IARMJ report

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

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Tribute to our Africa Chapter

Justice Martha Koome

Chief Justice of the Republic of Kenya

Justice Tujilane Rose Chizumila

African Court on Human and People's Rights

From the Editor

Dear Friends and Colleagues,

We hope you are all well and safe.

Despite the circumstances of an unprecedented global health crisis over the last 2 years, you have continued to support IARMJ's activities worldwide and we wish to thank you for that. Your interest and your active participation are the cornerstone of this association.

Having in mind that in 2022 we will celebrate the 25th anniversary of our Association, we have decided to dedicate each of our newsletters to one of our Chapters. We start with our African Chapter and we congratulate Chief Justice Martha Karambu Koome who is the first female judge in Kenya's history to reach the highest judicial office. Justice Koome became the 15th Chief Justice and President of the Supreme Court of Kenya. We also have the honour to include in this newsletter an excerpt from the forthcoming autobiography of Hon. Lady Justice Tujilane Rose Chizumila of the African Court on Human and People's Rights. What an amazing story. Thank you Justice Chizumila for giving us the opportunity to travel back with you to the beginning of the Cabinet Crisis in Malawi. We are looking forward to reading your whole story, when the book is published.

On 20 June 2021, we celebrated World Refugee Day, which coincided with the publication of the UNCHR's annual report, Global Trends, with its analysis of global displacement. Their statistics show that by the end of 2020, a record 82.4 million people were forcibly displaced worldwide as a result of persecution, conflict, violence, human rights violations or events seriously disturbing public order. In the same year, around the world, asylum-seekers submitted 1.1 million new claims. The United States of America was the world's largest recipient of new individual applications (250,800), followed by Germany (102,600), Spain (88,800), France (87,700) and Peru (52,600). We wish to thank our judicial colleagues and members, in courts and tribunals around the world, who strive to uphold the rule of law.

We hope you enjoy the newsletter.

Until we meet again…we send you our warmest wishes!

Catherine Koutsopoulou

Vice- President, IARMJ

Co-Editor

HABARI KUTOKA NAIROBI

Update from the President…

"When a stranger sojourns with you in your land you shall not do him wrong"- Leviticus, 19:33.

Two unrelated but equally important events occurred around me since my last update. The first is that on 29th April 2021 the Government of the Republic of Kenya and UNHCR announced that they were moving to close the Dadaab and Kakuma Refugee Camps and repatriate the last refugees by 30 June 2022. The first such announcement was made in 2016 and yet the practical implications of such an action are still difficult to grasp. Suffice it to say that it is a serious matter and which is already at the High Court of Kenya in Nairobi, where the legality of the announcement is being challenged.

The second is that on 13 May, 2022, I had my second dose of the AstraZeneca vaccine. While happy that I had the good fortune to do so, I wonder how many others may not get that opportunity for various reasons. I pray that we all do so and avoid the ravaging effects of the Covid pandemic.

On our esteemed Association, I still encourage all Chapters to create virtual programs and share the links through our website. This way we shall continue interacting in these difficult times. The organs of the Association should also meet regularly to give updates to the members on their respective mandates.

Stay Safe and see you soon.

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

1. The socioeconomic impact of COVID-19 on refugees and asylum seekers in Africa

Whether they are refugees, displaced persons or migrants, hundreds of thousands across Africa are trapped and helpless in the face of the coronavirus pandemic. The consequences are already being felt. A verification and vulnerability exercise conducted by UNHCR at the end of April revealed evidence of deep and hard-hitting economic impact of the crisis on refugees. Individuals surveyed overwhelmingly reported (85 percent) not having any income. The majority of refugee families assessed mentioned they are no longer being able to pay rent and more than half (60 percent) are at risk of eviction. As such, financial assistance was consistently reported as a top priority to cover their daily minimum existential needs, namely food, rent and essential medicine. Older refugees, and refugees with disabilities or a critical and chronic medical condition report an even greater need for food, medication, soap and other hygiene items.

Indeed, as the COVID-19 pandemic took hold worldwide in the first months of 2020, countries in West and North Africa implemented various measures to limit the spread of the virus, such as border closures between countries and partial or full confinements within countries. These mobility restrictions, together with the socioeconomic impact of the COVID-19 crisis, considerably affected refugees' and migrants' capabilities to migrate. Most refugees and migrants interviewed in North and West Africa between July and November cite increased difficulty moving between countries (40% in North Africa and 75% in West Africa) and within countries (53% in North Africa and 34% in West Africa). More than half of respondents in North Africa (53%), and just under half in West Africa (43%) stated they had lost financial resources due to the coronavirus restrictions, noting both loss of work (39% in North Africa and 27% in West Africa) and loss of financial support from family (14% in North Africa and 16% in West Africa). Of those respondents who stated losing income, 21% in North Africa said it impeded their ability to continue with their migration journey (24% in Tunisia, 19% in Libya). In West Africa, 30% of all respondents who stated losing income said it negatively impacted their onwards journey (49% in Burkina Faso, 13% in Mali, 27% in Niger).

Furthermore, in Burkina Faso, where jihadist movements are increasing their bloody attacks, there are some 765,000 internally displaced persons, plus 30,000 Malian and Nigerien refugees who have

fled insecurity in their countries. If proven cases of covid are discovered in camps, with the promiscuity, the country could be "a dangerous focus of the disease" for the whole of West Africa, warns a. A concern already expressed by the World Health Organization (WHO). In Chad, the United Nations High Commissioner for Refugees (UNHCR) manages camps housing 600,000 Sudanese, Central African and Nigerian nationals on sites that are often unsanitary. It is difficult to imagine how all these people will be treated once the virus has spread to their tents.

UNHCR calls for equitable access to COVID-19 vaccines for refugees In Tunisia, a request was sent to the health ministry last January to vaccinate 700 refugees and asylum seekers against the coronavirus. Naoufel Tounsi, Officer in Charge of United Nations High Commissioner for Refugees (UNHCR pointed out that the UNHCR office is waiting for the approval of the Health Ministry to submit the recipients' list to the relevant health services or to register them directly on the vaccination platform. He also explained that out of a total of 6700 refugees and asylum seekers, 6 confirmed cases of coronavirus infection had been recorded in January and February 2021 as well as two deaths, already suffering from other diseases.

Senegal which hosts about 16,000 refugees and asylum-seekers of more than 16 different nationalities, mostly from Mauritania opened its [COVID-19] vaccination campaign to all eligible individuals, including refugees. The news spread quickly among refugees, mostly via word of mouth and social media. They almost immediately started approaching vaccination centres and getting their first jab. Refugees were already benefitting from the vaccination for people over the age of 60 years, but now they can be vaccinated on the same footing as Senegalese adult citizens of all ages.

2- The ongoing humanitarian tragedy of asylum seekers in the Mediterranean Sea

Since the onset of the pandemic, sea departures of North Africans, particularly Tunisians, towards Europe, have increased as they face greater constraints to their livelihoods brought about by the pandemic and political instability, and seek out livelihood opportunities abroad. Available data from UNHCR up until October 2020 shows that Tunisia surpassed Libya as the main embarkation point towards Italy – with not only Tunisian nationals making the crossing but also nationals of Ivory Coast. This year, the number of persons departing from Tunisia to Europe through mixed movement as substantially increased when compared to last year, with more than 1,400 people having departed from Tunisia since the start of 2021 . Two shipwrecks occurred on 10 March along Sfax governorate. In the first shipwreck off Kerkennah island, 39 people drowned while 134 survivors were brought to shore by the Tunisian marine guards. The second shipwreck took place off the coast of Jebeniana city with 70 persons onboard, including four children, who were all taken to shore.

In Libya, at least 120 asylum seekers are feared dead after their rubber boat capsized in stormy seas while they were attempting to reach Europe on 21 April . The people could have been rescued but all authorities knowingly left them to die at sea. Alarm Phone was in contact with this boat in distress over a period of ten hours , and repeatedly relayed its GPS position and the dire situation on board

to European and Libyan authorities and the wider public. The only action undertaken was the launch of a surveillance airplane of Frontex, seven hours after the first alert, which found the boat and informed all authorities and merchant vessels in the area about the critical distress situation. UN High Commissioner for Refugees Filippo Grandi said: “The worst Mediterranean tragedy of the year has just occurred ».

