs 108(1)(a)-(d) of the *IRPA*, namely the automatic loss of permanent resident status (see *Gnanapragasam v Canada (Public Safety and Emergency Preparedness)*, 2023 FC 1735 ("*Gnanapragasam*"))¹. As the Federal Court has yet to decide on the underlying *Charter* issues, some cessation cases under these paragraphs of the *IRPA* are being held in abeyance.

Looking forward and beyond

Canada is not the only country to adopt a cessation regime. Across Europe, we have seen a revival in the use of cessation for a variety of factors (see Maria O'Sullivan, *Legal Note on the Cessation of International Protection and Review of Protection Statutes in Europe* (2021), and Jessica Schultz, *The end of protection? Cessation and the 'return turn' in refugee law* (2020)). Whereas states are routinely scrutinized for any tightening of containment measures like pushbacks, this same scrutiny has yet to be applied to cessation regimes as affecting the durability of refugee protection.

Further questions arise from cessation and its relationship to refugee protection more broadly. As Boston College's Professor Daniel Kanstroom highlights, there is a lingering question as to whether the removal of deportees ends these deportees' rights under international human rights law.² There is also a question as to whether deportees "have specific rights claims in the country to which she is deported (typically her country of nationality) based on discrimination against her as a 'deportee.'"³

I do not raise these questions with a position thereon or answers thereto. I simply raise them for the members of IARMJ so that they may reflect on their own position within cessation's process. Specifically, I put to the members to reflect on both the legal context in which cessation decisions are made, but also to reflect on the journey that individuals whose refugee protection is ceased will embark on.

Shirzad Ahmed
President, Americas Chapter

¹ The *Charter* challenge in *Gnanapragasam* became moot following the RPD's determination that the applicant was ceased under paragraph 108(1)(e), rather than 108(1)(a) (*Gnanapragasam v Canada (Public Safety and Emergency Preparedness)*, 2024 FC 761). The same issues will now be decided in consolidated Federal Court Files Nos. IMM-5466-23 and IMM-5481-23.

² "The Right to Remain Here as an Evolving Component of Global Refugee Protection: Current Initiatives and Critical Questions" (2017) 5:3 J Migr & Hum Sec 614 at 635.

³ Ibid.

ASIA PACIFIC CHAPTER

Dear friends and colleagues,

Since the last newsletter the Chapter has been busily engaged in planning for the regional conference, which has had a date change to accommodate arrangements and will now be held on 25-26 November 2024 in Melbourne, Australia. The conference will be hosted by and held at the Peter McMullin Centre on Statelessness, University of Melbourne, and will tackle vital and topical themes under the conference title *Vulnerabilities in Refugee and Migration law: People, processes, and systems*.



Sean Baker
President,
Asia Pacific Chapter

We are pleased that the conference will include notable Australian and Asia Pacific judges, academics and scholars in the protection and migration fields, as well as some very exciting international presenters. The initial program will be released shortly but, in the interim, I can signal that, among many topics, we are planning to have leading speakers to address the following:

- Vulnerability, harm and mental health (including the impact on decision-making)
- Understanding Statelessness in Australian Law and Practice
- Detention and its impact on the presentation of claims
- Judicial resilience
- Vulnerability in deportations and removals
- Credibility and the PRE Project's study of evidence in refugee status decision-making
- Developments in refugee law in the Asia Pacific region
- Credibility, gender and SOGI
- Trauma informed practice
- Foreseeability - imminence
- Artificial Intelligence – its vulnerabilities and opportunities

The venue is the University of Melbourne Law School. Professor Michelle Foster, a long-standing supporter of the IARMJ, is the director of the Law School's Peter McMullin Centre on Statelessness which was established in 2018 with the objective of undertaking research, teaching and engagement activities aimed at reducing statelessness and protecting the rights of stateless people in Australia, the Asia Pacific region, and more broadly. Michelle has kindly made the Centre's facilities available to us, for which we are hugely grateful.

Earlybird registration for the conference will open in July, so please do keep an eye out for this. The conference will not be live-streamed, because we want to bring us back to the pre-Covid joy of meeting in person and the opportunity to build relationships.

You will see from elsewhere in the newsletter that the Philippines has inaugurated its National Refugee Day, with all government offices and NGOs required to step up in support of the refugee community and the Philippines' commitment to the protection of those in need. In a world of increasing pressures on refugees, the approach of the Philippines is uplifting. I should add that Judge Maria Josefina San Juan Torres (Joy) is not only an active member of the Supreme Court's Special Committee on Facilitated Naturalization for Refugees and Stateless Persons but is also Vice President of the IARMJ's Asia Pacific Chapter. I have no doubt that Joy's boundless energy and commitment has been a significant contributing factor.

Looking forward to seeing as many as possible of you in November.

Sean Baker

President, Asia Pacific Chapter

IARMJ Asia Pacific Biennial Conference

10



Vulnerabilities in Refugee and Migration Law: People, processes, and systems

**25 - 26 November 2024
Melbourne**

**Peter McMullin Centre on
Statelessness**

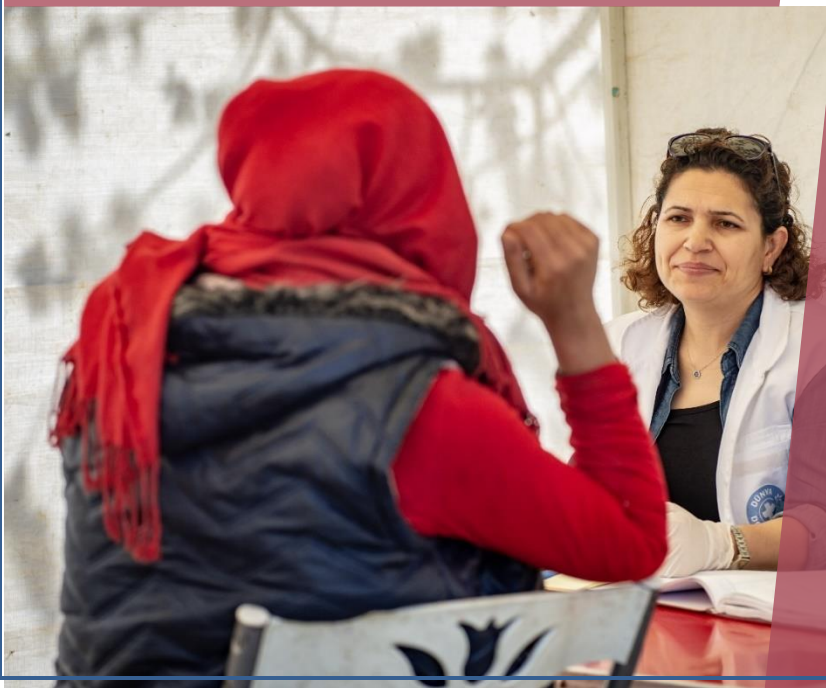
**University of Melbourne
Law School**

**Melbourne, Victoria,
Australia**



**Early bird registration
opens shortly**

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‘NATIONAL REFUGEE DAY’ LAUNCHED IN THE PHILIPPINES

The Philippines Justice Department’s Refugees and Stateless Persons Protection Unit (the DOJ-RSPPU) has just launched the country’s first National Refugee Day, set for 20 June every year.⁴

In a speech made on 4 June 2024 (read by DOJ Undersecretary Raul T Vasquez), Justice Secretary Jesus Crispin Remulla assured that the Philippines is taking great strides towards upholding the rights and welfare of refugees.

Under Presidential Proclamation No 265 issued in 2023, 20 June every year is now declared to be National Refugee Day. The proclamation mandates that all agencies of the government, universities and colleges, local governments, NGOs and the private sector are to participate in the celebration.

