



# IARMJ report

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

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**The 13<sup>th</sup> IARMJ world Conference**

***ACCESS TO JUSTICE IN REFUGEE AND MIGRATION LAW***

**The Hague**

**8-12 May 2023**

**Register for the conference [here!](#)**

## *From the Editors,*

Dear Colleagues and friends,

As I write these words, I am looking forward to the next Global Conference of the IARMJ in May 2023, in The Hague. It has been three years since we last met, in sunny Costa Rica, just before the global pandemic really took hold.

These have been turbulent years, with a period of no-travel stasis during the lockdown phase, followed by increased levels of migration when travel resumed, driven in part by armed conflicts and environmental catastrophes. Events in Afghanistan and Ukraine have required a global response, and the EU has activated its Temporary Protection Directive for the first time ever, to deal with the huge migration out of Ukraine over the last year.



**Judith Gleeson**  
Co-Editor

We begin this Newsletter as always, with an introduction from our President, Justice Isaac Lenaola, who has led the Association with distinction, under particularly demanding conditions during the pandemic years.

As usual, you will next find fascinating news from all four Chapters on what has been happening around the world. For the first time, this Newsletter also includes a note from me as Chair of the Supervisory Council. The Council will meet again before the Conference and its full reports will be available there.

Under Conference Matters, this newsletter contains an important draft resolution authorising our Management Board to create an Editorial Committee to oversee the publication of work produced by the IARMJ, and in particular, by its Working Parties. The IARLJ, as it then was, did in the past have an Editorial Committee to ensure publication of Conference materials (as books, where funding was available). The new Constitution requires a Resolution to revive and codify this important oversight, to ensure that IARMJ publications which meet our standards can take their proper place externally.

Please read carefully both the draft Resolution and the accompanying Explanatory Note, and send any comments to Michael Hoppe and Hugo Storey, the joint proposers of the Resolution, before the Conference, even if you will not be able to attend.

We include an update from Katelijne Declerck, Michael Hoppe and Hugo Storey, who together constitute the Global Judicial Analysis Steering Group, as to their progress on this important project, which will raise significantly the IARMJ's international profile, looking to provide for the rest of the world the guidance that IARMJ Europe has done for EASO (now EUAA) in relation to EU domestic and international protection law.

We have included the usual 'news and views' of publications, interesting articles, and case law from around the world. You will see that Australia, New Zealand, and the UK are all grappling with issues arising out of the need to access security service evidence in some asylum appeals.

If ever there was a time when our international conversations at a global migration conference were of vital importance, this is that time. I look forward to catching up with as many of you as can make it to The Hague, and if not, around the world in the Chapter meetings.

Till then, keep safe, and best wishes,

*Judith Gleeson*  
Co-Editor

# HABARI KUTOKA NAIROBI

## Update from the President...

Greetings to you all,

Preparations for the long awaited World Conference are at an advanced stage. Please visit our website for details of the exciting topics and speakers.

As we approach the actual date for such a conference, logistical issues ordinarily crop up but we are doing our best to ensure a smooth ride to The Hague, Netherlands.



**Justice Isaac Lenaola**  
**President**  
**IARMJ**

One of the innovations of the new IARMJ Constitution is the establishment of the Supervisory Council to supervise the Management Board-Article 3.8. Last year a very successful meeting between the Council and the Board was held and another is slated for 25th April 2023. Upper Tribunal Judge Judith Gleeson is the current Chair of the Council. The joint engagement ensures transparency and accountability and also ensures that the Board keeps its eyes on the objectives of the Association and delivers on its mandate.

Ahead of the World Conference, Chapters held their own Conferences and all reports indicate that they were very productive. Chapter Presidents will, elsewhere in this Newsletter, give detailed reports on the same.

One of the interesting items to look out for at the World Conference is an update on the proposed IARMJ Judicial Global Analysis. Katelijne Declerck, Hugo Storey and Michael Hoppe have put in long hours towards that project and I encourage all of us to pay keen attention to the report and generate sound ideas on how to actualize it. You will find a short note in this Newsletter, explaining the current position.

As the draft Conference programme is already on the website, any ideas to improve it are welcome as we still have a few weeks to fine-tune it.

See you all soon and with best wishes,

*Isaac Lenaola*

**President, IARMJ**

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## A MESSAGE FROM THE GLOBAL JUDICIAL ANALYSES (GJAs) STEERING GROUP

This is a message directed to all those colleagues kind enough to fill in a questionnaire about plans for a Global Judicial Analyses project from the Global Judicial Analyses (GJAs) project steering group.

This questionnaire was circulated to those who attended either the European Chapter conference in Slovenia (last September) or the Africa Chapter conference in Tanzania or the Asia Pacific Chapter conference in Australia (both last November). You will recall the questionnaire spoke about a pilot to be run early in 2023 and to be completed in time for the May world conference.

Unfortunately the time has turned out to be too short to commence this pilot. It will therefore be postponed until after the May conference. There will be scope for discussions about this during the conference (for those who are attending), but we want all respondents to know that we have not forgotten about this.

*Katelijne Declerck*

*Michael Hoppe*

*Hugo Storey*

**Members of the GJA Steering Group**

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## NOTICE OF IARMJ ANNUAL GENERAL MEETING

The Association advises that its Annual General Meeting will be held on Friday 12 May 2023 at 11.30 am or soon thereafter, at the 13<sup>th</sup> World Conference venue, being:

The Hague Conference Centre, New Babylon  
Anna van Buerenplein 29  
The Hague - The Netherlands

The proposed agenda for the meeting is:

- Matters arising from the meeting at San Jose, Costa Rica
- President's Report
- Treasurer's Report
- Supervisory Council Report
- Resolution on IARMJ Publications <sup>1</sup>
- Special Presentations
- Election of Officers for the 13th Executive of the Association
- Any other business (to be notified to the Secretary no later than 7 days before the meeting)

*Martin Treadwell*

**Secretary, IARMJ**

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<sup>1</sup> See Resolution and Explanatory Note below.



## NEWS FROM THE CHAPTERS

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

### AFRICA CHAPTER

Dear Colleagues

From the African Chapter, the efforts have been intensified to get the Sub Chapter structures functional. The objective is to ensure that the Chapter is present in the whole continent. This will augur well for our membership drive in almost all the African continent's corners.

Our main objective is to ensure that we have a well-grounded and context specific training programme regarding Refugee and Migration law around the Continent. Meetings have been held in this regard and it is all systems go. Our stated intention is to ensure that the UN Convention and OAU Convention are appropriately dealt with in our training programmes.



**Judge President Dunstan  
Mlambo**

A related objective related to the Sub Chapter initiative is to conduct a continental scoping exercise that identifies each country's refugee law regulatory system. The reason for this process is that different countries have different regulatory arrangements. For example, there are countries that do not have formalised appeal structures such as refugee appeal boards, and any refugee-related appeal must be lodged with a Government Minister. The consequence is that there is no refugee law jurisprudence being developed in these countries in particular as there are no court challenges directed at the decisions taken by the Ministers. We have also had meetings with the Centre of Excellence (JIFA) to come up with a regional training programme that takes account of this context and the applicable laws in each region and country.

On the case law front, from South Africa one can report about two cases, *Rafea Ahmad Faqirzada and Others vs Minister of Home Affairs* B25/2023 and *Shanko Abraham and Others vs The Minister of Home Affairs and Another* A5055/2021 that have taken place in South African Courts regarding refugee law and have led to widespread controversy. Details, and links to the cases themselves, are in the caselaw reports in this Newsletter.

Regarding the World Conference, efforts are in place to ensure that the Africa Chapter is adequately represented in the Conference. We are engaged in efforts to raise funding support in this regard.

*Mlambo JP*

**President, Africa Chapter**



**IARMJ colleagues at Arusha, November 2022**

## AMERICAS CHAPTER

Dear friends and colleagues,

Kind regards from the Americas!