3- Scientific events

Faced with the new phenomena affecting humanity in general, but also migrants, refugees and asylum seekers in particular, (Covid-19) African states are working to strengthen the professional capacities of lawyers and especially judges in order to fill the legal vacuum and find solutions to situations that were hardly governed by pre-established texts.

UNHCR's contribution in this field is quite remarkable since this organisation has been organising, in the four corners of Africa, all sorts of scientific events and in particular training sessions for legal professionals .The latest example was The virtual training for judges on refugee law organised in Nairobi, Kenya on 8 and 9 April 2021 by the Judiciary Training Institute (JTI) in collaboration with The Attorney General Alliance (AGA-Africa) and UNHCR. The two-day training brought together both High Court and Court of Appeal judges of Kenya and was aimed at equipping them with knowledge and skills required in applying the principles, law, and policies relating to the protection of refugees.

The workshop was graced by Hon. Justice Isaac Lenaola, President, International Association of Refugee & Migration Judges (IARMJ), Hon. Justice Kathurima M’Inoti, Director, Judiciary Training Institute and Markus Green, AGA-Africa Board Member.

The training sessions were facilitated by seasoned facilitators: Hon. Justice Isaac Lenaola, President, International Association of Refugee & Migration Judges (IARMJ), Hon. Theresa Holmes-Simmons, Assistant Chief Immigration Judge Arlington, Charlotte, Philadelphia and York Immigration Courts, Hon. Justice John Mativo, Judge, High Court of Kenya, Prof. Elizabeth Schmelzel, Adjunct Professor, George Mason University, Alice Wangari Mwanzia, Advocate, High Court of Kenya, Daniel Kamphuis, Senior Integrity Officer, United Nations High Commissioner for Refugees Representation Office, Nairobi, Yamini Pande, Senior Protection Officer, United Nations High Commissioner for Refugees Representation Office, Nairobi and Thomas Kibunja, Protection Officer, Refugee Affairs Secretariat.

4- Conclusion

In conclusion, I would like to end on a note of hope.

In 2019 the waves threw the child Bangora on the coast of Tunisia, following a secret migration operation in which a boat carrying dozens of irregular migrants was destroyed. The Tunisian

authorities placed the unaccompanied child without identity documents in the village of children without bond in Mahras in the governorate of Sfax, in southern Tunisia, for a period of 3 years, before efforts to reveal his original family and return him to it were successful. « I am the most happiest man on earth I feel like I am in paradise when I see him today thank you very much for all that you have done for me » said the father of the child in a letter send to the village of children.

Mlambo JP

President, African Chapter

AMERICAS CHAPTER

Dear Colleagues,

Our continent, like the rest of the world, is seriously affected by the COVID-19 pandemic.

We take this opportunity to express our solidarity to all the people close to our association who have become ill or have experienced its consequences in their work or families.

During this period we have had a magnificent conference led by the Honorable Judge Russel Zinn, on the approach to justice in times of pandemic from the Canadian experience. In the coming months, starting in June from Peru, we will have more conferences from different parts of the Americas to learn from each other and see different perspectives.

I am pleased to report that we have been in conversations with distinguished Brazilian jurists, who have expressed their interest in the work of our association and their motivation in joining it. In the coming months we will have a joint activity that will be announced. In the same way, I am in contact with people who from different parts have expressed their interest in knowing more about the association and collaborating with it.

As always, we thank UNHCR and IOM for their closeness and support with our chapter, courts and members. We are sure that this support is vital to improve the quality of our work.

In this newsletter we present important information from the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights on refugee and migration matters. We invite the members of the chapter to send us their most important decisions to be informed in the next edition.

Keep safe and kind regards from Costa Rica!

Apreciados Colegas:

Nuestro continente, al igual que el resto del mundo, se ve afectado gravemente la pademia del COVID-19. Aprovechamos para expresar nuestra solidaridad a todas las personas cercanas a nuestra asociacion que han enfermado o han experimentado sus consecuencias en su trabajo o familias.

En este período hemos contado con una magnífica conferencia a cargo del Honorable Juez Russel Zinn, sobre el abordaje de la justicia en tiempos de pandemia desde la experiencia canadiense. En los próximos meses, empezando en junio desde Perú, tendremos más conferencias desde distintas partes de Las Américas sobre la misma temática.

Me es grato informar que hemos estado en conversaciones con distinguidos juristas de Brazil, quienes han manifestado su interés por el trabajo de nuestra asociación y su interés de unirse a la misma. En los próximos meses tendremos una actividad conjunta que será anunciada. Del mismo modo, estoy en contacto con las personas que de diferentes partes han manifestado su interés de conocer más de cerca la asociación y colaborar con nosotros.

Agradecemos como siempre al ACNUR y a la OIM su cercanía y apoyo con nuestro capítulo, tribunales y miembros. Estamos seguros que ese apoyo es vital para el mejoramiento de la calidad de nuestro trabajo.

En esta newsletter les presentamos importante información de la Comisión Interamricana de Derechos Humanos y de la Corte Interamericana de Derechos Humanos sobre materia de refugio y migración. Invitamos a los miembros del capítulo a remitirnos sus decisiones más destacadas para ser informadas en la próxima edición.

Manténganse a salvo y reciban mi saludo desde Costa Rica!

Important Information For Members

From de Chapter:

We respectfully remember the payment of the annual membership fee. For more details, contact our treasurer at the email address: gaetan.cousineau@sympatico.ca

From de Inter-American Court of Human Rights:

The President of the Inter-American Court of Human Rights, Judge Elizabeth Odio Benito, has presented the Inter-American Court's 2020 Annual Report to the Committee on Juridical and Political Affairs of the Organization of American States. The English version can be accessed at the following link: https://www.corteidh.or.cr/docs/informe2020/ingles.pdf

Esteban Lemus Laporte

President, Americas Chapter

ASIA PACIFIC CHAPTER

Dear colleagues,

There are two important events about which I want to update you.

Webinar on children

The first is the very successful webinar held by the Chapter in March 2021, on the topic of "The Child in Protection and Migration Law". Held on 24 March, the presentation was given by (in order of appearance) Bruce Burson (NZ), Sean Baker (Australia) and Joy Torres (Philippines), with the writer running the technology and generally acting as ball boy.

We were delighted to have over 50 participants to the webinar. Bruce spoke about child-specific forms of harm in the context of protection claims. Sean followed this up with an excellent

presentation on the issue of statelessness and children, and Joy concluded the evening by discussing the impact of the 'best interests of the child' principle generally, and then in the context of protection claims, with consideration of some European and American cases. The latter included the decision of the Court of Appeals for the 7th Circuit in 2004, in *Olowo v Ashcroft* 368 F.3d 692 (7th Cir, 2004)) May 11 2004. In that case, the applicant had sought refugee status on the ground that her (US citizen) daughters would be subjected to FGM if she were deported. The application was denied, on the grounds that refugee status require d "the applicant to demonstrate that she herself will be subject to persecution if removed, and do not encompass any consideration of persecution that may be suffered by other family members who may be obliged to return with her in her home country". It is interesting to consider whether, in some jurisdictions at least, the outcome would be the same today, or whether the effect of witnessing harm being caused to another family member might not, of itself, provide the necessary harm and breach of human rights. As a footnote, in *Olowo* the court not only denied refugee status but also suggested that the State remove the applicant's daughters from her custody because she had indicated an intention to take her with them back to her home country, where they would be forced to undergo FGM.

The presentations by Bruce, Sean and Joy are available on the Asia Pacific Chapter page of the IARMJ's website.

Japanese case law study

The second matter of importance is the very recent publication of a special edition of the *CDR Quarterly* journal by the Project of Compilation and Documentation on Refugees and Migrants (CDR), at the Research Centre for Sustainable Peace, Institute of Advanced Global Studies, University of Tokyo (Komaba campus). CDR is a research project run by Professor Yasunobu Sato. Over the past few years, Professor Sato has worked towards a compilation of English translations of the most significant refugee and protection decisions from the Japanese courts.