To further affirm the country’s commitment, the DOJ-RSPPU (Department of Justice – Refugee and Stateless Persons Protection Unit) was created under the Department of Justice, and has been granted its own budget under the 2024 General Appropriations Act. "Resources which help in our efforts will... further improve our capacity in order to help those seeking refuge in the Philippines and which, we hope, will continue for many years to come, given the growing number of forcibly displaced all over the world," DOJ-RSPPU head Chief State Counsel Dennis Arvin Chan said. "I hope that the National Refugee Day would pave the way for stronger, more nurturing, inclusive and sustainable communities here in the country," he added.

National Refugee Day 2024 kicks off with the first National Refugee Forum on 20 June, discussing the experiences of the displaced and how to help them. The 2nd Refugee Film Festival and Short Film Competition will be held at De La Salle-College of Saint Benilde and a "Hope Away from Home" traveling exhibit by UNHCR will be on display at the Supreme Court in Manila, on 20-22 June.

Chief State Counsel Chan noted that there are “more or less a thousand recognised refugees here in the Philippines” and “with about the same number of pending applications.” He added that the refugees are of diverse nationalities “but mostly coming from Middle East and African countries”. As to the refugees who became Filipino citizens, he noted that “there are less than 10 who have undergone naturalisation”.

Judge Maria Josefina G San Juan-Torres (Joy Torres) of the Judiciary’s Special Committee on the Facilitated Naturalization for Refugees and Stateless Persons noted that, in 2022, the Supreme Court approved the rule that simplified petitions, reduced legal and procedural hurdles, and facilitated the naturalisation of refugees and stateless persons. The rule governs the procedure for the filing of petitions for naturalisation by refugees and stateless persons recognized by the Philippine Government and allows for electronic publication of the petition on the website of the Official Gazette and in one newspaper or media website, in order to “reduce the fees and be less burdensome for them.”

The Supreme Court said that the rule is the Philippines’ recognition of its commitments under international law, particularly the 1951 *Convention Relating to the Status of Refugees*, the 1967 *Protocol Relating to the Status of Refugees*, the 1954 *Convention Relating to the Status of Stateless Persons*, and the 1961 *Convention on the Reduction of Statelessness*, stating:

“... the approval of the Rule is the Judiciary’s contribution to the fulfilment of the Philippines’ pledges during the Global Refugee Forum and High-Level Segment on Statelessness to enhance the policy, legal, and operational framework for refugees and stateless persons to ensure their full access to rights... including their facilitated naturalization and other rights as may be provided by national laws.”

⁴ Sourced from W Bacelonia “PH Reaffirms Commitment to Uphold Rights, Welfare of Refugees” [Philippine News Agency](#) (4 June 2024), J Damicog “Philippines Assures Support, Assistance to Refugees, Stateless Persons – DOJ” [Manila Bulletin](#) (4 June 2024), “Humanitarian Legacy: Philippines To Continue Welcoming Refugees – Remulla” [Politiko](#) (4 June 2024), “DOJ Kicks off 1st National Refugee Day 2024” [Abogado](#) (4 June 2024) and D Galvez “Philippine Affirms Aid to Refugees, Stateless Persons” [The Philippine Star](#) (5 June 2024).

EUROPE CHAPTER

Dear friends and colleagues,

The European chapter organized a workshop in Berlin on 3 and 4 June 2024. The chapter organizes these workshops biennially and we discuss relevant topics relevant to our day-to-day work.

The topic for the workshop was *Climate Change, Socio-Economic Deprivation and the Non-Refoulement Principle*.

We started with an introduction from Jacob Schewe, (FutureLab Leader, “Security&Migration” Potsdam Institute for Climate Impact Research), who presented his research on the topic *Climate Change and Migration – which Migratory Movements to Expect?* The impression I was left with was that the reasons for migration are much more complex than I thought. It is seldom just one reason behind migration, like climate change or political situation, but a complex interplay between various factors like the environment, the political, demographics, economic and social situations.

We continued with presentations on *Sufi & Elmi, Teitiota (and others?) – Standards for Climate-Related Non-Refoulement in Supra or International Jurisprudence* and *Standard(s) of Proof and Burden of Proof in Cases Related to Climate, Socio-Economic Deprivation or Medical Conditions*.

This was followed by case studies in working groups on *Protection Against Deportation for Socio-Economic and/or Health Reasons*. The case examples came from different countries. The conclusions from the working groups were presented in a plenary session – showing the difference in views from the different groups/ countries.

The next day we had a meeting with Ms Linda Teuteberg (Member of Parliament for the Free Democratic Party (FDP), Member of the Committee for Home Affairs on “Acting as National Legislative Power in the field of European Migration Law”. We covered various topics but, just a few days before the meeting, a police officer had been killed by an asylum seeker and we talked about the impact of events like this on the general discussion, both political and in the public, on questions of migration. We also touched on the topic of church asylum, ie where rejected asylum seekers take refuge in churches and the police are denied entry to detain them.

The discussion was followed by a visit to the German Bundestag, the old Reichstag building.

I have attended quite a few of these workshops in Berlin and the format can be highly recommended. The number of participants are limited, and so are the number of topics covered. That gives a chance to have in-depth discussions impossible in large conferences. That most of the participants also stay at the same place makes it possible to renew contact with new and old friends.



**Johan Berg,
Secretary
Europe Chapter Council**



**Linda Teuteberg addressing
members of the IARMJ-Europe in
the German Parliament**

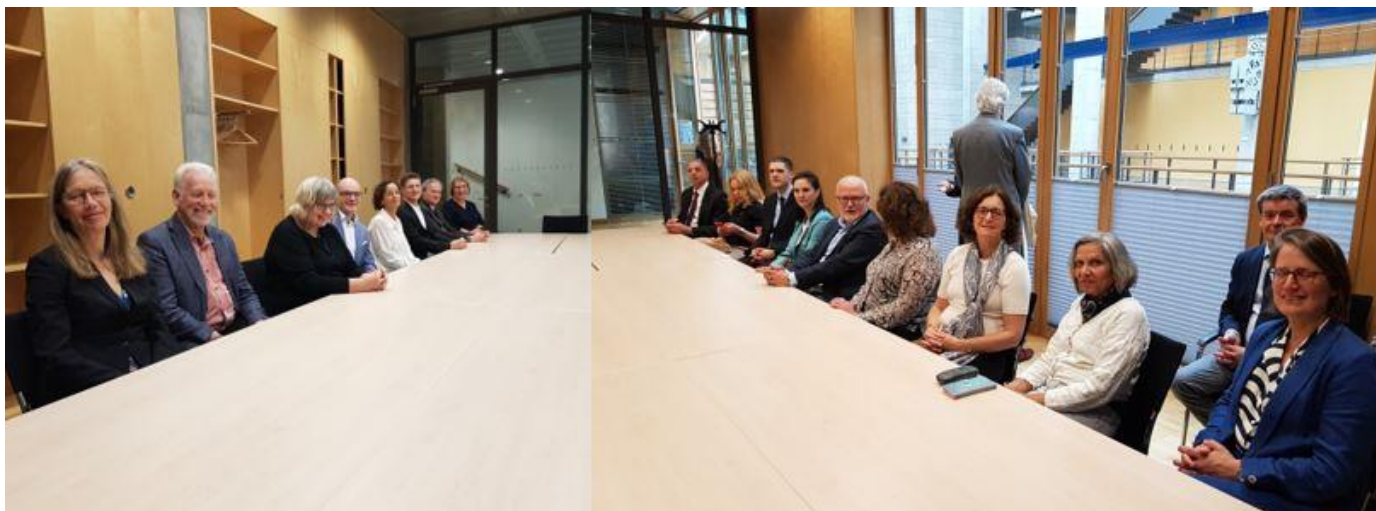
Johan Berg

THE BERLIN WORKSHOP

Climate Change, Socio-Economic Deprivation and the Non-Refoulement Principle

2-4 June 2024

Photos taken during the IARMJ-Europe's visit to the Parliament of the Federal Republic of Germany



With the wonders of photoshop, the table is as one (nearly!)