The XIII International Conference is coming! It's amazing how time passes! It has now been 3 years since our previous global conference in San José in 2020.

The Conference in San José was undoubtedly a great meeting, where we discussed important issues, we had the opportunity to greet each other again and in other cases to meet and establish professional alliances that last to this day. The XII Conference was not only relevant because of the natural beauty of Costa Rica, but also because it coincided with the start of the Covid-19 Pandemic, which has caused so much suffering to humanity and imposed so many challenges on us.



**Judge Esteban Laporte**  
**President,**  
**Americas Chapter**

### IMPORTANT INFORMATION AND NEWS FROM THE AMERICAS

#### 1. Los Angeles Declaration

An important declaration was adopted at the IX Summit of the Americas in Los Angeles, United States in June 2022. The declaration was signed by 20 countries and has been promoted to strengthen national and regional efforts to create the conditions for safe, orderly, humane, and regular migration and to strengthen frameworks for international protection and cooperation among the states.

“In particular, UNHCR welcomes the commitment of states in the Americas to strengthen protection systems and guarantees that no one should be returned to a country where they would face persecution or human rights violations; the provision of access to fair and efficient asylum procedures, and the development of alternative legal stay or temporary protection arrangements. The Declaration, furthermore, acknowledges the positive contributions of refugees and migrants to the socio-economic development of their host communities and the need to promote their inclusion and integration.” ([www.unhcr.org](http://www.unhcr.org))

#### 2. Immigration and Refugee Board of Canada (IRB)

In 2022, the Immigration and Refugee Board of Canada released an update to its Chairperson's Guideline on Gender Considerations in Proceedings Before the Immigration and Refugee Board. This was a major overhaul of the previous guidelines on women refugee claimants fearing gender-related persecution that Canada had last updated in 1996. The new guidelines:

- Define what form trauma-informed adjudication should take and how adjudicators are expected to implement such principles.
- Detail the nature of the intersectional approach that is expected in refugee status determination in Canada.
- Discuss how decision-makers should consider the impact of the cycle of violence and coercive control when evaluating credibility in cases involving gender considerations.
- State that in proceedings involving intimate partner violence or family violence, members should apply an intersectional approach to assess forward-looking risk, including the individual's history of abuse,

their immigration status, socio-economic status, community, and cultural norms, and whether any other family members may be at risk. Canadian adjudicators are to make reference to the [Intimate Partner Violence Risk Identification and Assessment Framework](#) from the Barbra Schlifer Commemorative Clinic.

- Apply to gender-based violence involving men and boys. They discuss how this is generally under-reported and therefore country condition information may be scarce.
- Counsel that a contextual and intersectional approach should be used to determine whether a claimant's reluctance to seek state protection was reasonable, for example where an inability to seek out state protection is due to the criminalization of consensual adult sex work, among numerous other factors.
- Discuss how decision-makers should consider whether child custody arrangements affect the viability of an internal flight alternative, for example where an agent of harm shares custody of a child with the claimant or appellant, and may be able to use their rights of parental access to obtain contact information and continue the abuse.
- Provide a definitive statement that for Canadian law, non-governmental organizations, such as domestic violence shelters, are not a substitute for state protection.

New Immigration Appeal Division Rules (2022) came into force on January 14, 2023. The new Rules will help ensure that the IAD fulfils its mandate to resolve appeals efficiently, fairly, and in accordance with the law.

The new IAD Rules will:

- Reduce the time it takes to finalize an immigration appeal.
- Simplify the language and the organization of the Rules.
- Introduce new digital practices.

The Immigration Appeal Division Rules and Regulatory Impact Analysis Statement (RIAS) can be found [here](#). I want to dedicate the Americas contribution to this newsletter to the work of the Immigration and Refugee Board of Canada (IRB), Canada's largest independent administrative tribunal. With this recognition, we highlight the invaluable contribution of the IRB, not only in the correct application of the law, but also in its efforts to make justice accessible to migrants and refugees and its special contribution to our association in the training of judges during our conferences and preconference.

Every year, the Board renders more than 40,000 decisions on refugee protection and immigration matters. The IRB has updated jurisprudence that can be followed [here](#). Also, a selection of IRB decisions is available on the Canadian Legal Information Institute's ([CanLII](#)) website. I encourage you to visit these pages and review the up-to-date and select jurisprudence.

### **3. Regional Inter-Agency Coordination Platform for Refugees and Migrants from Venezuela (R4V)**

More than 6.3 million refugees and migrants from Venezuela were hosted across 17 countries in Latin America and the Caribbean during 2022. Their plight is being monitored by R4V, described as “a Regional Inter-Agency Coordination Platform for Refugees and Migrants from Venezuela”. They note:

“According to the Refugee and Migrant Needs Analysis (RMNA), conducted by the Regional Inter-Agency Coordination Platform for Refugees and Migrants from Venezuela (R4V), and published in October 2022, the spiralling costs of living, lingering impacts of the COVID-19 pandemic, lack of documentation and the widespread irregular status of refugees and migrants, and very high unemployment rates have increased the

vulnerability of refugees and migrants from Venezuela and have undermined the efforts made in previous years to rebuild their lives and to integrate in host societies across the region.

To respond to these mounting needs, this new multiyear RMRP 2023-24 will bring together an unparalleled number of 228 appealing partners, including 208 NGOs, civil society and faith-based actors (46 of which are refugee- and migrant-led organizations) to implement humanitarian, protection and socio-economic integration activities to assist the situation of 3.4 million refugees and migrants.”

For more information about this analysis and appeal, please see [here](#).

In conclusion, I invite you to make every effort to attend the World Conference in The Hague: like all previous IARMJ conferences it will be a magnificent opportunity to update ourselves and exchange professional experiences.

I hope to see you all soon!

*Esteban Lemus Laporte*

**President, Americas Chapter**



## ASIA PACIFIC CHAPTER

Dear Colleagues,

Since I last wrote, the Chapter has held our Regional Conference in Newcastle, New South Wales, Australia in November and a webinar earlier this month.

The November 2022 Conference enabled us to meet in person after several years of being apart due to the pandemic. Newcastle is a coastal city with a superb outdoor lifestyle and a world class University. We were very lucky to have the University as a venue, which allowed for use of the wonderful Conservatory of Music as a suitably grand plenary venue and the University proper for our pre-conference training and



breakout sessions. There were over 80 attendees over the training and conference sessions. In particular we were very lucky to have judicial delegations from Indonesia and the Philippines, including Justices Napitupulu and Hidayah of Indonesia and Associate Justice Jhosep Lopez, of the Supreme Court, Philippines and our own Judge Joy Torres.

country information.

The conference itself opened with a critical reflection on our cultural competence, and a heartfelt and stirring recounting of a refugees journey to Australia. Sessions on the two days revolved around the conference themes of culture and cultural constructs and addressed many issues vital to our work as review decision makers.

On the Friday the women judge's lunch was a real success.

The welcome drinks held at the University and the Conference Dinner at the old Customs House of Newcastle were greatly enjoyable, and the conclusion of the conference included a real highlight, a performance by the Newcastle Tibetan Children's Choir.

Thanks are due to the Asia Pacific Council who put in so much time and work to this successful event, and in particular to Sue Zelinka who not only organised the event to run so smoothly but was also able to bring in speakers and caterers from the refugee communities of Newcastle and the Hunter region. Thanks go to all speakers and chairs who provided such insightful and important presentations, and to the personnel of the University who were the perfect hosts.

This month we began the first of our webinar series on social media evidence in review processes by Louise Moor of the IPT and Christine Cody of the AAT. The session had over a hundred attendees and generated much discussion. Of particular note was that Louise presented whilst New Zealand was in the midst of storms and flooding. New Zealand is now in the process of recovering from a cyclone and our thoughts are with those who lost loved ones or their houses.