Historically, it has been very difficult for the outside world to access Japanese case law. As Professor Sato put it in his opening remarks:

> "Until now in Japan there have been no journals or magazines focused specifically on the issues of the movement of people, and which utilise a multi-disciplinary approach through which to view these issues. Moreover, there have been no journals published in English, in this field in Japan. The CDRQ is the first of its kind in Japan. Although the level of discourse in Japan has developed to a point, the situation and activities in Japan have not been made well known to the rest of the world. The CDRQ will act as a doorway by which to pass through the language barrier and open the discussion in Japan to the rest of the world."

The *CDR Quarterly* sets out to provide translations of relevant aspects of cases decided by the Japanese courts, (all on appeal from first-instance decisions of the Immigration Bureau) addressing the following issues:

- The right of refugee status applicants to access the courts and access to justice
- Cessation of refugee status by Article 1(c) of the Convention
- A second application for refugee status by an Iranian who converted to Christianity
- Appeal against non-recognition in the case of an applicant who had been raped during police custody as a consequence of her political activities
- Appeal against non-recognition in the case of a former diplomat, based on a COI analysis
- Appeal against non-recognition in the case of a Burmese pro-democracy activist by imposing a high burden of proof as to his activities

The publication of so much case law in one place owes much to the commitment of Professor Sato but also to the hard work of a team of skilled translators, Koei Matsushita, Haruka Jifuku, Erika Tanaka, Ryoko Koike, Masako Suzuki and the IARMJ's very own Yukari Ando. Truly, they have completed an incredibly important project. Now that the core of Japanese cases has been made available to the non-Japanese-speaking world, it is hoped that CDR can continue to translate and publish cases as they come to hand and that it will come to represent the globally-accessible depository of Japanese case law in this challenging area.

The *CDR Quarterly* journal is available here, or it can be found as a PDF on the Asia Pacific Chapter page of the IARMJ's website. The website for CDR itself is at http://cdr.c.u-tokyo.ac.jp.

The southern hemisphere is sliding into winter now but it is appropriate that Japan is coming into summer.

Martin Treadwell

President, Asia Pacific Chapter

EUROPEAN CHAPTER

American Bar Association - Section on International Law
Union Internationale des Avocats - Institute for the Rule of Law
International Association of Young Lawyers - Human Rights Committee

Rule of Law 24-hour Webathon, 4-5 May 2021 (Lawyers across the globe and around the clock for the rule of law)

"Access to Justice for Refugees during COVID - Past, Present and Future"

Boštjan Zalar
President of the European Chapter of the International Association of Refugee and Migration Judges (IARMJ-Europe)

When we discuss issues of access in the field of asylum, we really need to distinguish between access to justice and access to the asylum procedure, because the competent bodies for determining asylum claims are administrative authorities and not the courts. Courts around the world provide judicial control of first instance decisions, but courts in many parts of the world, for example, in the Member States of the EU, may also decide cases on merit and may grant international protection to asylum seekers. In addition, there is also the third issue – the issue of access to proper reception conditions, so that the right to human dignity of asylum seekers is protected during the procedure.

So, let me put access to justice in asylum cases in a broader perspective:

At the beginning in Europe, the discussions and legal questions regarding effective access to justice for refugees were rather sophisticated. These considered questions on the appropriate and necessary scope and intensity of judicial control over administrative decisions on asylum. And since absolute human rights such as non-refoulement were at stake in those disputes, the European Court of Human Rights in Strasbourg introduced clear and detailed standards on strict judicial scrutiny already 30 years ago, starting with the *Soering v. the United Kingdom*, *Chahal* and *Vilvarajah* cases.

However, things started to be less sophisticated as regards access to asylum procedure and justice around the year 2012, well before COVID-19, when the first cases on the coordinated push-backs at our borders and in the open sea came to the Strasbourg Court. In this respect, I need to mention the Grand Chamber judgment of the Strasbourg Court in the case of *Hirsi Jamaa and others v. Italy*,[1] where fundamental and extremely important standards on effective access to procedure and access

[1]App. no. 27765/09 [GC], 23 February 2012.

to effective legal remedy not just in extra-territorial context were established for 47 European states. Therefore, these were not introduced by national legislators, but rather by an international court.

I also need to stress that these standards on access to procedure and justice were introduced because there was a strategic litigation behind this specific case conducted by excellent lawyers and with the UNHCR as the intervener.

Soon after the *Hirsi Jamaa* judgment, the rule of law in this field was further strengthened with the EU Procedures Directive, which in Article 46 imposed an obligation to the courts of the Member States of the EU to provide a full and *ex nunc* examination of facts and law in disputes against decisions of administrative authorities. The EU Procedures Directive also provided rules on free legal aid for asylum seekers in judicial proceedings. And thus here the EU legislator played a very important role, but it actually followed the standards of the Strasbourg Court on effectiveness of legal remedy concerning the protection of fundamental human rights. The CJEU in Luxembourg followed the approach of the Strasbourg Court with reference to the principle of autonomy of EU law. The Luxembourg Court made an important manoeuvre as regards the extra-territorial effect of EU law on access to asylum and protection of non-refoulement in the case of X and X from 2017. In that case, there was an opportunity that the Luxembourg court would rule in favour of the protection of prohibition of inhuman treatment and would establish a legal access for genuine refugees who are threatened by inhuman treatment to come to the territory covered by EU law in order to ask for asylum. Well, the Luxembourg Court did not take that interpretative opportunity and so left this issue to national laws of the Member States.[2]

I thus come to the access to justice in the present situation of Covid-19:

Despite some four or five very important judgments on push-backs that have been issued by the Strasbourg Court after the *Hirsi Jamaa* judgment, going up until 2020, the so-called non-entrée policies at our borders, the policies of push-backs and pull-backs remained in full operation when the COVID-19 crisis hit our societies. There have been some important judgments of the national courts against policies of push-backs starting with the Supreme Administrative Court of Poland in 2018, and the Court in Rome, French *Conseil d'Etat*, and the Administrative Court of the Republic of Slovenia and the Constitutional Court of Serbia in 2020 during the Covid-19 crisis; and this is also the case with access to justice in the filed of refugee law.
However, today, there are still too many pending cases at the Strasbourg Court against states because of their push-back policies at the borders, that have been conducted prior to pandemic, including against Italy, Poland, Latvia, Greece, the Netherlands, Hungary, Spain, Croatia, and North Macedonia. Panelist from the yesterday's first session, Stephanie Boyce and Joanna Korner, pointed out that the rule of law crisis started prior to pandemic. Therefore, new restrictions to access to state territory starting in March 2020 due to national measures to prevent spread of the coronavirus have only

[2]C-638/16 PPU, X and X, [GC], 7 March 2017, para. 51.

added further obstacles to get to the asylum procedures and, of course, to get to the courts due to lock-downs, which in some states included courthouse closures.

What I have missed as a lawyer in these early developments after March 2020 has been a professional debate about national rules on restrictions to access to territory and how they fit or conflict with international obligations, including EU law on the Common European Asylum System. And secondly, as a judge, in that first year of the COVID-19 pandemic I missed more forward-looking and strategic thinking about the consequences of this new format of executive rule-making, which limit fundamental rights without at the same time having a standard form of judicial control. While some presidents of supreme and constitutional courts and leading actors in judiciaries have reacted appropriately to these challenges with strategic thinking and actions, some have not, or at least not yet.

So, what is ahead of us, in the future, as regards access to justice?