Delegates impressed by the architect's model for the new IARMJ summer retreat for members



**Europe Chapter
(IARMJ-Europe)
Biennial Conference**



8 - 10 September 2024

**Dublin Castle,
Dublin,
Ireland**



Programme

Welcome reception, Sunday 8 September
Conference dinner, Portrait Gallery,
Dublin Castle, Monday 9 September



REGISTRATION NOW OPEN

Discount hotel bookings must be received by 24 July 2024

www.iarmj.org

WORKING PARTIES UPDATE

PRESENTATION ON THE IARMJ WORKING PARTIES AT THE 8TH ANNUAL CONFERENCE OF THE REFUGEE LAW INITIATIVE, UNIVERSITY OF LONDON

The Refugee Law Initiative (RLI), School of Advanced Studies, at the University of London, holds an annual conference **“for bringing together decision-makers and practitioners, policymakers, academics and students to share their research findings, debate, and discuss the latest thinking and developments in the refugee protection field.”** The explicit intention is to provide **“a global platform for furthering research, dissemination and legal and policy impact in the refugee law field.”** This year’s annual conference was titled, *“Pacts, Promises and Protection,”* held June 3 to 5, was designed to **“interrogate the proliferation across the world of a range of new quasi-legal pacts on refugee protection.”** The venue for the RLI 8th annual conference was the University of London’s Senate House. Over the two-and-a-half-day conference there were 18 panel sessions, three keynote speakers, and a poster session. Over 70 papers were presented at the conference in total on a wide variety of topics covering the broad annual conference theme.

In my capacity as the Co-ordinator of the International Association of Refugee and Migration Judges (IARMJ) Inter-Conference Working Parties Process, I was fortunate to be on an interesting panel session entitled, **“Approaches to Judicial and Administrative Decision-Making in the Asylum Field,”** that was held in the afternoon of the second day of the conference. My paper presentation, *“IARMJ Inter-Conference Working Parties Process: Striving to Achieve Judicial Harmony in International Refugee and Migration Law,”* covered the following topics: the background on the IARMJ; the role of the IARMJ, globally and regionally; the IARMJ Working Parties Process; two IARMJ Working Parties in action; and conclusions and reflections. All presentations were limited to a maximum of about 15 minutes each and, consequently, only the barest minimum could be covered on each of these broad paper topics.

The Background on the IARMJ

Starting with the founding of the Association in 1997, as the International Association of Refugee Law Judges (IARLJ), based in Haarlem, The Netherlands, to the Association changing its name to the IARMJ in 2019, there has always been an Inter-Conference Working Parties Process within the Association that has played an important role in furthering the objects of the association such as **“fostering a common consistent understanding and application of international law, practices and principles related to refugee, complementary protection, statelessness and related migration issues.”** It was further noted that section 1.2.2 (g) of the IARMJ Constitution likely covered the bases of the Inter-Conference Working Parties Process, **“amongst judges mutually beneficial professional development, training and research initiatives, timely issue based, decision writing and publication and projects that further the attainment of the objects of the Association.”** Several basic elements of the IARMJ were also outline such as the Executive Office positions, the IARMJ Management Board, Supervisory Council, biennial World and Regional Chapter Conferences, and the *IARMJ report*, our newsletter. The point was stressed that all IARMJ publications are fully available through open access to everyone online.

The Role of the IARMJ Globally and Regionally

The role of the Association, both globally and regionally, was outlined. It is important to stress that the United Nations High Commissioner for Refugees (UNHCR) position, as the United Nations’ refugee agency, with the responsibility under Article 35 of the *1951 Convention relating to the Status of Refugees* for the supervision of international refugee law, has a very onerous responsibility for ensuring the appropriate application and interpretation of international refugee law by States. At the same time however, it is financially dependent on States and regional organizations like the European Union (EU) for its funding. Moreover, the UNHCR has reporting requirements within the UN system through its Executive Committee, the UN Secretary General, the UN Security

Council, and the UN General Assembly. Further, it needs the permission of States to operate within their territories. And, although the UNHCR issues guidelines, handbooks, and reports to assist States in deciding their claims for refugee protection these are non-binding but are rather persuasive. Accordingly, the UNHCR must be supremely diplomatic in its relationship with States. All this implies, that the UNHCR must function through the “[politics of persuasion](#).”

It is further worth noting that there is no International Refugee Court or Tribunal to resolve divergencies and differences that are likely to emerge inevitably in applying and interpreting the *1951 Convention* and its *1967 Protocol related to the Status of Refugees*. This makes it vitally important that professional judicial associations, such as the IARMJ, play such an important role both globally and regionally to ensure that the divergencies and any differences in the application of refugee rights instruments are resolved and there is a general consistency in the application and interpretation of refugee rights instruments.

The IARMJ Inter-Conference Working Parties Process

The IARMJ Inter-Conference Working Parties Process has contributed to assisting to resolve divergencies and differences in international refugee law since the Association was first established in 1997. IARMJ Working Parties are comprised of small transnational groups of Association members who are interested in the substantive legal issue area of their Working Party. They are led by a Rapporteur and an Associate Rapporteur who are responsible for organizing their meetings, assisting with the research, and writing their conference papers and/or reports. For a brief description of the IARMJ Working Parties, please see the Association’s website [here](#).

There are currently 12 active IARMJ Working Parties:

- **Human Rights Nexus**
- **Judicial Resilience and Well-Being**
- **Membership in a Particular Social Group**
- **Training/Ongoing Professional Development**
- **Vulnerable Persons**
- **Climate, Migration, and Protection Pathways**
- **Asylum and Migration Procedures**
- **Deportation**
- **Country of Origin Information, Expert Evidence, and Social Media**
- **Exclusion Clauses, Cessation, and Deprivation of Citizenship**
- **Detention**
- **Artificial Intelligence, Information Technology, and Judicial Decision-Making**

The Rapporteurs and the Associate Rapporteurs of each of the IARMJ Working Parties meet on a quarterly basis between IARMJ World Conferences. This turns into biweekly meetings when the IARMJ World Conference is about four months off, to ensure that everyone is on track for the IARMJ World Conference. The meetings are held online and last for about one hour. They are chaired by the IARMJ Inter-Conference Working Parties Coordinator, James C. Simeon.

The Inter-Conference Working Parties Process holds a face-to-face breakfast meeting at IARMJ World Conferences and there is always a panel session on the program for the IARMJ Working Parties to present their work and to discuss substantive issues arising from their Working Parties’ conference papers and reports, etc. IARMJ World Conference papers and reports and other documents are posted on the IARMJ website for members to access, to read, and to consider.

Two IARMJ Working Parties in Action

For illustrative purposes, two IARMJ Working Parties were featured to provide a glimpse of how the IARMJ Working Parties operate in practice. The two IARMJ Working Parties examined were the Artificial Intelligence, Information Technology, and Judicial Decision-Making (AIITJD) Working Party and the Judicial Resilience and Well-Being Working Party (JRWB).

The remit of the AIITJD Working Party is to consider the practical issue in understanding how technology used by migrants and decision-makers works, how it affects the quality of evidence and how it is generating new evidence (such as mobile geographic data, aside from social media) which did not exist before. Another key area is the extent to which it can manufacture evidence with ease, such as “deepfake” AI-generated documents.