**Sean Baker**  
**President,**  
**Asia Pacific Chapter**





In Australia the High Court in *SDCV v Director-General of Security* [2022] HCA 32, handed down in October 2022, considered whether, in a visa cancellation on character grounds, the Courts could rely on secret evidence which was available only to the judicial officer and State lawyers and was not disclosed to the applicant or his lawyers, in what was argued was fundamentally procedurally unfair to the applicant and contrary to Chapter III of the Australian Constitution.

The majority held that practical injustice is not resolved by reference to a minimum requirement of procedural fairness in every case but depends on the nature of the proceedings and the rights and interests at stake. The Court considered the interaction of the legislative scheme with public interest

immunity and relied on the primacy of Parliament and the Executive for balancing the concepts of open justice and national security. Three judges dissented on different bases, but which expressed concepts of a Constitutional minimum as well as a concern that the legislation did not allow the Courts to consider the interests of parties when deciding to refuse disclosure.

*Sean Baker*

President, Asia Pacific Chapter



*The Newcastle Tibetan Children's Choir*

## EUROPE CHAPTER

Dear colleagues,

As always, the Europe Chapter has been very active. In September 2022, we held a very successful regional Chapter Conference in Brdo, which was fully reported in the last newsletter.

That was followed by many other successful contributions in Europe and worldwide:



**Bostjan Zalar,**  
**President,**  
**Europe Chapter**

1. **Trier ERA, 29-30 September 2022** (on-line), Annual Conference on EU's Asylum and Migration; presentation of the topic: *"Selected Issues from the Case Law of the ECtHR in Migration and Asylum Related Disputes."*
2. **Neum, BiH, 3-4 October 2022:** national training event for judges in civil and administrative law, presentation of the topic: *"Basic European Standards on the Right to Oral Hearing and Effective Judicial Protection in Asylum Cases."*
3. **Canada, University of Waterloo, 2 November 2022** (on-line), 14<sup>th</sup> Annual Conference of the Canadian Association of Refugee and Forced Migration Studies; presentation of the topic: *"Crisis and Forced Migration: Manifestations of Power in a Changing World: The Case of Europe"*.
4. **Zagreb, 30 November 2023**, workshop for administrative law judges (UNHCR, Hrvatski pravni centar); presentation of the topic: *"European Standards on the Right to Oral Hearing and Effective Legal Remedy in Asylum Disputes."*
5. **Malta, 8-9 December 2023**, European Union Agency for Asylum (EUAA), Annual meeting of the EUAA pool of trainers - Judicial Skills Specific to International Protection Judges; presentation of the topic: *"Do Safeguards of Judicial Independence and Impartiality under ECHR and EU Law Sufficiently Address Challenges of Bias, Prejudice or Misuse of Stereotypes in Asylum Adjudication?"*
6. **Belgrade, 14 December 2023**, workshop for judges (UNHCR, Belgrade Centre for Human Rights): Interface between Asylum and Extradition; presentation of the topic: *"Judicial Interventions in Extradition Cases in Slovenia: Between the Need for Europeanisation of National Case Law and Challenges of Status Quo and Omission Biases."*
7. **Kiev, 3 January 2023**, National School for Judges of Ukraine, Tenth of April and UNHCR (workshop for judges): The principle of *non-refoulement* in the framework of Ukraine's international obligations; presentation of the topic via video recording: *"Do Safeguards of Judicial Independence and Impartiality under ECHR and EU Law Sufficiently Address Challenges of Bias, Prejudice or Misuse of Stereotypes in Asylum Adjudication?"*



8. **Lisbon, 22 March 2023:** EJTN Administrative Law Training for judges; presentation of the topic: *“Selected Examples of Methodological Approach to Understanding and Effective Implementation of EU Rules on Regular Migration”*.

The Europe Chapter has been responsible, over a number of years, for the preparation for the European Asylum Support Office (EASO) of a significant body of Judicial Training Analysis materials, dealing with the implementation of the Common European Asylum System. EASO has now, of course, become the European Union Asylum Agency (EUAA) and IARMJ Europe continues to be involved with its work.

On 23-24 March 2023, a High-Level Roundtable will be held at the Court of Justice of the EU in Luxembourg, presenting the topic *“Developments in Judicial Dialogue through the Case Law of the CJEU, the ECtHR and National Courts in the Field of the Common European Asylum System”*.

The High-Level Roundtable is jointly organised by the EUAA, the CJEU, the ECtHR, IARMJ Europe and the Association of European Administrative Judges (AEAJ). The roundtable aims to build on the tradition of good cooperation among the most prominent stakeholders in the field of international protection in Europe, and to take the judicial dialogue between the two European courts one step further, offering participants an overview of the state of play with regard to the topics identified as highly relevant to their everyday work as members of courts and tribunals.

The IARMJ will be well represented at the Roundtable: I will be speaking on *Reflections on the Past 13 Years of Judicial Dialogue in the Field of Asylum from the Perspective of a National Judge*. Many other IARMJ members will also speak. Those attending will have the opportunity to observe the hearing of case C-125/22, a request by the Rechtbank den Haag for a preliminary ruling on the question whether an applicant’s individual circumstances and the general situation in the country of origin must always be examined and assessed as an integrated whole, having regard to their mutual interdependence, *before* determining what feared manifestation of serious harm may be substantiated by those factors.

It should be a very interesting Roundtable and I will say more about it in the next Newsletter.

*Boštjan Zalar*

President, Europe Chapter



*Court of Justice of the EU in Luxembourg, venue for the High-Level Roundtable*

## WORKING PARTY UPDATES

### Judicial Resilience and Well-Being

Refugee and migration judges spend their working days listening to claimants recounting their experiences of fear, trauma, violence, and persecution. We are required to solicit these sensitive accounts from potentially vulnerable claimants, while dispassionately and objectively assessing their veracity.

Psychological distress, burnout, and vicarious trauma can be occupational hazards we experience.

Some of us have developed a concern about the mental health effects of our work and the lack, in some jurisdictions, of adequate training and support around these issues.



**Martha Roche, Working Party Rapporteur**

The issues of trauma exposure and burnout for immigration judges were raised for the first time at the IARMJ conference in Costa Rica in February 2020. This led to the formation of an IARMJ Working Party on Judicial Resilience and Well-Being. The purpose of the Working Party is to raise awareness of mental health issues for



refugee and migration judges, such as vicarious trauma and burnout, and to promote best practice strategies for these issues for both individuals and organisations.

In November 2022, two members of the Working Party, Martha Roche and Jade Murphy, led a breakout session on judicial resilience and well-being at the IARMJ Asia Pacific Conference in Newcastle, Australia. Martha discussed vicarious trauma issues including research and academic commentary about how these issues affect us and our work. She also told the group about a wellbeing and

resilience plan, *Tatau O Te Ora*, that has recently been launched at the New Zealand Immigration and Protection Tribunal. Jade looked at the research regarding well-being and resilience concepts. Jade used the research to identify practical ways in which we can build resilience and improve our well-being so that we can better manage when we find ourselves in the inevitable situations of high-stress, trauma, and burnout. Jade also discussed the science behind why these strategies are beneficial.

A discussion followed where participants shared experiences and information about mental health and well-being issues. A psychologist in attendance suggested that an emerging area in this space was the concept of moral injury which is a strong cognitive and emotional response to events that violate one's moral or ethical code and has increasingly been recognised as an issue for some working within some immigration frameworks.

There will be a similar breakout session on vicarious trauma and judicial resilience and well-being at the World Conference in The Hague in May 2023 with a presentation from Working Party members and others, and an opportunity for participants to discuss the issues and share personal and organisational strategies. It is hoped that in addition to an opportunity to learn and share information, this breakout session will provide an opportunity for interested IARMJ members to join the Working Group.