Certainly, the dynamic struggle will continue between the concept of majoritarian democracy on one side, and that of constitutional democracy on the other. The later takes the fundamental rights of the least advantaged individuals more seriously. I hope that the sociologist Niklas Luhmann was wrong when he said 50 years ago that in the future the democratic state of law might only be remembered as an aberration in the evolution of mankind, on that only gained dominance for a short period of time. This was 25 years later followed by the question raised by Jürgen Habermas as to whether democracy would survive globalisation.[3]

For the time being it seems that the future of access to justice in the field of refugee law will in many cases be dependent on the volunteerism and enthusiasm of lawyers and experts from NGOs on the ground, even students of legal clinics and young refugee counsellors who engage in strategic litigation in order to protect the rights of refugees before courts. Certainly, access to justice will depend on individual judges who are intimately convinced that their independence and professionalism are much more important than their promotion or other forms of recognition and reward, including their material well-being; it will depend on judges who actually exercise their intellectual courage and, of course, who possess some knowledge of international law. In this respect, I would like to highlight, in particular, the professional work of colleagues, for example in Hungary, who by sending preliminary questions to the CJEU on interpretation of EU law on asylum provoked some seminal judgments of the Luxembourg Court on judicial independence and separation of powers and checks and balances in this field, like the Grand Chamber judgments in the cases of Torubarov and FMS and others. Access to justice means nothing if it is not independent justice.

In other words, I believe that judges are well aware that “justice” does not mean “just us”. Especially under the given state of the rule of law in Central and Eastern Europe, together with my colleagues,

[3]Kjaer, F., Paul, 2010, Between Governing and Governance, Hart Publishing, p. 1.

we try to cultivate the so called "*etos of service*" that Justice Robin Knowles mentioned yesterday and we do this in discussions particularly within the judicial networks and judicial associations. In our association – the International Association of Refugee and Migration Judges – we have more than 500 members from all continents, while the European chapter of this global judicial association has more than 300 members, this includes supreme court judges. As long as we are here and we are taken more than just seriously by other actors from private and public sector who are responsible for the rule of law, too, I continue to have confidence in our joint success in the future. Madame Albright, former State Secretary of the USA, yesterday pointed out the importance of public-private partnership when we discuss strategies and programs to support the rule of law. Our association the European Chapter of the IARMJ, who is a private law, non-profit organisation of individual judges, during the last 10 years established an unique partnership and even organisational structure within the European Asylum Support Office (EASO), which is an EU agency governed by the representatives of the Governments of the Member States. Since this EU agency has got a mandate to develop and establish training for judges, we judges are drafting professional development series, judicial training guidance notes on all major aspects of EU refugee law and we provide training based on these materials. So, training materials and workshops are designed by judges for judges with full attention that everything we do in this partnership is in line with principle of judicial independence despite the fact that EU hard law is silent on the aspect of judicial training and judicial independence. Namely, in the EASO Regulation, judicial independence is taken as granted. But, judicial independence is not something that is granted. We are acting and reacting each and every day with this having in mind in order to respond to every possible sign that might lead to jeopardise judicial independence. That is why, I still did not find time to tidy my room - as you probably noticed.

I thank you very much for your attention.

Boštjan Zalar

President, European Chapter

CALL FOR MEMBERS AND CASELAW

IARMJ – Working Group on Exclusion Clauses, Cessation, Deprivation of Citizenship

Dear all members of the IARMJ.

At the IARMJ World Conference in Costa Rica in 2020, the area of interest for the working group on exclusion was expanded to also include cessation and deprivation of citizenship.

The co-rapporteur presented at the Conference a provisional paper on exclusion based on the caselaw of the Court of Justice of the European Union. Apart from this provisional document, no papers have been produced since professor/ judge Satvinder Juss presented an extensive draft paper on Exclusion and terrorism to the World Conference in Bled in 2011.

Exclusion, cessation and deprivation of citizenship are all topics of interest for judges working with asylum and migration law. Question on cessation regularly comes up before the courts, as the case below from the Norwegian Supreme court shows. Cessation is also an integral part of the EU New Pact on Migration and Asylum. Deprivation of citizenship is a much-discussed topic, at least here in Norway where the Immigration Appeals Board now handle appeals in cases where it is now being discovered that asylum seekers, now Norwegian citizens, gave a false identity when they applied for asylum.

The Working group at the moment consist only of three members and we are in need of more members from all chapters of the IARMJ. We are also in need of caselaw from our chapters on the topics.

We call for members of the IARMJ – or other interested professionals – to join the working party by expressing their interest to Johan Berg, jbe@une.no.

We also call on all members to send us caselaw on exclusion, cessation or deprivation of citizenship which they consider would be of general interest. The cases should be in English or with a translation.

Johan Berg

Co-rapporteur
jbe@une.no

The forgotten refugee child: a personal experience

(Excerpt from a Forthcoming Autobiography)

By TUJILANE R. M. CHIZUMILA

Lady Justice Tujilane Rose Chizumila of the African Court on

Human and People's Rights, based in Arusha Tanzania

Kisima Magazine Issue 4 | January 18 - March 2021

TESTIMONY

The Beginnings of the Cabinet Crisis in Malawi he comradeship of the families we found in Zomba seemed reassuring, or so it seemed to me. In fact, it was in 1963, when I was 10 years old, that names like Yatuta Chisiza, his young brother Dunduzu Chisiza Sr., Orton Chirwa the QC, Rosemary Chibambo, Augustine Bwanausi and Aleke Banda made inroads into my still-developing brain. I was too young to understand that these people were playing a significant role in the governance of our country.

I also did not know that there was such a thing as politics in the world. To me these names were just part and parcel of our life in the beautiful scenic town of Zomba. Most of them had children who were our age mates whom we often played with. But I recall very well two incidences that happened and made me remember these names forever. I recall very clearly the first incident. It was the horrifying murder of a man we found killed in the fields behind my school in Blantyre called CI where I was in grade 6.

We were living in Sunny Side then full of the elite whites and a few Malawian civil servants. My father was then a senior civil servant. It was around noon when we knocked off from school and we took the usual short cut home when we suddenly saw a body of a man lying in a very grotesque position and the whole group of us stopped instantly. It was so quiet you could have heard a pin drop. The body was stiff and on peeping closely we noticed that his head had a big open wound from the face to the back caused by what was obviously a machete or an axe. It was awful and very terrifying. We all looked once in a state of shock and when it suddenly dawned on us that the man had been killed we scrambled and run for our lives as fast a sour little legs could carry us. I remember my heart thudding and pounding away like the way I used to pound sorghum and maize at my maternal grandmother’s home.

I reached home and went straight into the house, locking all doors. I was trembling with fear. I had never seen a dead person in my whole life. Now to see a dead man with a head sliced into half was beyond my imagination. It was later on when the news broadcast on the radio confirmed that the dead man was apparently killed for being a rebel. But what my young brain could not fathom at that time was that surely the man did not deserve to be killed at all, worse still in such a gruesome manner. The question that has remained with me to date is why kill a fellow human being like a pig. The sight of that dead body remained fresh in my mind for a very long time. It was horrendous. Next day at school I remember how those of us who had witnessed the dead body were still gripped in fear.

We agreed never to use that short cut again even though taking the main road meant going round along way before reaching our homes. In those days death was such a fearsome thing that used to be hidden from the sight of children. Most child refused to be locked behind doors whenever there was a funeral in the village or neighborhood. Death and funerals were not discussed in front of children. No children attended funerals at all. It was taboo. So this rendezvous with death was just so petrifying.

After we moved to Zomba, one day news spread like wildfire that Du Chisiza Sr. had died a Namadzi bridge. At first it was said that he had crashed his car over the bridge but before long news started spreading that it was not an accident as it was meant to seem but he had been killed and made to look like an accident. Fear gripped me again as I recalled the murder of the man behind my school in Blantyre. Surely not another grisly killing. I started asking myself questions which I had no answers to. I couldn't dare ask my parents such questions as to who was doing the killings and what was the reason behind the killings, because it was taboo during my days to ask your parents or elders questions, worse still questions on such a sensitive issue as murder. My greatest fear was that we were going to be killed too since I didn't see any reason for these murders. To me it seemed they we just wanton killings, so maybe my friends and I, even our parents and grandparents could end up being victims of these fearful killers.