Its most recent conference paper was released and distributed for consideration at The Hague, IARMJ World Conference, The Netherlands, May 10-12, 2023. The conference paper delves into the very broad area of AI/IT and **how it has impacted society and specifically migrants and the refugee and migration law decision-making process.**

The AIITJD’s conference paper offers some practical guidance for judges when considering the impact of technology.

- **Be familiar with complex types of data and means of communications.**
- **Be curious about gaps in your knowledge and seek expert evidence, if appropriate and possible.**
- **Become more familiar with the decision-makers’ processes, as they become ‘blended’, with a mix of AI/IT and human oversight.**
- **As judges, we must remind ourselves to be conscious of the (human) problem of unconscious bias. Technology and the use of AI can allow others to analyze our decisions and make allegations of bias or predict judicial outcomes.**

It concludes by noting that, “**It remains our task to adapt in applying the rule of law.**”

The remit of the Judicial Resilience and Well-Being Working Party is to raise awareness of the mental health issues of refugee and migration law judges, such as vicarious trauma and burnout, and to promote the best practices and strategies for these issues for both individuals and organizations.

This Working Party had a session at the 2023 The Hague IARMJ World Conference and the 2022 Asia Pacific Regional Chapter Conference. It is currently researching and writing a conference paper that will be presented at the next IARMJ World Conference to be held in Nairobi, Kenya. The Working Party is hoping to be able to develop a set of recommendations for refugee law adjudicative bodies for how to address the mental health issues that refugee and migration law judges face given the nature of their work.

New Zealand’s Immigration and Protection Tribunal has launched a well-being and resilience plan, *Tatau O Te Ora*, for its judges. Other tribunals are also doing the same. For instance, the **Immigration and Refugee Board of Canada** introduced a *Strategy for Psychological Safety and Mental Health* in fiscal year 2022-2023.

The JRWB Working Party has also been examining the available research to identify practical ways in which judges can build resilience and improve their well-being so that they can better manage the inevitable situations of high-stress, trauma, and burnout.

A new area that has been looked at is “moral injury” which is a strong cognitive and emotional response to events that violate one’s moral or ethical code and is increasingly being recognized as an issue for those who are working within the refugee and migration field.

Conclusions and Reflections

Since 1997, nearly 30 years, the IARMJ has played an important role in the training of refugee and migration law judges and decision-makers and advancing research and publications in the field and, in this process, playing a vital role in helping to resolve divergencies and discrepancies in the application and interpretation of international refugee and migration law. It has worked closely with the UNHCR and more recently the IOM, along with the academic community, in both developing and assisting in evolving the field of international refugee law.

The *IARMJ Inter-Conference Working Parties Process* has been central to this role of advancing international refugee law through its conference papers, reports, publications, and guidelines that it has prepared for its members to facilitate their onerous responsibilities in deciding asylum and migration law claims.

The IARMJ Working Parties have taken on challenging cutting edged issues and concerns and have provided practical guidance and support for IARMJ members. There are currently 12 active Working Parties, but they are reviewed on a biennial basis and if changes are required then they will be made, that is, Working Parties will be ended, combined, and/or new ones established.

IARMJ Working Parties provide members with an opportunity to get involved with international refugee and migration law issues and concern at a comparative and global level and to contribute to helping to shape the development of the law, best practices, and policies in these areas.

The IARMJ Inter-Conference Working Parties Process is one of the Association's great successes.

Dr James C Simeon, Co-ordinator of the IARMJ Inter-Conference Working Parties Process

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REPORT FROM THE WORKING PARTY ON MEMBERSHIP OF A PARTICULAR SOCIAL GROUP

Women as a 'Particular Social Group' – Note on recent case-law of the Court of Justice of the European Union

(by Hilka Becker, Rapporteur of the IARMJ Working Group on 'Membership of a Particular Social Group')

The application of the concept of 'Membership of a Particular Social Group' in relation to gender has recently gained further clarity, at least in the context of the application of EU law, and this article provides a short insight into three very relevant cases decided by or pending before the Court of Justice of the European Union (CJEU):

Earlier this month, the CJEU published its most recent judgment concerning the interpretation of 'membership of a particular social group' in the case of *K, L v Staatssecretaris van Justitie en Veiligheid* ([C-646/21](#)). This matter

concerned two sisters of Iraqi nationality who have lived in the Netherlands since 2015. The applicants in this matter claimed a fear of persecution on return to Iraq because of the identity they have formed in the Netherlands, characterised by the adoption of norms, values and conduct that are different from those of their country of origin, which have become so fundamental to their identity and conscience that they cannot renounce them.

In its judgment, the Court confirmed that: “(...) women, including minors, who share as a common characteristic the fact that they genuinely come to identify with the fundamental value of equality between women and men during their stay in a Member State may, depending on the circumstances in the country of origin, be regarded as belonging to a ‘particular social group’, within the meaning of Article 10(1)(d) of the [Qualification Directive](#).”

The judgment follows the ruling in the matter of *WS v Intervyuirasht organ na Darzhavna agentsia za bezhantsite pri Ministerskia savet* ([C-621/21](#)) in which the CJEU held in January of this year that “women, as a whole, may be regarded as belonging to a ‘particular social group’, (...), where it is established that, in their country of origin, they are, on account of their gender, exposed to physical or mental violence, including sexual violence and domestic violence”. In coming to that finding, the CJEU reiterated that although “membership of a particular social group is to be established independently of the acts of persecution, (...), of which the members of that group may be victims in the country of origin”, the fact remains that “discrimination or persecution suffered by persons sharing a common characteristic may constitute a relevant factor where, in order to ascertain whether the second condition for identifying a social group [laid down in EU law] is satisfied, it is necessary to assess whether the group in question appears to be distinct in the light of the social, moral or legal norms of the country of origin in question”.

We now await a further judgment from the CJEU dealing with the issue of women as a ‘particular social group’ in Joined Cases [C-608/22](#) and [C-609/22](#), the matters of *AH and FN v Bundesamt für Fremdenwesen und Asyl*, in which Advocate General de la Tour delivered his opinion in November 2023. These two cases concern the situation of women in Afghanistan since the return of the Taliban regime there. The Advocate General in his opinion recognises that “the situation of women and girls in that country has deteriorated rapidly, to the point that their very identity can be said to be denied” and he deals with the pertinent question whether refugee status may be granted to those women and girls solely on account of their gender, or whether the authorities of the EU Member States must to identify whether an individual risk of persecution exists.

The opinion first clarifies that “the concept of ‘acts of persecution’ includes an accumulation of discriminatory acts and measures adopted by a country against women and girls to restrict or even prohibit, inter alia, their access to education and healthcare, their gainful employment, their participation in public life and politics, their freedom of movement and freedom to take part in sports, depriving them of protection against gender-based and domestic violence and requiring them to cover their entire body and face, in so far as those acts and measures have the cumulative effect of depriving those women and girls of their most basic rights in society and thus undermine full respect for human dignity”.

The Advocate General expresses the view that “there is nothing to prevent a competent authority from considering, in the light of all the information at its disposal, that it is not necessary to establish that the applicant is targeted because of distinctive characteristics other than her gender” and suggests that the CJEU should answer the second question referred to it for a preliminary ruling by the Supreme Administrative Court of Austria accordingly.