*Martha Roche*

**Rapporteur, Working Party on Judicial Resilience and Well-being**



## Country of Origin Evidence, Expert Evidence and Social Media

Members of the Country of Origin Information, Expert Evidence, and Social Media Working Party have been writing a set of guidelines to assist judges in assessing evidence presented from social media sources. The Working Party hopes to present these guidelines to all the members at The Hague World Conference for their consideration.

Social media evidence has taken on much greater importance in recent times. It raises numerous challenges. Sometimes these are manifestations of broader issues in status determination, such as the dangers of evidence being tailored to support asylum claims; sometimes questions arise that are more bespoke to the information technology era, as with the extent to which disclosure of one's personal accounts should be expected when balanced against privacy rights.



**Mark Symes, Working  
Party Rapporteur**

The evidence may corroborate genuine political convictions consistent with an asylum claim, or be purely adventitious – or it may exist somewhere between the two, as where an asylum seeker responds to the chilling effect of laws repressing their freedom of expression in their country of origin by speaking out more in more liberal regimes.

There are a number of recurring considerations, which the Working Group has summarised for now as including durability, detectability, visibility, malleability, and reliability, all in the context of predicting the reaction of the country of origin's authorities.

However you approach it, there is a lot to think about, and we encourage IARMJ members to follow the Working Group's progress. We are very keen for any input and insight from colleagues around the world.

*Mark Symes*

**Rapporteur, Working Party on Country of  
Origin Information, Expert Evidence, and  
Social Media**

## SUPERVISORY COUNCIL

The IARMJ's new **Constitution** provides for the creation of a Supervisory Council with oversight of certain functions carried out by the Management Council and the IARMJ's four regional Chapters. The first Supervisory Council was elected at the World Conference in Costa Rica.

The Supervisory Council is appointed from one World Conference to the next. The present Council met for the first time in 2022 and will meet again on 25 April 2023, before the World Conference in The Hague in May 2023.

Copies of the Minutes of, and Presidential and Chapter Reports to the 2022 meeting of the Supervisory Council are available on request from the Association's Secretary, **Martin Treadwell**, and those of the 2023 meeting will be available at the World Conference in May 2023.

The principal provisions of the IARMJ Constitution governing the Supervisory Council are set out below:

### Role and duties of the IARMJ Supervisory Council

#### **3.10 The role of the Supervisory Council**

3.10.1 The Supervisory Council has, during the time between General Meetings, overview and supervision of the Management Board, including:

- a. formally appointing Chapter Presidents, who have been validly elected by Chapter members, to be Board Members; and
- b. deciding upon requests for approval of certain Management Board resolutions, as set out in Article 3.10.2, proposed during that time.

3.10.2 The following resolutions of the Management Board require prior approval of the Supervisory Council:

- a. to establish and/or incorporate any further regional or sub-regional Chapters of the Association, or to any disestablishment or amalgamation;
- b. to determine the place or places of the business of the Association;
- c. any borrowing on behalf of the Association or any Chapter;
- d. the appointment of a replacement Secretary or Treasurer, to fill casual vacancies arising between General Meetings (see Article 3.14.5).

3.10.3 The duties of the Supervisory Council also include the determination of appeals made under Articles 2.3.4 or 2.4.2.c. These appeals will be made according to fair and expeditious procedures established by the Supervisory Council.

#### **3.11 Meetings of the Supervisory Council**

3.11.1 The Supervisory Council shall meet at least once during each year, at a physical meeting or otherwise by international conference call/video links (or any combination thereof) and shall hold such other meetings as it may consider necessary.

...

3.11.6 A simple majority of the members of Council shall constitute a quorum.

#### **3.12 Voting in the Supervisory Council**

3.12.1 Decisions of the Supervisory Council shall be by simple majority of those present or participating electronically.

The report of the Supervisory Council will be tabled at the AGM of the Association at The Hague, on 12 May 2023.

*Judith Gleeson*

**Chair, Supervisory Council**

## DRAFT RESOLUTION - IARMJ PUBLICATIONS

***“That this conference authorises the IARMJ Management Board to establish an IARMJ Editorial Board whose function will be to decide which materials produced by working parties or other working groups of the association can be published as ‘IARMJ publications’.”***

### Explanatory Note

1. The text above in bold, which was developed by Michael Hoppe and Hugo Storey, in consultation with and with the support of the Management Board and of James C Simeon, Coordinator of the Working Parties, represents a draft resolution which will be put before the plenary meeting of the IARMJ at the World Conference in The Hague in May 2023.

The purpose of this Explanatory Note is to provide relevant context and background to the Resolution. Both the Resolution and the Explanatory Note are in draft and both may accordingly be amended in the light of any comments received.

2. The IARMJ Constitution has, as one of its objectives, ‘to foster within the judiciary and quasi-judicial officers world-wide a common, consistent understanding and application of international law, practices and principles relating to refugee, complementary protection, statelessness and related migration issues’.<sup>2</sup>

3. Despite having established itself firmly over the past 25 years as an important international actor in the field of refugee and migration law, the IARMJ has produced scarcely any global publications under its aegis. There have been books of World Conference proceedings, but these have never purported to represent guidance and they mix judicial and non-judicial contributions. Only two or three Working Party documents have been endorsed at previous world conferences.<sup>3</sup>

The European Chapter has, in the last 8 years, produced and/or developed, in co-operation with EASO/EUAA<sup>4</sup>, over 16 publications on asylum law for members of courts and tribunals, most of which have been translated into several languages. However, these have been expressly confined to (regional) EU asylum law.

Save for the production of a Training Manual in 1998, there have not been any attempts to produce or publish any global judicial analyses/training manuals etc. In having so little to show at the global level for all the remarkable work that has been done over the years, the Association compares poorly with other international associations in the international law field. It also means that many high-quality papers, talks, guidelines, training tools, etc have not received the recognition they deserve.

4. Amongst the reasons for this lacuna are two in particular. It is rarely practical for plenary World Conferences to discuss and debate detailed texts. There have been understandable concerns that sometimes materials produced might not meet quality criteria or reflect a judicial consensus.<sup>5</sup>

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<sup>2</sup> IARMJ Constitution, 1.2.2.

<sup>3</sup> James C Simeon, Coordinator of the Working Parties has confirmed (in an email of 28 Jan 2023 to HS) that only three working party guidelines have been approved by conference resolution: The Human Rights Nexus Working Party resolution at the Ottawa conference; the Medical Experts Evidence Guidelines; and the Country of Origin Information Guidelines.

<sup>4</sup> The European Asylum Support Office (EASO) was renamed European Union Asylum Agency (EUAA) on 19 January 2022.

<sup>5</sup> These illustrate that quality criteria have been applied de facto in the past, when considering whether to put any working party guidelines up for world conference endorsement.

5. There has been growing realisation that it is not realistic to expect that materials produced by a small group of members (as guidelines, judicial analyses etc) can achieve the endorsement of each and every IARMJ member. By definition, the Association comprises judges of every hue of opinion.
6. However, it is realistic - and long overdue - to create a mechanism for deciding on what materials merit production under the IARMJ banner. Putting out certain materials as 'IARMJ publications' does not have to mean that they are agreed in full by each and every member. That can be made clear in a standard disclaimer. It only requires that the association can be satisfied, through application of a proper process applying quality criteria, that they are suitable to go out under the IARMJ name.
7. This is the central idea behind the proposal to establish an IARMJ Editorial Board.
8. It would be for the IARMJ Management Board, possibly in conjunction with the Supervisory Council, to settle the precise structure and methodology, but essential elements would be:
  - (i) that the members of the Board be selected on the basis of their level of expertise in refugee and migration law;
  - (ii) that its members be representative of the Association and hence that this Board had at least one member from each of the four Chapters;
  - (iii) that it establish a consultative procedure to ensure the Management Board and the Chapter heads have proper opportunity to comment before any decision is made by the Editorial Board; and
  - (iv) that appointment to this Board be for a fixed term, to ensure there could be turnover and opportunity for new members to play a role over time.
9. The four essential components of the Editorial Board would therefore be:
  - (i) level of expertise;
  - (ii) representation of all four chapters;
  - (iii) a consultative process with wider membership; and
  - (iv) a time-limited tenure.