Not long thereafter, I recall very vividly one day when our father was out of the country and my mum was still at school, my brothers and I saw a group of machete-wielding youth leaving the main road and heading toward our house shouting and singing loudly while sharpening their machetes on the tarmac. Our dog, Cleopatra, was barking fiercely in response. We wanted to go outside and see for ourselves but che Grey, our houseboy cumboss told all of us to go inside the house. Then he quickly ran outside and locked the dog in its kernel. Next he locked all the doors and windows of the house and told us to lie down on the floor in the dining room and keep quiet. Of course we were arguing with him, but one quick look at him told us we would be in trouble for not listening to him, for he was fond of reporting our misbehavior to mum.

The youths came and surrounded the house, going around it several times like the mythical witches. I remember seeing cheGrey shaking for the first time since I knew him. We all lay there on the ground holding our breaths. My youngest brother was then around 6 years old. Ordinarily, we would have played Tom and Jerry with cheGrey, from which we derived much pleasure. I and my two brothers, both younger than me, always played truant with cheGrey, watching him scuttle after us at his old age. Then he would report us to mum and she would take action. CheGrey would stand there with a smug look on his face watching us either getting a beating or a stern warning from our mum. But immediately our mum finished her punishment on us we would join forces and plan our next attack on him. Poor man! He must have been in his 50s then and had a lovely wife called Anaphiri, with whom I used to play a game called phada. She must have been in her early 20s or slightly younger. They hadn't children. She was his third wife. He was a Muslim. We really enjoyed them as a couple and played all sorts of tricks on both of them.

Then I heard the youths smashing windows while shouting abuses. I was too frightened to hear the actual words they were using. Five minutes later, which seemed an eternity to me, they were gone, leaving us with smashed windows and debris that gathered on the floor. But what shocked us most was seeing cheGrey, the man who never even feared my father as we all did, physically shaking like a leaf. That sobered us up and made us realise that what had just happened was very serious. Butat that point I had absolutely no idea what this serious issue was all about and that the repercussions would change the history of Malawi and of my own family too. Then we checked on Cleopatra and she was all right.

There was no phone in the house, so we could not contact mum who was teaching at a school in the neighborhood. She came shortly thereafter, running, and, on seeing us all safe, she hugged us with a great sigh of relief. It was only after this incident that we started respecting che Grey. He had saved our lives. Our dog too survived. What was of great interest was that when we first heard the youths shouting from our small gate, and cheGrey shouted at us to go inside the house and lock ourselves in, Cleopatra, a bulldog, had just delivered puppies a few days earlier and was very vicious Even my uncle, the young brother of my mum living with us, who was her only friend, had to handle her with care after the delivery. One risked losing a hand or a chunk of flesh from your body if you went too close to her. Even to take her plate for washing or to give her food was a big risk and we feared her.

She did not allow any of us to get too close to her or her beautiful puppies. What shocked us on this day was that she allowed us to carry the puppies from the kitchen veranda where she had her bed into the house. She just followed us faithfully.

Then we told her to lie down and keep quiet. It was unbelievable how she too kept quiet throughout the ordeal. There wasn't even a squeak from her babies. The following day we left for school with my brothers but we never made it to school. Barely a few minutes later we met people running all over the streets in a confused state, fear written all over their faces. Others shouted at us, "You kids go back home quickly! Can't you see it is not safe for you? There is a coup!" What could a little girl make of the word coup! We hesitated, deliberating whether to believe them or continue to school to avoid the wrath of our mum for absconding from school.

Then we saw another group of people, mostly men, well dressed in their suits, running from the direction of government houses to the market, with their ties fluttering in the wind. We made a U-turn and ran for our lives. Panting and shaking, we told cheGrey what we had seen. At first he thought it was one of our usual pranks on him. But then he suddenly saw so many people running on the main road and he quickly locked us indoors, repeating his instructions of a few days earlier. This time around we readily obliged. Fortunately, no group came to our house again.

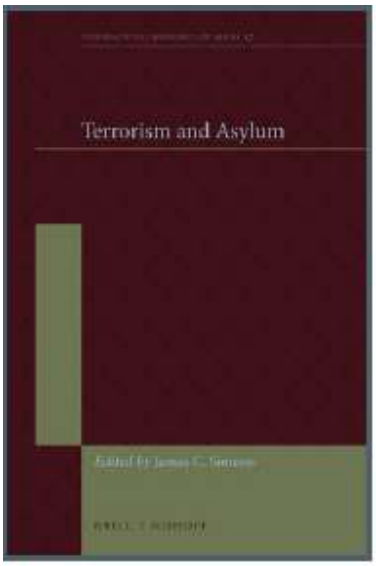
Thereafter, I remember one of Dad's friends visiting us, and Mum announced that we were to pack up and leave for her home village.

We left.

IN THE LIBRARY

Terrorism And Asylum

Edited By James C. Simeon, York University, Toronto, Canada



Terrorism and Asylum, edited by James C. Simeon, explores terrorism
and asylum in all its interrelated and variable aspects, and permutations.
The critical role terrorism plays as a driver in forced displacement, within
the context of protracted armed conflict and extreme political violence, is analyzed.

Exclusion from refugee protection for the alleged commission of terrorist activities is thoroughly interrogated. Populist politicians' blatant use of the "fear of terrorism" to further their public policy security agenda and to limit access to refugee protection is scrutinized. The principal issued and concerns regarding terrorism and asylum and how these might be addressed , in the pubic interest while at the same time, protecting and advancing the human rights and dignity of everyone are offered.

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Freedom In The World 2021

Freedom House, 3 March 2021

Freedom in the World 2021 marks the 15th consecutive year of decline in global freedom. the countries experiencing deterioration outnumbering those with improvements by the largest margin recorded since the negative trend began in 2006.

The Darkest Decade: What Displaced Syrians Face if the World Continues to Fail Them

Norwegian Refugee Council, March 2021

Today, displaced Syrians in the region are worse off than ever before. The spread of COVID-19 and the economic pressures that have come with it have exacerbated humanitarian needs that have emerged over the last ten years. More than 23 million people inside Syria and in neighbouring refugee-hosting countries are now in need of humanitarian assistance, some of the highest recorded figures of people in need of aid since the conflict started one decade ago.

Yemen: Civil War and Regional Intervention

Congressional Research Service, 12 March 2021

For several years, Yemen has been considered the worst humanitarian crisis in the world, and public health experts warn that the COVID-19 pandemic may have significant negative effects on Yemen's vulnerable population.

Report on the human rights situation in Ukraine (1 August 2020 - 31 January 2021)

UN Office of the High Commissioner for Human Rights and United Nations Human Rights Monitoring Mission in Ukraine, March 2021

Covid-19 Pandemic Sparked Year of Rights Crises

Human Rights Watch, 4 March 2021

The question for the international community, for governments around the world, and for the multilateral institutions and corporations who hold the keys to a human rights-respecting exit from the COVID-19 pandemic, is not whether it is technically possible, but rather whether they have the willingness to abide by their human rights commitments to make it happen.

Covid-19 and Violence Against Women: The Evidence Behind the Talk

UN Population Fund, March 2021

Big data from online searches and public posts was analysed in eight countries, to identify trends of violence-related searches, as well as help-seeking behaviour as a proxy for understanding the impact of covid-19 lockdowns on the rates of violence experienced by women.

UPCOMING EVENTS

Online Conferences (ZOOM)

August:

Presentation by the Administrative Immigration Court of Costa Rica on the occasion of its tenth anniversary of creation. "Application of Administrative Justice in cases of migration and refuge. The experience of Costa Rica" Date: Wednesday 18. Time: 11:00 San José. English translation available

People interested in participating can write to: elemus@mgp.go.cr or tam@mgp.go.cr

THE WORKING PARTIES

Update - Artificial Intelligence, Information Technology, and Judicial Decision-Making Working Party

Our working party comprises Rapporteur, John Keith (Upper Tribunal Judge, Immigration and Asylum Chamber, UK) and Associate Rapporteurs, Clara Mota, (Federal Judge, Brazil); Christine Cody (Member of the Administrative Appeals Tribunal, Australia), with support from past IARMJ Global President, Katelijne Declerck. We are also grateful for the insights provided by various colleagues, including Judge Joe Neville (First-tier Tribunal, Immigration and Asylum Chamber, UK).