THE WORKING GROUP ON ‘MEMBERSHIP OF A PARTICULAR SOCIAL GROUP’ IS LOOKING FOR NEW MEMBERS – if you are interested in joining the group, please contact Hilkka Becker via hbecker@protectionappeals.ie

IN THE LIBRARY

RECENT PUBLICATIONS

NEMIS, NEAIS, NEFIS) and CJEU newsletters

Dr Carolus Grütters, of the Centre for Migration Law at Radboud University, Nijmegen, advises that the latest issues of the Centre's newsletters NEMIS (on European Migration Issues), NEAIS (on European Asylum Issues), NEFIS (on European Free Movement Issues) and CJEU (CJEU judgments and pending cases overview) are now available at <https://cmr.jur.ru.nl>. There are also links to all four newsletters on the IARMJ website under 'Useful Links'.

A SELECTION OF IN-DEPTH REPORTS

World Migration Report 2024

International Organization for Migration (IOM), 7 May 2024

The twelfth edition of the World Migration Report has been produced to contribute to increased understanding of migration and mobility throughout the world. It presents key data and information on migration as well as thematic chapters on topical migration issues, including migration and human security, and gender and migration.

DFAT Country Information Report: Sri Lanka

Australian Department of Foreign Affairs and Trade (DFAT), 2 May 2024

This report covers topics related to protection status determination including (but not limited to): the demography, political system, human rights framework and security situation of Sri Lanka, as well as information regarding race/nationality, religion, the death penalty, and torture within the country.

Iraq - Country Focus

European Union Agency for Asylum (EUAA), May 2024

The purpose of this report is to provide information relevant for the assessment of applications for international protection, including refugee status and subsidiary protection. The report provides information on the treatment of selected profiles by state and non-state actors as well as on key socio-economic indicators in the country, with specific focus on the cities of Baghdad and Sulaymaniyah.

"I Escaped with Only My Life": Abusive Forced Evictions in Pakistan

Human Rights Watch (HRW), 28 May 2024

According to HRW, the Pakistani government has increasingly used a colonial-era law to forcibly evict thousands of low-income residents, shop owners, and street vendors to facilitate public and private development projects across the country in violation of international human rights law and standards. However, Pakistan's antiquated legal code permits such practices.

Death sentences and executions in 2023

Amnesty International, 29 May 2024

This report covers the judicial use of the death penalty for the period of January to December 2023. Amnesty International's monitoring shows that in 2023, the lowest number of countries on record carried out the highest number of known executions in close to a decade. These figures confirm trends of recent years that pointed to the ever-increasing isolation of retentionist countries.

Articles of Interest in the Media

A selection of media reports which you may have missed over the past couple of months

Panama Completes First Climate-Related Relocation

Human Rights Watch, 29 May 2024

This article discusses the community-led planned relocation of the Guna Indigenous people from the flood-prone island of Gardi Sugdub in Panama, in anticipation of long-term climate change impacts like sea-level rise.

Questions and Answers: New EU Law on Corporate Value Chains

Human Rights Watch, 24 May 2024

In the context of global supply chains, a new EU law requires corporations to protect people in their value chains. Corporations are to conduct due diligence to adhere to human rights, labour rights, and environmental standards.

'Nowhere to go': Rohingya face arson attacks in Myanmar's Rakhine State

Al Jazeera, 21 May 2024

Fighting between the military and the Arakan Army (AA) has escalated in the western state of Rakhine, with thousands of Rohingya fleeing for their lives. There have been fires across the town of Buthidaung. The AA rejected claims that it was behind the arson, saying the fires were started by the Myanmar military in air attacks.

A Human Rights Guide to the 2024 European Elections

Human Rights Watch, 15 May 2024

Between 6 – 9 June 2024 voters in all 27 EU member states went to the polls to elect 720 members of the European Parliament. These are the first European elections since Brexit, the Covid-19 pandemic, and conflicts in Ukraine and the Middle East.

Women as Wives: How Uzbekistan's Justice System Fails to Serve Women

The Diplomat, 14 May 2024

The article notes that "annually, around 40,000 cases of gender-based violence are reported to law enforcement bodies in Uzbekistan, and almost all victims are women. 85 percent of all violence against women takes place at home, making domestic violence the most prevalent type of gender-based violence". The article further notes how, due to socioeconomic dependence on men, lack of support from wider society, stigma and pressure, many victims do not seek help, especially from the police.

Sudan: RSF massacres in Darfur 'possibly genocide', says HRW

Middle East Eye, 9 May 2024

The Rapid Support Forces (RSF) and its allied militias are accused of killing thousands of people and displacing hundreds of thousands more during their onslaught on el-Geneina, the state capital of West Darfur, between April and November 2023. Human Rights Watch claims such attacks constitute ethnic cleansing and possible genocide.

Iran Seeks to Tighten Crackdown On Afghan Refugees

Radio Free Europe Radio Liberty, 8 May 2024

Iran says it has expelled approximately 1.3 million unauthorized migrants over the past year, primarily Afghan refugees. The article notes that "according to the United Nations Refugee Agency, Iran currently hosts around 3.4 million foreign refugees, with Afghans comprising the largest single group."

Recent Case-Law of Interest from Around the World

AFRICA

I & anor v Director of Asylum Seeker Management: Department of Home Affairs and ors **(821/2022) [2024] ZASCA 87 (5 June 2024)**

In this recent decision, the Supreme Court of Appeal of South Africa upheld an appeal against the Western Cape Division of the High Court which had dismissed an application to compel the Department of Home Affairs to accept second applications for refugee status after the initial ones were unsuccessful.

The Burundian appellants claimed that, after the rejection of their first applications, circumstances changed in Burundi. Widespread political violence broke out, following which thousands of Burundians fled the country. Those who remained were subjected to oppression, torture, rape, and sexual violence. The applicants said that it was not safe for them to return, as this would place them at risk of persecution or serious threat to their lives, safety and/or physical freedom. The Department determined that the appellants may not again apply for asylum in South Africa without returning to their country of origin. The High Court then dismissed their applications on the basis that a re-submission of an asylum application after the initial one had been unsuccessful amounted to abuse of the asylum system provided for in the Refugees Act 130 of 1998.

On appeal, the Supreme Court of Appeal noted that the Refugee Convention and the OAU Convention embodied the customary international law of *non-refoulement* which finds expression in the Refugees Act. The Court noted that South Africa has not yet developed a significant jurisprudence on *sur place* refugee claims, and looked to the jurisprudence of the United Kingdom and Canada.

The Court clarified the reach of the principle of *non-refoulement* as being protection afforded for as long as a claimant has not exhausted all available remedies, including internal appeals and judicial review. But, once an application is finally rejected, the protection falls away. The Court pointed out that, whilst the High Court was concerned about the possible abuse of the system by the appellants, it was not the Court's place to determine whether the new applications had merit. That was within the remit of the Department. To that extent, the High Court erred. The matter had to be remitted to the Department to consider the merits of the *sur place* claims in the light of certain guidelines outlined in the judgment. However, the Supreme Court sounded caution against possible abuse of refugee claims *sur place*, and made the following observations:

- First, a *sur place* claim is not validly made by reformulating a claim that has already been finally determined.
- Second, a *sur place* claim must set out a proper evidential basis for the claim. What circumstances have changed, the evidence of that change, and their specific consequences for the applicant must be set out in the application. Absent this content, an application may be summarily rejected.
- Third, there is much scope for abuse if *sur place* claims are made (sometimes on a repeated basis) without proper foundation, to extend protection for lengthy periods of time. This should not be tolerated. And the Department should develop expedited procedures to bring to finality *sur place* claims that facially have no basis.

With these observations, the Court upheld the appeal with costs, set aside the order of the High Court and remitted the matter to the Department.

S v Minister of Home Affairs and Others;
M v Minister of Home Affairs and Others; R v Minister of Home Affairs and Others

(2024/021421; 2024/025071; 2024/025073) [2024] ZAGPJHC 1695 (2 May 2024)

The three applicants were foreign nationals seeking refugee status in South Africa. They presented themselves at the Pretoria Refugee Reception Office but were turned away, two on the grounds that nationals from their did not qualify for asylum at all and one being told that access to the office was by appointment only.