*Michael Hoppe*

*Katelijne Declerck*

*Hugo Storey*

**Proposers of the Resolution**



*Michael Hoppe*

*Katelijne Declerck*

*Hugo Storey*



## IN THE LIBRARY

### RECENT PUBLICATIONS

#### LINKS TO A SELECTION OF IN-DEPTH REPORTS COVERING TOPICS OF INTEREST

##### **World Report 2023**

*Human Rights Watch (HRW), 13 January 2023*

The 33<sup>rd</sup> annual Human Rights Watch World Report summarises human rights conditions in close to 100 countries worldwide in 2022. The crises that unfolded in 2022 – from Ukraine to China to Afghanistan – have caused immense human suffering, but have also presented new opportunities for human rights leadership around the world.

##### **UNODC Global Report on Trafficking in Persons**

*United Nations Office on Drugs and Crime, 24 January 2022, 24 January 2023*

This report provides an overview of patterns and flows of trafficking in persons at global, regional and national levels, based on trafficking cases detected in 2017-2021. It shows how the pandemic has increased vulnerabilities to trafficking in persons.

##### **Watch List 2023**

*International Crisis Group (ICG), 31 January 2023*

ICG's Watch List identifies ten countries and regions facing deadly conflict, humanitarian emergency or other crises in 2023. This year's list includes detailed conflict analyses on Afghanistan, Armenia and Azerbaijan, Brazil, the Gulf, Iraq, Mozambique, Myanmar, Sudan, and Ukraine.

##### **Corruption Perceptions Index 2022**

*Transparency International, 31 January 2023*

This report measures perceptions of corruption in 180 countries across the globe. The latest edition finds that the majority of countries measured stagnated in their anti-corruption efforts over 2022 and that the "COVID-19 pandemic, the climate crisis and growing security threats across the globe are fuelling a new wave of uncertainty".

##### **DFAT Country Information Report IRAQ**

*Australian Department of Foreign Affairs and Trade (DFAT), 16 January 2023*

This report covers topics including but not limited to: the demography, the political system, the human rights framework, the security situation, race/nationality, religion, the death penalty, and torture in Iraq.

##### **Afghanistan: Overview of recent developments and key players in Afghanistan**

*Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD), 22 December 2022*

This document features recent information pertaining to the ongoing situation in Afghanistan, including but not limited to such topics as: The Taliban, vulnerable groups in Afghanistan, Al Qaeda, and resistance groups.

##### **The Russian Federation – Political opposition**

*European Union Agency for Asylum (EUAA), 16 December 2022*

This report provides information regarding political dissent in the Russian Federation for international protection status determination, including refugee status and subsidiary protection. It examines the treatment of groups like journalists and human rights activists, as well as the current legal and political context of Russia.

### **Rethinking Humanitarian Assistance: Climate and Crisis in the Horn of Africa**

*Centre for Strategic and International Studies*, 9 January 2023

This report explores the changing humanitarian needs in the Horn of Africa. It provides a fresh view of the interactions between climate change and other vulnerabilities within the region, finding that novel approaches to addressing humanitarian issues are needed to address emerging threats both in the region and across the globe.

### **To Sleep the Law**

*Human Rights Watch (HRW)*, 29 November 2022

This report takes stock of progress made towards accountability for the killing and injuring of protesters and activists committed during, and in the wake of, the 2019-2020 uprising across central and southern Iraq. It considers two aspects of accountability efforts by the Iraqi government - legal justice for perpetrators of violence, and financial compensation for victims and their families – and highlights specific cases of violence against protesters.

### **Gender-related killings of women and girls: Improving data to improve responses to femicide/feminicide**

*UN Women and UN Office on Drugs and Crime (UNODC)*, 23 November 2022

This report features policy recommendations to support comprehensive and multisectoral approaches to prevent and address gender-related killings and other gender-based violence against women and girls. The findings show that, in 2021, around 45,000 women and girls worldwide were killed by intimate partners or other family members. While these numbers are high, the true scale of femicide may be much higher.

### **Global Wage Report 2022-23**

*International Labour Organization (ILO)*, 30 November 2022

This report explores how wages and their purchasing power have evolved in a world changed by events like COVID 19 and the war in Ukraine. Data from approximately 30 countries covering all regions and income groups show that, on average, wage employees lost about six weeks of wages during 2020-21, and that the loss was larger among women, workers in the informal economy, low-paid workers, and workers in low and middle-income countries.

### **Mixed Migration Review 2022**

*Mixed Migration Centre (MMC)*, 6 December 2022

In its annual report, the Centre's Migration Review reflects on recent events and emerging trends affecting refugees and migrants globally, attempting to document, analyse, and suggest solutions for alternative approaches to current migration policies. The report includes an overview of mixed migration in five regions (Africa, the Middle East, the Americas, Europe, and Asia), interviews with experts, and short essays.

### **"Pandemic or not, we have the right to live": The urgent need to address structural barriers undermining transgender people's rights across Asia and the Pacific**

*Amnesty International*, 14 November 2022

The COVID-19 pandemic caused widespread, and often deeply damaging, disruptions to the health, economic and social lives of millions of people across the world – however, these impacts were not experienced equally. This report documents the experiences of transgender people in 15 countries in South, Southeast and East Asia, and the Pacific Islands during the COVID-19 pandemic.

## ARTICLES OF INTEREST IN THE MEDIA

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

### **Uyghur Women and Forced Marriages in China**

*The Diplomat, 10 December 2022*

According to *The Diplomat*, there have been several attempts by the Chinese government to promote interethnic marriage over the years but, more recently, there has been a worrying trend that has seen over 1 million Chinese government officials sent to live with single Uyghur women or those who do not have husbands. Many are being blackmailed, sexually assaulted, or coerced into marriage due to fear that their relatives may be harmed.

### **Bangladesh's Brutal Crackdown on Political Opposition**

*Human Rights Watch, 9 December 2022*

With elections due again in 2024 and the ruling Awami League party seeking a fourth consecutive term, Sheikh Hasina's government is cracking down on campaign activities by the Bangladesh Nationalist Party. Hasina reportedly stated, "The hands that would be raised against us have to be broken". Awami League members, backed by security forces, have violently assaulted opposition gatherings. Home Minister Asaduzzaman Khan Kamal told the media that the government will not tolerate rallies on the streets. Ostensibly to prevent violence, police have ramped up security, set up check posts at the capital's entry points, and are searching buses and private cars.

### **United States: DHS Designates Ethiopia for TPS, Expands Employment Options for Ethiopian Students**

*Fragomen, 9 December 2022*

The United States has designated Ethiopia for Temporary Protected Status for 18 months from 12 December 2022. Eligible Ethiopian nationals and stateless residents will be able to file for TPS and for employment authorisation and travel permission documents. DHS and DOS have deemed the designation warranted due to the ongoing armed conflict and the extraordinary and temporary conditions related to severe climactic shocks in Ethiopia.

### **'Life is even worse now': Ration cuts and price rises hit refugees in Uganda**

*The New Humanitarian, 8 December 2022*

This article reports that refugees in Uganda "are facing increasing hunger and some are considering returning to their home countries as funding shortages force the World Food Programme (WFP) to cut rations". Uganda hosts approximately 1.5 million refugees from the Democratic Republic of Congo (DRC), South Sudan, and Somalia.