Scope

We set up the Artificial Intelligence Working Party after the Global Conference in Costa Rica in February 2020. We have, of necessity, worked solely remotely since then. This update explains the purpose and scope of our work, and recent developments in the UK. We intend to give practical guidance on common issues in the UK, Belgium, Brazil, Australia, in future – any colleagues wishing to comment from an African perspective would be most welcome.

Our main purpose is to answer the question: How does technology affect our ability to make judicial decisions in refugee and migration cases? A follow up question is how it affects our ability to receive and assess evidence, in order to reach those decisions. We were conscious, from the outset, of three points: first, the breadth of our enquiry – was it too wide? Second, the pace of change, not only within our courts, but within the societies we serve and their expectations of how we work, is constant. Third, while artificial intelligence may grab peoples' attention, other technology may be just as impactful on our work.

In order to tackle the breadth of the question, we broke it down into three areas:

- First, base-lining where we are now, in terms of the technologies used by government agencies; those seeking protection, their legal representatives and supporters; and the courts, tribunals and wider stakeholders, including members of the public.
- Second, where will we be in the future? For example, how do colleagues believe that the use of technology is likely to change in the next three to five years, particularly in light of Covid-19, advances in technology, and work volumes?
- Finally, what guidance for judges will be useful in respect of technology, to take into account data privacy and confidentiality concerns; access to justice for those with limited technology; any concerns about the discriminatory impact of technology and automation; and also the positive benefits of technology in judicial decision-making?

This update aims to start thinking about where we are now, focussing on the UK.

While any judicial decision-making has people at its heart, it does so as part of a complex process. The process for migration and asylum begins with an application; flows through to consideration by a state official; then, in the event of dispute, to judicial resolution; followed potentially by enforcement action.

At every stage in the process there has been recent, significant, technological change and further proposed changes have been announced. The impact of those changes is only just being felt.

The start of the process

There is currently a clear divide between how protection claims on the one hand, and claims for leave to enter, remain, or settle for non-protection reasons, on the other, are made. Non-protection applications must now be made in almost all cases 'on-line,' and there is increasing use of digital case management systems, with which many in the legal community will have been familiar for many years. The UK government's aim is to speed up standard visa processes, eliminate the need for in-person interviews and instead, transition to 'digital identities', including allowing mobile-phone uploads of facial images, which can be digitally verified. The idea of 'digital identities' is underpinned by recent legislation allowing the sharing of electronic data between government departments. A migrant worker's UK tax records and approved employer sponsor details can be compared in an automated way.

The Home Office's use of a 'streaming' algorithm, to aid the focus of Home Office officials in certain visa applications (not protection claims), was challenged as allegedly discriminatory in 2020. The exact weighting of criteria in the algorithmic mix is not known, as its use was withdrawn in August 2020, but 'nationality' was reported as one criteria. Its withdrawal was without admission of liability and before the courts ruled on its use. It was replaced with a 'person-centric attribute framework,[4]' under which staff focus is still triaged, using bulk-data analysis, into 'complex' and 'non-complex' cases. The bulk data includes email addresses, credit-cards and criminal convictions. Declared convictions will trigger automatic designation as 'complex', as will certain visa applications, such as by unaccompanied children and transit visitors. So, bulk analysis for non-protection applications seems set to stay. The extent to which courts will be asked to scrutinise the new framework remains to be seen, as does the extent to which people will ask the government about how their data is processed, perhaps as part of any court disclosure.

In contrast, protection claims cannot currently be made electronically. Instead, they have to be made in person, or by telephone, to a Home Office central screening unit. Since the law changed in 31st December 2020, the Home Office may now refuse to assess protection claims by adults and instead treat them as 'inadmissible', based on a person's earlier presence in, or connection to, a safe third country. As Home Office officials no longer have access to various EU databases after the UK's withdrawal from the EU, (such as the live version of Eurodac), officials are guided to check for biometric evidence of previous movement in the UK and overseas, including historic records; HGV or vehicle tracking data, and tax records. This ties into the 'digital identity' identity agenda, where increasing amounts of personal data held by the government will be held online and searchable by it. Given its recent introduction, courts have yet to asses the nature and quality of evidence produced in the event of legal challenge to 'admissibility' decisions. It also remains to be seen what the impact will be of applying the admissibility process only to claims made by adults. This ties into further government proposals about resolving disputes over the ages of claimants, which we will comment on below.

The assessment stage

Medical evidence and age assessments

Assuming that a protection claim is treated as admissible, the remainder of the protection assessment process focusses on officials intensively interviewing claimants, some of which are recorded, to assess consistency and plausibility, with limited use of IT. The impact of technology is currently limited in relation to medical evidence, with no government provision or sponsorship of medical experts.

[4] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/977890/interim-workflow-routing-visitor-v2.0ext.pdf.

However, there are two important new government proposals, as part of the 'New Plan for Immigration,' published on 24th March 2021[5]:

- a new National Age Assessment Board ('NAAB'); and
- a new system of a panel of pre-approved experts, including medical experts, who will report to the court or whom the court may require to be jointly agreed by the parties.

Age assessments play an important role in assessing the appropriateness of support for unaccompanied protection claimants, and there continues to be controversy over those claimants whom, it is alleged, seek migration advantages by claiming falsely to be minors. Age assessments are currently carried out by local council authorities, subject to judicial review in the Upper Tribunal. There is currently little, if any, role for science in these assessments. The New Plan for Immigration proposes to centralise responsibility for setting assessment standards with the NAAB, encouraging the use of 'scientific technology.' EASO has already published a guide on age assessment[6]', which refers to dental examination; the use of MRI; and physical development, but the limitations on scientific methods was also considered by the Upper Tribunal in R (on the application of AS (by his litigation friend Francesco Jeff) v Kent County Council (age assessment; dental evidence) [2017] UKUT 00446(IAC).[7] The proposals to introduce technology may prompt further judicial consideration of this topic.

Language analysis

The UK government has used language analysis evidence, most notably in relation to claimants claiming to be from Syria[8]. Its guidance to staff is that such analysis should only be used in two situations: where there is reason for concern; and for specific claimed nationalities of inadequately documented claimants (currently Syria, Palestine and Kuwait).

The use of voice analysis provides a useful case-study about how the understanding and assessment of the quality of evidence develops. It also dispels some of the myths around 'technology', and the importance of transparency about how evidence is produced. The process of voice analysis, currently undertaken by two outsourced providers, Sprakab and Verified, does not use computer-aided technology to any notable degree. Instead, the process typically uses human assessors, in a two stage process, to interview and record a claimant, and then carry out an analysis in conjunction with an expert linguist.

The process typically uses an analyst from, or with personal knowledge of, the dialect of the claimed region of origin, with a second level review by an expert in linguistics. The analysis is said to be carried out in accordance with industry–recognised criteria, while the challenges to the process have been

[5] https://www.gov.uk/government/consultations/new-plan-for-immigration.
[6] https://easo.europa.eu/sites/default/files/easo-practical-guide-on-age-assesment-v3-2018.pdf.
[7] https://tribunalsdecisions.service.gov.uk/utiac/2017-ukut-446.
[8] https://www.gov.uk/government/speeches/language-analysis-testing-authorisation-2013-palestinian-syrian-kuwaiti-no-2.

to the expertise of the assessors; the correct identification of claimants; and reliance upon the process, to the claimed exclusion of other evidence. Specific examples of successful challenges to the use of analysis have included:

- where an analyst allegedly misrepresented their expertise and was alleged to have a serious criminal history;
- where a claimant was misidentified as an adult when in fact they were minor; and
- where the recording of an interview was lost so that any challenge to the assessment was inhibited.

As the use of analysis has increased, so too have the challenges to its use by unsuccessful claimants. In common with other questions which arise in a large number of cases, there was judicial guidance by the Upper Tribunal, as endorsed ultimately by the UK Supreme Court (SSHD v MN & KY [2014] UKSC 30)[9] which set out a number of principles:

- A decision on a person's background or origin should not be based solely on linguistic analysis. The Supreme Court warned of expressions of certainty and conclusions of assessors which were not otherwise scrutinised by judges. In one case, an expression of certainty was contradicted by a later finalised report without any explanation for the discrepancy.