Each applicant was subsequently arrested and detained and was charged and convicted of being present in South Africa without a valid visa. Each served a short prison sentence before being sent to the Lindela Repatriation Centre for deportation. Each then applied to the High Court for release.

Two applied for orders restraining the respondents from deporting them and affording them an interview, during which they could show good cause for entering or remaining in South Africa without a valid visa. The third applied for an order restraining his deportation pending being afforded such a good cause interview, which the respondents were required to take “all necessary steps” to arrange within 10 days.

The High Court granted the orders and postponed each application to 28 March 2024, with a direction that the respondents show why the applicants should not be released. If a ‘good cause’ interview had not been arranged by that date, then the applicants’ detention would likely have become unlawful. That is the effect of *Ashebo v Minister of Home Affairs* 2023 (5) SA 382 (CC) where the Constitutional Court held that a refugee claimant without a valid visa can be detained pending a good cause interview under Regulation 8 (3), but that his or her detention becomes unlawful if such an interview is not organised within a reasonable time.

When the matter was called again on 28 March 2024, the respondents did not appear. However, none of the applicants had filed any further papers indicating whether a good cause interview had been arranged. Accordingly, the Court postponed the application to 15 April 2024, directing that an affidavit be filed setting out whether a good cause interview had been arranged and giving the respondents a further opportunity to justify detention.

Despite service of the order, the respondents again failed to appear on 15 April 2024. Each applicant had, however, filed an affidavit confirming that none had been afforded a good cause interview. Accordingly, in the absence of any justification for the applicants’ ongoing detention, the Court ordered that each applicant be immediately released. The Court directed that the respondents pay the applicants’ costs.

This case continues the Department of Home Affairs failure to attend court proceedings in which it is named as respondent. See also [Rudasingwa v Minister of Home Affairs](#), mentioned in the February newsletter.

AMERICAS

Singh v Canada (Citizenship and Immigration)

2024 FC 979 (CanLII)

This recent decision from the Canadian Federal Court revisits the difficult issue of the internal flight alternative (“IFA”), also known in other jurisdictions as relocation or the internal protection alternative.

The appellants, from India, feared harm from the wife’s ex-fiancé, a drug dealer/gang member with alleged ties to the Congress party and the local police. After the wife broke her engagement and married her husband, they faced threats from the ex-fiancé and his associates. The Refugee Protection Division found that the appellants had a viable internal flight alternative in Hyderabad. On appeal, the Refugee Appeal Division agreed with the finding of

the viability of an IFA in Hyderabad although finding that the agents of persecution or harm did not lack the motivation to harm the appellants. The appellants appealed to the Federal Court.

The test in Canada (which has analogues in other legal systems) is whether, on the balance of probabilities:

- a. the claimant will be subject to (for refugee status, on a “serious possibility” standard) persecution or (for complementary protection, on a “balance of probabilities” standard) danger or risk in the proposed site of an internal flight alternative; and;
- b. in all the circumstances, including circumstances particular to the claimant, conditions in the proposed site are such that it would not be unreasonable for the claimant to seek refuge there.

The burden for this second prong (the reasonableness of an IFA) is quite high as the Federal Court of Appeal in *Ranganathan v Canada (Minister of Citizenship and Immigration)* (CA), 2000 CanLII 16789 (FCA), [2001] 2 FC 164 has held that it requires actual and concrete evidence of the existence of conditions which would jeopardise the life and safety of a claimant in travelling or temporarily relocating to a safe area.

The Refugee Appeal Division had found that, even though the ex-fiancé and his gang maintained the motivation to harm the appellants, they had not established that they had the motivation to locate them in Hyderabad and that the ex-fiancé and his gang did not have connections throughout India sufficient to harm the appellants in Hyderabad. It was not established that the agents of harm had connections to the Congress Party or to the police outside their locale.

In the Federal Court, the appellants relied on *Bhuiyan v Canada (MCI)*, **2023 FC 410** to argue that continued interest in the family meant that ‘means’ was automatically established. *Bhuiyan* (a recent reiteration of a long line of authority) had held that the fact that the agents of harm contacted the Bhuiyans’ relatives almost two years after they left their country indicated that they still had “the means” to locate them. Further, if the agents of harm visited and endangered relatives to inquire about a claimant’s whereabouts, an IFA was unreasonable. In such a situation, not being able to share location information with family or friends was found to be tantamount to hiding, which does not support a viable IFA. Family and friends cannot be expected to lie and put their life in danger if they are visited by agents of harm who are known to be capable of making violent threats.

Rejecting the principle in *Bhuiyan* on the facts here, the Court held that means and motivation of the agent of harm *are* highly relevant factors in assessing the first prong of the IFA test, and are highly factual. In that context, potential harm to the family may be relevant. But the appellants’ argument was not in the context of the fact-findings, but was based on an oversimplified assertion that once continued interest exists, means are established.

The case is important for emphasising that ‘means’ needs to be assessed on the facts at hand, but also for leaving intact the reasoning in *Bhuiyan* – that having to live in hiding, in the sense of not being able to share location information with family or friends, rendered an IFA untenable (or unreasonable, the language has varied across cases). (Ed: This same outcome may also have been reached if the subjective concept of what is ‘reasonable’ had been viewed by the court through the lens of human rights – that it would require breaches of various human rights, including the rights to privacy and family unity (Arts 17 and 23, ICCPR), freedom of association (Art 19, ICCPR) and freedom of movement (Art 12, ICCPR)).

ASIA PACIFIC

AP (Chile) v Refugee and Protection Officer

[2024] NZHC 1408

In this recent decision from the New Zealand High Court, the Court had granted leave to the appellant to appeal against a decision of the Immigration and Protection Tribunal on the grounds that it was seriously arguable that:

“... the Tribunal has inadvertently made its factual assessment against an incorrect legal test. Although the statutory test is set out in the decision, there is no engagement with the meaning of “degrading treatment” under the ICCPR and how

this might differ from the real chance of serious harm test which dominates its previous discussion. Inevitably, therefore, the question arises whether application of the two tests may have been inadvertently conflated when it is at least seriously arguable that the treatment which the Tribunal accepted had occurred in Chile, may satisfy one test but not the other.”

In granting leave, the Court had observed that there was a “paucity of New Zealand authority on what constitutes ‘degrading treatment’ for the purposes of” the Tribunal’s complementary protection inquiry under Article 7 of the ICCPR”.

At the substantive hearing of the appeal, however, the High Court (differently constituted) found no such error on the part of the Tribunal. It agreed with the Tribunal’s approach that the threshold of serious harm must be reached before the decision-maker can “determine if that harm is eligibly persecutory, torturous or cruel in human rights terms”, citing with approval the Court’s earlier decision in *DV (Pakistan) v Refugee Protection Officer* [2020] NZHC 3346 which had upheld and adopted the Tribunal’s approach in *AC (Syria)* [2011] NZIPT 800035. *DV (Pakistan)* had (rightly) agreed that both the refugee inquiry and the complementary protection inquiry require the same threshold level of harm, notwithstanding the different language employed. The High Court, in *AP (Chile)* held that:

“In the present case, the Tribunal plainly set itself first and correctly the task of identifying a ‘qualifying form of harm’. It found none. On those facts (to which the appeal is held), it concluded — again, correctly — there was nothing to assess for protection.”