### **Dramatic increase in Andaman Sea crossings, warns UN refugee agency**

*UN News, 2 December 2022*

UNHCR issued an alert over the dramatic increase in the number of people attempting to cross the Andaman Sea, mostly Rohingya refugees travelling from Myanmar and Bangladesh to Indonesia. See also *AP News* (9 December 2022), [Myanmar rescues 154 Rohingya from boat in distress](#)

### **First Nauru refugees arrive in New Zealand under resettlement deal**

*Radio New Zealand, 24 November 2022*

Six men who had been held in Australia's offshore processing facilities for more than eight years arrive in New Zealand. Four are Rohingya Muslims from Myanmar, one is from Sudan, and one is Cameroonian. According to the article, their arrival is "part of an offer made by the New Zealand government to resettle up to 150 people who are or have been detained on Nauru each year for three years".

### **Wagner Group: The Case for a Terrorist Designation**

*Opinion, Julian McBride, Geopolitical Monitor, 10 November 2022*

According to McBride, the Wagner Group's trail of atrocities around the world make it a natural fit for a terrorist designation, which perhaps could help bring about an end to the war in Ukraine by pressuring the Kremlin to come to the negotiating table sooner rather than later.

### **Over 300 Lankan migrants held in Vietnam after dramatic high seas rescue**

*News First (Sri Lanka), 9 November 2022*

305 Sri Lankan illegal migrants were rescued on the high seas between Vietnam and the Philippines, after their vessel broke down. The Sri Lanka's Foreign Ministry said that they are held at a facility close to the Vung Tau province in Vietnam.

## **Recent Case-Law of Interest from Around the World**

### **AFRICA**

#### ***S v Bashala***

(CC 30 of 2018) [2022] NAHCMD 465 (08 September 2022)

The accused was convicted of the illegal smuggling of refugees for financial or other material benefits. The High Court of Namibia had to weigh up her circumstances, the crime committed and the interests of society.

Mitigating factors were found to be the fact that the accused was a first offender and the sole carer of her two children, paying for their rent and transport expenses as they had no other income. She expressed remorse and had a range of severe health issues. Her husband was unemployed and was undergoing cancer treatment. The Court pointed out, however, that ill health cannot become a licence to commit crimes, nor can offenders expect to escape punishment because of health issues.

The aggravating factors considered were that the victims were fleeing from war in their country. They were vulnerable and desperate to find safety and security and were exposed to great danger while travelling to Namibia. These factors contributed towards the seriousness of the crimes. The accused was sentenced to a total of three years' imprisonment.

It is interesting to consider the emphasis placed on the victims' flight from persecution as an aggravating factor. There is an argument to be made that (notwithstanding the profit-making) the accused's assistance to refugees might have been seen, in some jurisdictions, as a mitigating factor.

#### ***Rafea Ahmad Faqirzada and Others v Minister of Home Affairs***

(HC Gauteng, B25/2023, 28 February 2023)

*Faqirzada* involved 22 Afghan nationals who were refused entry into South Africa from Zimbabwe at the Beitbridge Port of Entry after the Gauteng Division of the High Court granted them entry into the country. The case concerned the Ministry of Home Affairs' regulatory action to issue an Asylum Transit Visa, which grants an asylum seeker temporary refuge.

The respondent had refused to grant the applicants entry to South Africa, on the grounds that it had a discretion to refuse entry to persons considered a security risk, without processing an asylum transit visa (issued for the purpose of enabling the person to seek asylum in South Africa). The High Court, however, agreed with the

applicants that Regulation 7 of the Refugee Act No 130 of 1998 required the respondent's immigration officer to issue them with non-renewable asylum transit visas to permit each individual entry into South Africa for the purposes of lodging an application for asylum and that the officer had no discretion to exercise in granting them asylum or refugee status. His role was merely to provide an asylum transit visa as required by Regulation 7 and he had no further discretion to turn the applicants away.

The case sparked much controversy in South Africa, with people asking on what basis the claimants were seeking refugee status in South Africa if they were already in a country (Zimbabwe) that had provided them sanctuary and was not at war.

### ***Shanko Abraham and Others vs The Minister of Home Affairs and Another***

Case No A5055/2021

**(link not available as the decision is not yet online – the online Newsletter will be updated in due course)**

*Abraham* involved Ethiopian nationals who were in South Africa illegally. They relied on the Constitutional Court judgment in *Ruta v Minister of Home Affairs* (CCT02/18) [2018] ZACC 52, to be allowed to apply for refugee status although they had contravened a number of South African laws by staying in the country illegally. The Judges in the Full Court relied on the Constitutional Court in *Ruta* to say that Section 2 of the Refugees Act No 130 of 1998 trumps all the other provisions that deal with illegal foreigners in the country. This is the provision that embodies the non-refoulement principle. The effect of this approach is that other enactments that regulate and seek to control illegal entry into South Africa are rendered nugatory.

Both these cases have just been handed down and it remains to be seen if any appeals will be initiated.

## **AMERICAS**

### ***Canada (Citizenship and Immigration) v Galindo Camayo***

2022 FCA 50 (CanLII)

A Colombian woman who had repeatedly used her Colombian passport to travel to Colombia was found to have re-availed herself of the protection of her country of nationality and the cessation provisions of paragraph 1E of the Refugee Convention, as well as national cessation provisions under para 108 of the Immigration and Refugee Protection Act S. C. 2001 were engaged. The Federal Court found that the RPD had not erred in finding that protection had ceased. Para 84 of the Court's decision sets out the principles applicable in considering cessation.

### ***Rendon Ocampo v Canada (Citizenship and Immigration)***

[2023] FC 80 (19 January 2023)

A family of five Colombian citizens challenged the decision of the Refugee Protection Division that they were neither Convention refugees nor persons in need of protection under section 96 and 97 of Canada's Immigration and Refugee Protection Act, SC 2001, c.27 [IRPA]. The Court upheld the RPD which had found that the applicants had not rebutted the presumption of state protection in Colombia. Nor, the Court held, did it err in failing to consider the claimed sexual orientation of one of the applicants.

As regards state protection, the grounds were no more than a disagreement with properly reached findings of fact.



The Court noted that expert opinion:

“... should not be given exalted status in administrative proceedings simply because it is prepared by a licensed professional: *Molefe v Canada (Citizenship and Immigration)*, [2015 FC 317](#) at para [31](#). The evidence must stand or fall on its own merits: *Moffat v Canada (Citizenship and Immigration)*, [2019 FC 896](#) at para [30](#).”

There was no public law error in the RPD’s reasoning on this question.

The sexual orientation point had not been raised during the RPD hearing, and was not apparent on the face of the record nor from the facts argued before the RPD. The panel member of the RPD spent considerable time with the applicants’ counsel, defining the issues at the beginning of the hearing and gave counsel an opportunity to redefine the issues during testimony and argument:

“... if it was their view that the issues had evolved or were not characterized correctly. However, no further refinement was made. In this context, the RPD cannot now be faulted for failing to consider further issues: *Mariyadas v Canada (Citizenship and Immigration)*, [2015 FC 741](#) at paras [25](#), [32](#).”

The applicant in question had denied belonging to the LGBTQ community in her denunciation, and her later evidence was inconsistent. The applicants had not pointed to evidence establishing widespread persecution and regular targeting of lesbian women, nor did the evidence establish that she was ever targeted on this basis, or that it was a reason for the persecution the applicants feared. The decision of the RPD was upheld.

### ***Winleke v Canada (Citizenship and Immigration)***

[2023] FC 247 (20 February 2023)

In *Winleke*, the Refugee Appeals Division was found not to have erred in law in taking into account the applicant’s failure to seek asylum during a 6-month stay in the United States, even though the US government was known for its hostile immigration policies. Criticism of the style and intensity of the questioning at first instance was insufficient to explain an inconsistent narrative regarding core aspects of the claim, particularly since the applicant was represented by counsel when he completed his application forms: it was reasonable to conclude that the numerous inconsistencies were material to the claim and rationally led to a negative credibility finding against the applicant. The decision of the RPD was upheld.