- The central challenge to Sprakab's general expertise was not sustained, albeit in the two cases under appeal the expertise of the individual assessors was flawed. That did not mean that any analyst or assessor was infallible and the judge must be alive to the possibility of error. In that context, it is important that all the parties have a proper opportunity to submit expert assessment and all available evidence should be taken into account.

- The parties must have an opportunity to challenge any linguistic assessment opposing them. This means that any sound recording of an interview must be made available in good time before a court hearing.

Appeals

The biggest significant development since 2020 is how a Tribunal appeal is made and considered. Other than for out-of-country appeals; appeals by those in detention; and litigants in person; the appeal process is now entirely digital, requiring an IT account created on a new internet-accessed platform, 'MyHMCTs'.

Broadly speaking, a claimant's representative must answer a simple sequence of basic questions, upload (in pdf or word format) the Home Office's decision, which then automatically 'talks' to the Home Office's database, to check whether the details are correct. Assuming they are, the system generates (with limited human involvement) time-limited directions, about which parties'

[9] https://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKSC/2014/30.html&query=(MN)+AND+(ky).

representatives are notified by an automated alert system and they are then required to then access their MyHMCTS account. Gone are the days when non-compliance could occur because of non-receipt of a notice of hearing or directions. The software not only 'task-manages' stages of the appeal process, but can complete parts of it itself, such as the automatic generation of final electronic bundles – the principle being that all of the documentary evidence should have been uploaded, in good time, without separate, side documents in physical format, which are not on the system. Again, gone should be delays because parties are talking about different bundles of documents or side documents. A judge considering any appeal now has a clear 'line of sight' to the relevant evidence and issues. The potential benefits for speedier resolution of cases are:

- earlier recognition of protection status;
- from an evidential perspective, less risk that evidence will have been superseded by events; and
- a system which prompts and collates for a judge all of the documentary evidence.

The government's stated intention is for detained and out-of-country claimants to have a form of digital access in the near future; and litigants in person already have an augmented system, whereby they are provided contact details of where to send documents and responses by post or email, which are then uploaded on their behalf by Tribunal staff under a 'Bulk print and scan' process, which also automatically prints out or emails any communications to them, without the need for human intervention, to allow them to participate fully in the process. A form of digitalisation of the Upper Tribunal's processes is anticipated in the near future.

The Hearing

Covid has prompted two key innovations. For the first time, most, if not all, First-tier Tribunal hearings are now audio-recorded (historically, this was only at Upper Tribunal level and above) which means that disputes over the evidence given orally at tribunal, or difficulties with communicating that evidence, because of issues with an interpreter, are swiftly resolved by means of a party ultimately seeking a transcript, on payment.

Second, 'remote' or 'hybrid' hearings over video or telephone conference facilities have become commonplace. This has necessitated specific modification to the law[10] and rules[11] on hearings; and the formulation of practice directions[12]. A number of the decisions by senior UK courts have grappled with the impact on fairness that remote hearings can have[13] and there are well-known academic papers on the impact of remote hearings in immigration cases[14]. Whether the proportion of remote hearings will continue at the same level as during the Covid-19 lockdown period remains to be seen, although they remain popular with a number of representatives and parties. They also increasingly open up Tribunals to requests to hear live evidence (whether expert or otherwise) from witnesses outside the jurisdiction via video-link. The Upper Tribunal grappled with this issue in the case of Nare (evidence by electronic means) [2011] UKUT 443 (IAC), (paragraph [21d]) advising of the need to get confirmation that the other country's government has no objection to evidence being given from its jurisdiction.

Remote hearings also offer the increased opportunity to hear live expert country evidence from experts based nearer to, or in, the countries about which they are giving evidence, instead of experts in the UK who may be a number of steps removed from the countries in question.

Final thoughts

Drawing the themes together, technology is already touching various parts of a complex legal process. Much of the IT will be familiar to those in other litigation environments, such as 'document management systems' and the effective task management of bulk litigation processes, namely 'case management systems.' AI is playing, at the moment, a limited role. Processes involving some of the most vulnerable people in society necessarily seek to address issues around lack of access to IT; lack of IT literacy; language barriers and other vulnerabilities. Where IT has been used at scale, the Courts have stressed the importance of understanding how IT is used alongside human intervention, and how that may affect the quality of evidence. The extent to which a claimant is the subject of 'data-scraping', whereby his or her personal information is extracted and analysed in an automated way from various sources such as various government databases, has yet to be considered by the Courts. The more prosaic changes around digitalisation of the Courts and Tribunals processes may have a more immediate, and just as important, impact. Future guidance will reflect on this rapidly developing subject.

John Keith

[10] Coronavirus Act 2020
[11] The Tribunal Procedure (Coronavirus) (Amendment) Rules 2020
[12] Amended Presidential Guidance Note No 1. 2020: Arrangements during the Covid-19 pandemic.
[13] For example, Re A (Children)(Remote Hearing: Care & Placement Orders) [2020] EWCA Civ 583.
[14] Remote Adjudication in Immigration, by Ingrid Eagly, 2015, Northwestern University Law Review, at https://escholarship.org/uc/item/5p1044zc.

RECENT CASE-LAW OF INTEREST FROM AROUND THE WORLD

AFRICA

Okoye v Minister of Home Affairs and Others (26144/2020) [2020] ZAGPJHC 382 (12 October 2020)

The applicant was a Nigerian national who arrived in South Africa in October 2010 and applied for refugee status under the Refugees Act 1998. He was granted a temporary 'asylum seeker' visa. His refugee status application was, however, dismissed. He did not review or appeal it. Instead, he applied for a "relatives" visa, issued to him in 2012. He was lawfully in South Africa until June 2018.

The applicant committed a drug-related crime and was convicted and sentenced to eight years' imprisonment in April 2017. In July 2020, a day before being released on parole, he was told that he would be further detained pending deportation. A warrant of detention was issued on 23 July 2020. He was not brought to Court for that purpose.

The applicant sought an urgent declaration that his detention was unlawful, and that he should be issued with an 'asylum seeker' visa in terms of Regulation 2(2) of the Regulations to the Refugee Act valid for 14 days within which he must approach a Refugee Reception Office to lodge a review application. An order was also sought staying his deportation pending "finalisation of all process regarding his application".

Various arguments raised by the applicant were rejected by Strydom J as being without merit. He did, however, find that section 34(1)(b) and (d) of the Immigration Act could not be relied upon for the extension of detention of illegal immigrants. In *Lawyers for Human Rights v Minister of Home Affairs* 2017 (5) SA 480 CC, the Constitutional Court had found that sections 34(1)(b) and (d) limited the rights of a detainee as contemplated in sections 12(1)(b) and 35(2)(d) of the Constitution (the right not to be detained without a trial and the right to challenge the lawfulness of detention in court in person). The Constitutional Court had declared section 34(1) invalid, and the declaration of invalidity was suspended for 24 months from the date of the order to enable Parliament to correct the defect. The court had further ordered that, in the interim:

> "4. Pending legislation to be enacted within 24 months or upon the expiry of this period, any illegal foreigner detained under section 34(1) of the Immigration Act shall be brought before a court in person within 48 hours from the time of arrest or not

later than the first court day after the expiry of 48 hours, if the 48 hours expired outside ordinary court days.

5. Illegal foreigners who are in detention at the time this order is issued shall be brought before a court within 48 hours from this order or on such later date as may be determined by a court.

6. In the event of parliament failing to pass corrective legislation within 24 months, the declaration of invalidity shall operate prospectively."

The date of the court order in *Lawyers for Human Rights* was 29 June 2017. The 24-month period mentioned in the court order had lapsed before the applicant had been detained. No amendment to section 34 rendering the section constitutionally compliant had been made. The effect was that sections 34(1)(b) and (d) of the Immigration Act 13 of 2002 were invalid.