The case is important, in the New Zealand context, for correctly focussing on the seriousness of the anticipated harm. While it must arise from a breach of human rights, if the anticipated harm is not serious then nothing is to be gained by inquiring into whether it is “persecutory, torturous or cruel in human rights terms”.⁵

EUROPE

Recently, the Court of Justice of the European Union has issued two important judgments with possible impact beyond the borders of the EU.

The case *K, L v Staatssecretaris van Justitie en Veiligheid* from 11 June 2024 deals with the issue of westernised women and best interests of a child (Iraqi nationals), where the CJEU in addition to EU law on asylum and the Convention relating to the Status of Refugees also applied Convention on the Elimination of All Forms of Discrimination against Women (‘the CEDAW’), which was adopted by the United Nations General Assembly on 18 December 1979, the Convention on preventing and combating violence against women and domestic violence, which was concluded in Istanbul on 11 May 2011, and Article 3(1) of the International Convention on the Rights of the Child, adopted by the United Nations General Assembly on 20 November 1989.

The second judgment is the case of *European Commission v Hungary* from 13 June 2024. This judgment is relevant beyond the borders of the EU, because it shows what are the practical meaning and consequences in cases of (dis)respect of final judgments of the CJEU, as being a component part of the rule of law.

K, L v Staatssecretaris van Justitie en Veiligheid

C-646/21, 11 June 2024

Two sisters of Iraqi nationality, born in 2003 and 2005, arrived in the Netherlands in 2015, together with their parents and aunt. They have stayed there continuously ever since. On 7 November 2015, their parents lodged applications for asylum in their own names and on behalf of K and L, which were rejected on 17 February 2017.

⁵ New Zealand law adds “arbitrary deprivation of life” to its complementary protection regime but this does not detract from the correctness of the position stated by the High Court. Further, it should be noted that the reference to “cruel treatment” is legislative shorthand for “cruel, inhuman or degrading treatment or punishment” as per Article 7 of the ICCPR – see s131(6) of the Immigration Act 2009.

During administrative and court proceedings K and L argued that, due to their long stay in the Netherlands, they had adopted the norms, values and conduct of young people of their age and had thus become ‘westernised’. Consequently, as young women, they considered themselves able to make their own choices about their lives and their future, in particular as regards their relationships with men, marriage, their studies, their work and the formation and expression of their political and religious views. They feared persecution if they were to return to Iraq because of the identity they had formed in the Netherlands, characterised by the adoption of norms, values and conduct that are different from those of their country of origin, which had become so fundamental to their identity and conscience that they could not renounce them. They submitted that they are therefore members of a particular social group.

The District Court (the Hague) in October 2021 sent the order for reference to the Court of Justice of the EU (CJEU) with several questions on what is the right interpretation of eligibility criteria for refugees status under EU law in case of “westernised women” (first set of preliminary questions), and on how to interpret the best interests of a child provision from Article 24(2) of the *Charter of Fundamental Rights of the EU* (second set of preliminary questions).

The CJEU reformulated the first set of questions by saying that it is clear from the order for reference that that District Court is referring, in essence, to the fact that those women genuinely come to identify with the “*fundamental value of equality between women and men*” and wish to continue to benefit from that equality in their daily lives.⁶ From the methodological point of view, in addition to the text of the EU Qualification Directive 2011/9 the CJEU took into consideration several other legal sources. The CJEU stated that EU Qualification Directive 2011/95 must be interpreted not only in the light of its general scheme and purpose, but also in a manner consistent with the Geneva Convention and the other relevant treaties referred to in Article 78(1) TFEU. Those treaties include, inter alia, the Council of Europe *Convention on Preventing and Combating Violence against Women and Domestic Violence*, which was concluded in Istanbul on 11 May 2011, signed by the European Union on 13 June 2017 and approved on behalf of the European Union by Council Decision (EU) 2023/1076 of 1 June 2023 (‘the Istanbul Convention’), and which entered into force, so far as the European Union is concerned, on 1 October 2023. The purpose of the Istanbul Convention (Articles 1, 3 and 4(2)) is to, inter alia, protect women against all forms of violence, and prevent, prosecute and eliminate violence against women and domestic violence, and contribute to the elimination of all forms of discrimination against women and promote substantive equality between women and men, including by empowering women.⁷ As legal references, the CJEU also used Articles 3, 5, 7, 10 and 16 of the *Convention on the Elimination of All Forms of Discrimination against Women* (‘CEDAW’), which was adopted by the United Nations General Assembly on 18 December 1979 and entered into force on 3 September 1981.⁸ The CJEU also referred to the Charter of Fundamental rights of the EU, where Article 21(1) prohibits any discrimination based on, inter alia, sex⁹ and to its previous case law on women as victims of domestic violence (WS, C-621/21, 16 January 2024). The CJEU decided that the fact that a woman genuinely identifies with “*the fundamental value of equality between women and men*”, in so far as it presupposes a desire to benefit from that equality in her daily life, entails being free to make her own life choices, particularly in relation to her education and career, the extent and nature of her activities in the public sphere, the possibility of achieving economic independence by working outside the home, her decision on whether to live alone or with a family, and the free choice of a partner, choices which are fundamental to her identity. In those circumstances, the fact that a woman who is a third-country national genuinely comes to identify with the fundamental value of equality between women and men may be considered a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it. In that regard, the fact that that national does not

⁶ K, L C-646/21, 11 June 2024, para 33.

⁷ Ibid, paras 37, 8.

⁸ Ibid, paras 37, 4.

⁹ Ibid, para 38.

consider that she forms a group with other third-country nationals or all women who identify with that fundamental value is irrelevant.¹⁰ Second, the fact that young women who are third-country nationals have stayed in a host Member State during a phase of their lives in which a person's identity is formed, and that, during that stay, they have genuinely come to identify with the fundamental value of equality between women and men, is capable of constituting a common background that cannot be changed, within the meaning of the first indent of the first subparagraph of Article 10(1)(d) of the EU Qualification Directive 2011/95.¹¹ Under Article 10(2) of that directive, the competent national authority is to ensure that the characteristic related to membership of a particular social group is attributed to the person concerned in his or her country of origin, within the meaning of Article 2(n) of that directive, even if that person does not actually possess that characteristic.¹² There is no requirement that the fact that those women genuinely identify with the fundamental value of equality between women and men be political or religious in order for it to be recognised that, in the case of those women, there is a reason for persecution within the meaning of that provision. It is nonetheless the case that, depending on the circumstances, such identification may also be regarded as a reason for persecution based on religion or political opinion.¹³ In this case, the CJEU also explains in sufficient details criteria for the shared burden of proof between the applicants and the State.¹⁴

As regards the second set of preliminary questions, which concern the best interests of a child, the CJEU's starting point was Article 24(2) of the Charter of Fundamental Rights of the EU and the General Comment No 14 (2013) of the Committee on the Rights of the Children on the right of the child. The CJEU decided that it follows from Article 24(2) of the Charter and Article 3(1) of the International Convention on the Rights of the Child, adopted by the United Nations General Assembly on 20 November 1989, to which the explanations relating to Article 24 of the Charter expressly refer, that the best interests of the child must not only be taken into account in the substantive assessment of applications concerning children, but must also influence the decision-making process leading to that assessment, subject to specific procedural safeguards. *"As the United Nations Committee on the Rights of the Child has observed, the expression best interests of the child, within the meaning of Article 3(1), refers to a substantive right, an interpretative legal principle and a rule of procedure"*.¹⁵ The CJEU also points out the importance of Article 24(1) of the Charter which states that children may express their views freely, and that such views are to be taken into consideration on matters which concern them in accordance with their age and maturity and that when Member States are assessing the best interests of the child in a procedure for international protection, they should in particular take due account of the principle of family unity, the minor's well-being and *"social development"* – which includes his or her health, family situation and education – and safety and security considerations.¹⁶ As regards the question whether and, if so, how account is to be taken of harm allegedly suffered by a minor as a result of a long stay in a Member State and the uncertainty as to his or her obligation to return, /.../ it should be noted /.../ that it is not for the competent national authorities to assess the existence of such harm in the context of a procedure the purpose of which is to determine whether the person concerned has a well-founded fear of being persecuted if returned to his or her country of origin on account of his or her 'membership of a particular social group'.¹⁷ However, the competent national authority must take into account, after an individual examination, the best interests of that minor when assessing the merits of his or her application for international protection.¹⁸ In the absence of more specific provisions in Directive 2011/95 and Directive 2013/32, it is for the Member State to determine the detailed rules for assessing the child's best interests in the procedure for

¹⁰ Ibid, para 44.