## **ASIA PACIFIC**

### ***CXG17 v Minister for Immigration Citizenship and Multicultural Affairs***

[2023] FedCFamC2G 52 (2 February 2023)

The difference between claim and evidence was nicely highlighted by the Federal Court of Australia in *CXG17*. In that case, the appellant (from Pakistan) claimed, among other things, to be at risk because (a) recent Islamic State activity was “an additional factor to be considered in the threat assessment to those perceived to hold differing political and ideological views” and (b) his epilepsy would be considered to be a sign of demonic possession.

In reliance on *NABE*; *AWT15*; *MZAPC v Minister for Immigration and Border Protection* [\[2021\] HCA 17](#), the Federal Court of Australia held that (emphasis added):

“... if the Tribunal makes an error of fact in misunderstanding or misconstruing a claim advanced by the applicant and bases its conclusion in whole or in part upon the claim so misunderstood or misconstrued its error is tantamount to a failure to consider the claim.... **The same may be true if a claim is raised by the evidence, albeit not expressly by the applicant, and is misunderstood or misconstrued by the Tribunal.**”

In contrast to this, the Court then held (in relation to the ‘epilepsy’ limb):

“There is possibly a semblance of a claim for protection based on the community’s attitude towards the Applicant as demonic because of his epilepsy. However, there is no substance to the claim and it in my view is tantamount to a mere assertion. There was no probative evidence to support the claim put before the Tribunal.”

The decision thus neatly juxtaposes the obligation on the decision-maker to address a claim (even one not made!) if the evidence raises it, with the obligation on the claimant to establish the claim if he or she wishes to have it considered.

## EUROPE

### ***ZA v Ireland (Application no 19632/20)***

ECtHR (Fifth Section), 9 March 2023

The Applicant, a Nigerian national, complained that his deportation to Nigeria following his conviction for sexual and road traffic offences would entail an indefinite period of exclusion from Ireland and would disproportionately interfere with his right under Article 8 ECHR to respect for his family life and private life. The Court found no violation of Article 8. The indefinite duration of the deportation order did not affect the Court’s assessment that it fell within Ireland’s margin of appreciation.

### ***Kogan and Others v Russia (Application no 54003/20)***

ECtHR (Third Section), 7 March 2023

The case concerned the revocation of a residence permit issued to a human-rights activist, a US national with alleged Federal Security Services involvement. The Court found that there had been gross defects in the procedure leading to the revocation, and that the main aim of the revocation had been to punish the Applicant and her husband for their human-rights activities. The Court held that there had been a violation of Article 8 of the ECHR and Article 18 in conjunction with Article 8.

### ***The Refugee Convention reason of political opinion: two recent cases: a Case Note by Hugo Storey (Honorary President, Europe Chapter)***

Two recent cases of interest to both European and non-European members address in detail the Refugee Convention reason of political opinion: a decision of the UK Upper Tribunal, *EMAP (Gang violence, Convention Reason)* [2022] CG, UKUT 335 (IAC) (16 November 2022); and the judgment of the Court of Justice of the European Union (CJEU) in *P.I.*, Case C-280/21, 12 January 2023. It is convenient to deal with the first to appear - *EMAP*.

### ***EMAP (Gang violence, Convention Reason)***

[2022] CG, UKUT 335 (IAC) (16 November 2022)

Although post-Brexit, *EMAP* required the UK Upper Tribunal under transitional provisions to continue to apply EU asylum law. On political opinion, the Tribunal reconfirmed existing case law<sup>6</sup> which had given this reason a broad reading not necessarily confined to matters pertaining to government or governmental policy. The touchstone was rather that:

“To qualify as political the opinion in question must relate to the major power transactions taking place in

<sup>6</sup> *Gutierrez Gomez v SSHD* [2000] UKIAT 00007 (“Gomez”), endorsed in *RT (Zimbabwe) and others v SSHD* [2012] UKSC 38.

that particular society. It is difficult to see how a political opinion can be imputed by a non-state actor who (or which) is not itself a political entity".<sup>7</sup>

The Tribunal in *EMAP* sees this interpretation as consistent with Article 10(1)(e) of the recast Qualification Directive (QD) which refers to the holding an *opinion, thought or belief* about *them, their policies or methods*, holds a 'political opinion'. They also consider it to be in line with Article 6(c) whose terms can encompass non-state actors such as criminal gangs, so long as there is a lack of effective state protection.

The Upper Tribunal rejected two main objections to it. The first was that such an approach would mean treating the Refugee Convention as designed to protect victims of crime, which it was plainly not. "That is not however", the Tribunal said, "a principle so rigid that all victims of crime must be denied protection: most acts of persecution are, after all, crimes". The second objection was that such an approach was at odds with the reference to '[non-]political' in Article 1F(b)'s (Article 12(2)(b) QD's) exclusion clause. But, said the Tribunal, to read the two 'political's in different parts of Article 1 as identical would ignore the fundamental difference in emphasis and approach between the two.

The broad humanitarian purpose of the Convention has compelled decision makers to take, on the one hand, a flexible and evolutionary approach to who should qualify for protection, and on the other a restrictive, narrow approach to who can properly be excluded. Any differences in approach to a "non-political crime" and "political opinion" can therefore be properly explained by giving the word "political" its ordinary meaning in the light of the relevant context, object and purpose.<sup>8</sup>

In its headnote, the Tribunal set down the following country guidance on gangs in El Salvador, drawing on a considerable body of evidence highlighting how gangs in that country had become closely entangled with state institutions:

- (i) The major gangs of El Salvador are agents of persecution.
- (ii) Individuals who hold an opinion, thought or belief relating to the gangs, their policies or methods hold a political opinion about them.
- (iii) Whether such an individual faces persecution for reasons of that political opinion will always be a question of fact. In the context of El Salvador it is an enquiry that should be informed by the following:
  - (a) The major gangs of El Salvador must now be regarded as political actors;
  - (b) Their criminal and political activities heavily overlap;
  - (c) The less immediately financial in nature the action, the more likely it is to be for reasons of the victim's perceived opposition to the gangs.<sup>9</sup>

<sup>7</sup> *Gomez* [73].

<sup>8</sup> *EMAP* [83].

<sup>9</sup> The decision in *EMAP* also deals with the Convention reason of particular social group, concluding that Article 10(1)(d) is to be read disjunctively, not conjunctively. That conclusion is patently at odds with the CJEU ruling on this matter in *Ahmedbekova* (Case No C-652/16, [EU:C:2018:801](#)) [at §89], which held that this provision imposes "two cumulative conditions". In another respect, however, the Tribunal does raise a question not yet addressed by the Court, namely that this provision, like all the other paragraphs of Article 10(1), sets out an indicative, not an exhaustive list ('in particular...'). If all these paragraphs are indeed non-exhaustive (as seems to have been confirmed in the *P.I.* case, para 26), then it cannot be excluded that a particular social group could exist without satisfying these two cumulative conditions. But, even if the Upper Tribunal's decision not to follow the CJEU ruling in *Ahmedbekova* is untenable as a matter of EU law, it is strongly arguable that the Tribunal's approach is more in line with international refugee law and that the CJEU's cumulative approach is more restrictive than is justified under the refugee definition set out in Article 1A(2) of the Refugee Convention. It is inconsistent, for example, with UNHCR Guidelines on International Protection No 2 (HCR/GIP/02/02), and with the approach taken to 'particular social group' in two leading textbooks, that by Goodwin-Gill, McAdam and Dunlop and that by Hathaway and Foster.