There was nothing indicating that the applicant had been taken to court after his initial detention or when his detention was extended for a further 90-day period. Instead, he had been detained on warrants issued by an immigration officer and magistrates without being afforded the opportunity to challenge the legality of his detention in court. Strydom J held:

> "The legislature's failure to pass corrective legislation has now caused legal uncertainty as the detainee remains an illegal foreigner, despite his eminent release from detention. The detainee remains a person who faces deportation. It is not for this court to speculate or advise how this situation should be dealt with. This issue falls within the prerogative of the legislature…. The detention warrant which extended the detention of the detainee which is still effective should be set aside as the warrant was issued pursuant to the constitutionally invalid section 34(1)(d)."

The Court did not order that the applicant be given an 'asylum seeker' visa. Nor did it grant an injunction preventing his deportation. But it did order that he be released from detention.

AMERICAS

Inter-American Court of Human Rights

The institution of asylum, and its recognition as a human right under the Inter-American System of Protection (interpretation and scope of Articles 5, 22(7) and 22(8) in relation to Article 1(1) of the American Convention on Human Rights). Advisory Opinion OC-25/18 (Photo 3: Title: Visit of the members of the association to the Inter-American Court of Human Rights (2020)

Only in Spanish: https://www.corteidh.or.cr/docs/opiniones/resumen_seriea_25_esp.pdf

Inter-American Commission of Human Rights

Due Process in Procedures for the Determination of Refugee Status and Statelessness and the Granting of Complementary Protection. English version: https://www.oas.org/en/iachr/reports/pdfs/DueProcess-EN.pdf

ASIA PACIFIC

***AL (Thailand) v Immigration and Protection Tribunal* [2021] NZHC 810**

In an inquisitorial system, where does the duty to establish the case lie? At what point can an applicant reasonably ask that the benefit of the doubt be applied? The point is a simple one, but is not often raised before the courts.

This issue was recently considered by the New Zealand High Court, in *AL (Thailand) v Immigration and Protection Tribunal*. The claimant (facing charges in his home country) argued, *inter alia*, that he would be the subject of an unfair criminal charge and that he would be unable to access essential heart medication if imprisoned. His appeal having been declined by the Tribunal, the appellant argued before the High Court (among other things) that the Tribunal erred in finding that he would likely be able to access prescription medication in prison with no evidence to that effect and that it failed to apply the "benefit of the doubt" when assessing whether there was a real risk of serious harm arising from him potentially being denied his medication.

The High Court considered past authority and held that it was for the appellant to provide evidence to support his claim that he would be unable to access medication in a Thai prison. As to the application of the benefit of the doubt, he had provided no evidence that Thai prisons would prevent access to medication where it was required and funded by him. In these circumstances the "benefit of the doubt" principle did not step in to fix the deficiencies in the evidence.

EUROPE

Judgment of the Court of Justice in Case C-901/19, Bundesrepublik Deutschland () and individuelles"

The systematic application by the competent authorities of the Member States of a single quantitative criterion such as a minimum threshold of civilian casualties may exclude persons genuinely in need of protection. When considering an application for subsidiary protection, the competent authorities of the Member States must examine all the relevant circumstances which characterise the situation of the country of origin of the applicant in order to determine the intensity of an armed conflict.

Judgment of the Court of Justice in Case C-8/20, L.R. v Bundesrepublik Deutschland
An application for international protection may not be rejected as inadmissible on the ground that a previous application for asylum made by the same person was rejected by Norway. Even though that third State participates in part in the Common European Asylum System, it cannot be treated in the same way as a Member State

Court of Justice, Annual Report 2020
The CJEU published on 18 May 2021 its annual report for the year 2020, which highlights that 1582 cases were brought before the Court of Justice and the General Court and that 1540 cases were completed in 2020.
The President of the Court, Judge Koen Lenaerts stressed that "In Europe, as in the rest of the world, the past year has been deeply marked by the Covid-19 pandemic which has disrupted our private and social lives, as well as our working habits. Thanks to crisis plans previously put in place by the Court, together with the remarkable resilience and commitment on the part of the Institution's Members and staff, this unforeseen situation has been managed effectively… The statistics for the year are a reflection of the very limited consequences of the health crisis. Owing to the downturn in the activity of national courts during the first few months of the pandemic, the number of cases brought did not match the record set in 2019, but is close to that for 2018 and 2017. The number of cases completed is only slightly lower, mainly due to the various measures put in place to compensate for the fact that it was not possible to hold hearings for over two months, as well as the travel restrictions imposed since hearings resumed. It is also worth noting that, in spite of the critical context in 2020, the level of activity of both courts was similar to that seen in 2017 and higher than in 2016".

Konsul Rzeczypospolitej Polskiej w N. (Border controls, asylum and immigration - Visa policy - Judgment) [2021] EUECJ C-949/19 (10 March 2021) https://www.bailii.org/eu/cases/EUECJ/2021/C94919.html

1. Article 21(2a) of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, which was signed in Schengen on 19 June 1990 and entered into force on 26 March 1995, as amended by Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013, must be interpreted as not being applicable to a national of a third State who has been refused a long-stay visa.

2. EU law, in particular Article 34(5) of Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing, read in the light of Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as meaning that it requires the Member States to provide for an appeal procedure against decisions refusing a visa for the purpose of studies, within the meaning of that directive, the procedural rules of which are a matter for the legal order of each Member State,

in conformity with the principles of equivalence and effectiveness, and that procedure must, at a certain stage, guarantee a judicial appeal. It is for the referring court to establish whether the application for a national long-term visa for the purpose of studies that is at issue in the main proceedings falls within the scope of that directive.

Belgian State (Retour du parent d'un mineur) (Return decision - Father of a minor child who is a citizen of the European Union - Judgment) [2021] EUECJ C-112/20 (11 March 2021) https://www.bailii.org/eu/cases/EUECJ/

Article 5 of Directive 2008/115/Skype of the Skype Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, read in conjunction with Article 24 of the Charter of Fundamental Rights of the Skype Union, must be interpreted as meaning that Member States are required to take due account of the best interests of the child before adopting a return decision accompanied by an entry ban, even where the person to whom that decision is addressed is not a minor but his or her father.

Norway: Ref: HR-2021-203-A, Date: 2021-02-03, Keywords Immigration law. Revocation of residence.

The Immigration Appeals Board had decided to revoke the residence permit of a family from Afghanistan, see section 37 subsection 1 (e) of the Immigration Act, directing the family to seek internal flight in the home country. The Supreme Court found that the internal flight alternative could be considered in the revocation assessment under section 37 subsection 1 (e). The wording of the provision and in Article 1 C (5) of the Refugee Convention suggested such an interpretation. The same applied to the purpose of the Refugee Convention. It was also decided that the assessment had to be based on the conditions prevailing at the time of the decision and not at the time of expulsion to Afghanistan. There was no basis for departing from the main rule that administrative decisions must reflect the situation at the time of their making. The appeal against the Court of Appeal's judgment, which dismissed the District Court's judgment for the Immigration Appeals Board, was dismissed

UK, Supreme Court: Begum, R. (on the application of) v Special Immigration Appeals Commission & Anor [2021] UKSC 7 (26 February 2021)

https://www.bailii.org/uk/cases/UKSC/ – press summary attached- the Shamima Begum decision. Headed for European Court of Human Rights next.

UK, Supreme Court. Zabolotnyi v The Mateszalka District Court, Hungary [2021] UKSC 14 (30 April 2021)

https://www.bailii.org/uk/cases/UKSC/. Press summary attached. Extradition – whether prison conditions in Hungary amount to Article 3 ECHR inhuman or degrading treatment, particularly in the light of the lack of personal space. Assurance by the Hungarian Ministry of Justice was decisive on the facts.

UK, Court of Appeal: TD (Albania) v Secretary of State for the Home Department [2021] EWCA Civ 619 (29 April 2021)

https://www.bailii.org/ew/cases/EWCA/Civ/2021/619.html

Circumstances in which a persistent of fender's Article 8 ECHR rights are relevant to deportation

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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