¹¹ Ibid, para 45.

¹² Ibid, para 47.

¹³ Ibid, para 53.

¹⁴ See ibid, paras 56- 64.

¹⁵ Ibid, para 73.

¹⁶ Ibid, para 75.

¹⁷ Ibid, para 82.

¹⁸ Ibid, paras 78, 84.

international protection, in particular the stage(s) at which that assessment is to be made and the form it is to take.¹⁹

European Commission v Hungary

C-123/22, 13 June 2024

In this case, the action was filed by the EU Commission against Hungary for failure to fulfil its obligations under Article 260(2) Treaty of Functioning of the EU (TFEU). In paragraph 59 of the judgment, the CJEU acknowledged that, in the 2020 *Commission v Hungary* judgment, it had held that Hungary had failed to fulfil its obligations under Procedures Directive 2013/32 relating, first, to access to the international protection procedure, second, to the detention of applicants for international protection in the transit zones of Röszke and Tompa, third, to the removal of illegally staying third-country nationals, and, fourth, to the right of applicants for international protection to remain in Hungarian territory until the time limit for exercising their right to an effective remedy has expired and, when such a right has been exercised within the time limit, pending the outcome of the remedy. Action of the EU Commission against Hungary for failure to fulfil its obligations referred to the first, the third and the fourth of the aforementioned infringements. Compliance with the 2020 judgment required Hungary to adopt all the measures necessary to ensure effective, easy and rapid access to the international protection procedure. On the date of expiry of the period prescribed in the letter of formal notice, namely 9 August 2021, Hungary had not complied with that requirement.²⁰ The CJEU stated that the procedure laid down in Article 260(2) TFEU is aimed at inducing a defaulting Member State to comply with a judgment establishing a failure to fulfil obligations, thereby ensuring that EU law is in fact applied, and the measures provided for by that provision, namely “*a lump sum and a penalty payment*”, are both intended to achieve that objective.²¹

In order to determine a lump sum the CJEU applied the following factors: the seriousness and duration of the infringements found, the ability of the Member State in question to pay,²² the importance of the provisions which are the subject of the failure to fulfil obligations.²³ As regards the later, the CJEU acknowledged that compliance with Article 6 of Directive 2013/32 is necessary in order to ensure, in accordance with the right to asylum recognised in Article 18 of the Charter of Fundamental Rights of the EU, the effectiveness of the other provisions of that directive and, as a result, of the common policy on asylum, subsidiary protection and temporary protection as a whole. Infringement of that fundamental provision systematically prevents any access to the international protection procedure, making it impossible for the Member State concerned to apply that policy, as established in Article 78 TFEU, in its entirety.²⁴ Apart from certain protected values under EU law,²⁵ the CJEU also points out that such an infringement undermines in a “*particularly seriously manner*” both the public interest and the interests of third-country nationals and stateless persons wishing to apply for international protection as guaranteed by Article 18 of the Charter of Fundamental Rights of the EU. In particular, the systematic and deliberate avoidance of applications for international protection deprives the Convention Relating to the Status of Refugees, as supplemented by the Protocol Relating to the Status of Refugees, to which all Member States are parties and which constitutes the cornerstone of the international legal regime for the protection of refugees, of its essential effects as regards the Member State concerned. This constitutes an “*exceptionally serious*” breach of EU law.²⁶ In the light

¹⁹ Ibid, para 80.

²⁰ Ibid, paras 60, 65-66.

²¹ Ibid, para 96.

²² Ibid, para 101.

²³ Ibid, para 104.

²⁴ Ibid, paras 105-106.

²⁵ See Ibid, paras 107, 115-117.

²⁶ Ibid, para 108, 113.

of the exceptional seriousness of the infringements at issue and Hungary's failure to cooperate in good faith in order to bring them to an end, the CJEU considered it appropriate to impose a lump sum of €200,000,000.²⁷

In addition to the lump sum the CJEU also imposed a penalty. In order that a penalty would have coercive effect and that EU law is applied uniformly and effectively, it took into consideration: the degree of persuasion needed in order for the Member State in question to alter its conduct and bring to an end the impugned conduct,²⁸ the seriousness of the infringements, their duration and the capacity of the Member State in question to pay. In applying those criteria, regard must be had in particular to the effects of failure to comply on private and public interests and to the urgency of inducing the Member State concerned to fulfil its obligations.²⁹ Thus, the CJEU decided that Hungary must be ordered to pay the Commission a penalty payment of €900,000 per day of delay in implementing the measures necessary to comply with the 2020 *Commission v Hungary* judgment, from the date of delivery of the present judgment until the date of full compliance with that first judgment in so far as concerns Article 6 (effective access to the international protection procedure) and Article 46(5) of Procedures Directive 2013/32 (the right of applicants to remain in Hungarian territory until the time limit for exercising their right to an effective remedy has expired and, when such a right has been exercised within the time limit, pending the outcome of the remedy). Hungary was also ordered to pay the Commission a penalty payment of €100,000 per day of delay in implementing the measures necessary to comply with the 2020 *Commission v Hungary* judgment, from the date of delivery of the present judgment until the date of full compliance with that first judgement Cases selected and summaries prepared by Boštjan Zalar so far as concerns Articles 5, 6, 12 and 13 of the Return Directive 2008/115 (guarantees for non-refoulement).³⁰

Cases selected and summaries prepared by Boštjan Zalar.

*First they came for the socialists, and I did not speak out – because I was not a socialist.
Then they came for the trade unionists, and I did not speak out – because I was not a trade unionist.
Then they came for the Jews, and I did not speak out – because I was not a Jew.
Then they came for me – and there was no one left to speak for me.*

Martin Niemöller

Martin Niemöller (1892–1984) was a prominent Lutheran pastor in Germany. In the 1920s and early 1930s, he sympathised with many Nazi ideas and supported radically right-wing political movements. But, after Hitler came to power in 1933, he became an outspoken critic of Hitler's interference in the Protestant Church. He spent 1937 to 1945 in Nazi prisons and concentration camps. After the war, he became well-known for his opposition to the Nazi regime and as a former victim of Nazi persecution. In 1946, he gave a lecture tour in Allied-occupied Germany, publicly confessing his own inaction and indifference to the fate of many of the Nazis' victims. "They came for..." became the symbol of his penance.

²⁷ Ibid, para 132 and point 2 of the operative part of the judgment.

²⁸ Ibid, para 138.

²⁹ Ibid, para 141.

³⁰ Ibid, para 143 and points 3 and 4 of the operative part of the judgment.

WHO WE ARE AND WHAT WE DO

THE INTERNATIONAL ASSOCIATION OF REFUGEE AND MIGRATION JUDGES

The IARMJ is an organisation for judges and decision-makers interested in refugee law and migration law. In particular, it fosters recognition that refugee status is an individual right established under international law, and that the determination of refugee status and its cessation should be subject to the rule of law.

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