***P.I. v Migracijos Departamentas Prie Lietuvos Respublikos vidaus reikalų ministerijos***

CJEU Case C-280/21, 12 January 2023

*P.I.* was a reference from the Lithuanian Supreme Court about attempts by a refugee status applicant to defend his interests by bringing court action against non-State actors who, he said, had acted illegally against him and had been in a position, because of their corrupt connections with the State, to exploit, to the applicant's detriment, the mechanism by which the State imposes penalties for criminal offences, even where the applicant was motivated to do so in defence of his personal material and economic interests.

As Advocate General Richard de la Tour<sup>10</sup> had done, the Court concluded that the 'political opinion' reason must be given a broad reading. At para 26, they saw that as enjoined by several factors:

- (a) The first is the use of the phrase 'in particular' in order to list, non-exhaustively, the features which may serve to identify that concept.
- (b) Next, not only 'opinions' are referred to, but also 'thoughts' and 'beliefs' on a matter related to the potential actors of persecution and to the 'policies' or 'methods' of those actors, without those opinions, thoughts or beliefs necessarily being acted upon by the applicant.
- (c) Last, the perception of the 'political' nature of opinions, thoughts or beliefs by actors of persecution is highlighted.

The Court also considered a broad reading to be in line with the 1979 UNHCR Handbook (para 27).

The Court highlighted the close link between this reason and the right to freedom of expression in human rights guarantees, in particular Article 11 of the European Charter and Article 10 ECHR. It followed that 'opinion' included "not only 'information' or 'ideas' that are favourably received or regarded as inoffensive or with indifference, but also those that offend, shock or disturb" (para 30). It pointed out further, at para 31, that, insofar as Article 10(2) of the ECHR contains permissible restrictions, these could not cover a matter of public interest relating to exposure of corruption, as "freedom of expression is normally given a high degree of protection where the expression relates to matters of public interest", citing *Perinçek v Switzerland*, §§ 196(i), 197, 230 and 231. Underlining the important role of the doctrine of attribution set out in Article 10(2) QD (recast), the Court at para 31 also saw Strasbourg case law as underlining that 'political opinion' covers any opinion, thought or belief which, without necessarily being directly and immediately political, manifests as an act or omission which is perceived by the actors of persecution mentioned in Article 6 of the directive as part of a matter related to those actors or their policies and/or methods and communicating opposition or resistance thereto.

The Court saw, as one corollary of the fact that political opinion was a broad concept, that it has to be considered in "the general context of the country of origin of the applicant for refugee status, from, inter alia, a political, legal, judicial, historical and sociocultural perspective" (para 33). The Court concluded at para 40 that:

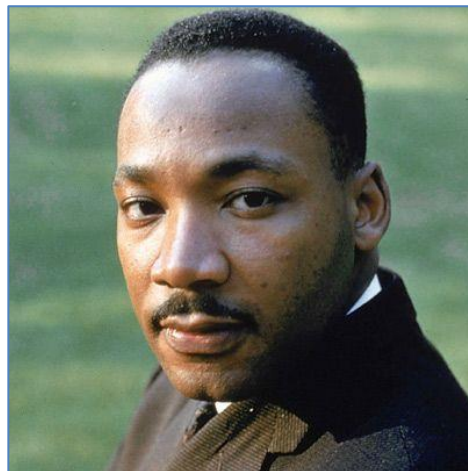
"Having regard to all the foregoing considerations, the answer to the question referred is that Article 10(1)(e) and (2) of Directive 2011/95 must be interpreted as meaning that the concept of 'political opinion' includes attempts by an applicant for international protection, within the meaning of Article 2(h) and (i) of that directive, to defend his personal material and economic interests by legal means against non-State actors acting illegally, where those actors, on account of their connections with the State via corruption, are in a position to exploit, to the applicant's detriment, the mechanism by which that State imposes penalties for criminal offences, in so far as those attempts are perceived by the actors of persecution as opposition or resistance as part of a matter related to those actors or their policies and/or methods."

<sup>10</sup> In his Opinion of 30 June 2022.

For countries that are EU member states, the interpretation of the ‘political opinion’ reason in *P.I.* is binding as a matter of EU law. It can be observed, however, that it adopts very much the same approach as that taken in para 1.6.2.5 of the IARMJ-produced *Judicial Analysis on Qualification for International Protection* (2<sup>nd</sup> ed, January 2023) as well as in the EUAA *Practical Guide on Political Opinion*, December 2022, both of which drew significantly on international jurisprudence.<sup>11</sup> Whilst a small point, it must be doubted that the CJEU is entirely correct at para 27 to say that their broad reading is similar to that set out in the 1979 UNHCR Handbook.<sup>12</sup>

It is interesting to compare the interpretations of ‘political opinion’ as given in *P.I.* and *EMAP*. If there is any specific difference between the two decisions, for EU countries bound to apply CJEU rulings, the *EMAP* decision would be of little value. However, a close reading indicates that the two broadly correspond. Both highlight, for example, the importance of assessing ‘political’ in the light of the particular society. Both confirm that opinions held by applicants regarding non-state actors can sometimes qualify. Both stress that this reason has to encompass not just opinions held by applicants but also those which actors of persecution may attribute to them (the doctrine of attribution).

One possible difference is that, unlike *EMAP* (and the EUAA *Practical Guide on Political Opinion*), the CJEU does not refer to ‘major power transactions’. At the same time, its analysis clearly views ‘political’ as capable of extending *indirectly* as well as directly to non-state actor organisations such as gangs, by virtue of their ‘connection with the State’: see eg para 32 and also paras 37, 40.



4 April 2023 marks the 55th anniversary of the tragic and needless death of **Martin Luther King Jr.**

In accepting the Nobel Peace Prize in 1964, he said:

**“I refuse to accept** despair as the final response to the ambiguities of history.

**I refuse to accept** the idea that the ‘isness’ of man’s present nature makes him morally incapable of reaching up for the eternal ‘oughtness’ that forever confronts him.

**I refuse to accept** the idea that man is mere flotsam and jetsam in the river of life, unable to influence the unfolding events which surround him.

**I refuse to accept** the view that mankind is so tragically bound to the starless midnight of racism and war that the bright daybreak of peace and brotherhood can never become a reality.”

<sup>11</sup> Both of which are available free on the EUAA website.

<sup>12</sup> At para 27 they state that “[T]hose guidelines also provide a broad definition of the concept of ‘political opinions’ in that the concept can include any opinion or issue involving the State, the Government, society or a policy”. But paras 80-86 of the Handbook make no reference, for example, to society.



# 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.

### THE EXECUTIVE

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<b>Americas Chapter President</b>	Judge Esteban Laporte, Costa Rica
<b>Asia Pacific Chapter President</b>	Sean Baker, Australia
<b>Europe Chapter President</b>	Judge Bostjan Zalar, Slovenia

Membership is open to judges and appellate decision-makers, and Associate Membership to interested academics by invitation.

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Russel Zinn, Canada

### THE ASSOCIATION'S WORKING PARTIES

The Association maintains a number of Working Parties, for the advancement and exploration of developments in refugee and migration law. The Convenor of the Working Parties is **James Simeon**, who can be contacted at [jcsimeon@yorku.ca](mailto:jcsimeon@yorku.ca). The Working Parties' Rapporteurs are:

#### Rapporteurs

Artificial Intelligence	<b>John Keith</b>	<a href="mailto:uppertribunaljudge.keith@ejudiciary.net">uppertribunaljudge.keith@ejudiciary.net</a>
Asylum Procedures	<b>Michael Hoppe</b>	<a href="mailto:Michael.Hoppe@vgkarlsruhe.justiz.bwl.de">Michael.Hoppe@vgkarlsruhe.justiz.bwl.de</a>
Deportation	<b>Martin Treadwell</b>	<a href="mailto:Judge.Treadwell@courts.govt.nz">Judge.Treadwell@courts.govt.nz</a>
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