IARMJ report

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INTERNATIONAL ASSOCIATION OF REFUGEE AND MIGRATION JUDGES

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2024

Dear colleagues and friends,

This is our last newsletter for 2023. It has been a busy year so far for IARMJ and we wish to thank you all for your commitment to our association. In 2024, we anticipate the African, Asia Pacific and the Europe Chapter's conferences – we will provide you in due time with all the relevant information – and we will speed up our preparations for the World Conference in 2025.

2023 was a rough year: war in Ukraine, conflicts in Sudan, the Democratic Republic of the Congo and Myanmar, insecurity in Somalia, prolonged humanitarian crisis in Afghanistan, terrorist attacks, and the current situation in Israel and Palestine, have been the main drivers of the alarming new total.

2024 approaches quickly and we wish it to be a peaceful year, governed by humanity, moral values, kindness and compassion.

For some of us, 2023 might also have been a year of endings. But an ending always leads to a new beginning, bringing you all a bright, shiny New Year! And as Edith Lovejoy Pierce said "*The book is called opportunity, and its first chapter is New Year's Day!*"

Happy New Year!

Looking forward to seeing you all soon!

Catherine Koutsopoulou
Co-Editor

HABARI KUTOKA NAIROBI

Update from the President…

Greetings from Nairobi, Kenya.

In recent years, the world has witnessed the ongoing Israel-Palestinian conflict and the subsequent migration crisis that has emerged from it. These interconnected issues have captured global attention, leading to discussions around the complex challenges faced by both Israelis and Palestinians, as well as those impacted by the migration crisis.

The Israel-Palestinian conflict is rooted in a long-standing territorial dispute over the historic region of Palestine. Today, both Israel and Palestine seek sovereignty and control over certain territories, resulting in a protracted conflict that has seen several rounds of violence over the years. The conflict has deeply affected the lives of individuals on both sides, with casualties, the destruction of infrastructure, and widespread trauma being unfortunate consequences.

As a result of the ongoing conflict, a significant migration crisis has emerged. Palestinians, driven by a desire for safety, stability and economic opportunities have been forced to seek refuge in neighbouring countries and beyond. This mass displacement has put pressure on existing host countries, leading to a strain on resources and a need for humanitarian aid.

The international community has responded to the Israel-Palestinian conflict and the migration crisis with varying degrees of involvement. Numerous nations have shown solidarity with both Israelis and Palestinians, calling for diplomacy and immediate dialogue. Humanitarian organizations, too, have been providing assistance to those affected by the conflict and supporting the affected communities.

While the path to peace in the region is undoubtedly challenging, dialogue and negotiation remain the most viable routes forward. Many individuals and organizations have advocated for a two-state solution, calling for Israelis and Palestinians to coexist within secure borders. The pursuit of a just resolution that respects the rights of both parties is imperative for long-term stability and prosperity.

As global citizens and as decision makers in asylum claims, it is important for us to stay informed about the Israel-Palestinian conflict and the migration crisis. That way, our decisions would be informed by impartial yet realistic appreciation of the facts and applicable law.

In conclusion, understanding the Israel-Palestinian conflict and its impact on migration is essential to fostering empathy, advocating for peaceful solutions and actively contributing to building a more compassionate and just world.

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

Judge President Dunstan Mlambo

Dear Colleagues,

It is apposite to congratulate our President, Justice Isaac Lenaola and the World Conference Organising Team, for arranging a successful conference in The Hague, in May 2023. Even though 2023 proved difficult from a fund-raising perspective, our Organising Team pulled off a spectacular conference.

In all respects, that conference was significant in featuring topical developments in the Refugee and Migration law realm. It's a conference that told us in no uncertain terms that the world of Refugee and Migration law is in flux and that we should keep our fingers on the pulse so to speak. The Africa Chapter was well represented in the World Conference, despite our struggle with funding. I must thank the UNHCR and EUAA for once more ensuring that a sizeable number of Judges from each sub regional chapter, was funded to attend the World Conference. In the case of the EUAA, it was instrumental in funding a big number of Judges from North Africa and Niger. We also appreciate the EUAA's commitment to the professional development of Judges in those two regions, in Refugee law. We will continue our cooperation with the EUAA in its envisaged projects in North Africa and Niger.

In our Chapter meeting there, we initiated the conversation regarding our next Regional Chapter conference in 2024, with particular focus on the venue. We firmed up a resolution that the Regional Chapter conference be convened in North Africa, Egypt or Tunisia. Discussions are ongoing as we speak to firm up the arrangement, and we should be able to finalize that part in the next two months.

We are also exploring convening a small regional seminar in West Africa targeting French speaking West Africa, to be specific. In the event that we are successful in holding this seminar, the idea is to create enough awareness and interest in French speaking West Africa to pave the way for our next Regional conference in that region in 2026.

In South Africa, we have just concluded a very successful Southern Africa Judicial Education Institute (SAJEI) training programme in Hermanus, Western Cape. I was allocated a slot, as Africa Chapter President, to make a presentation on refugee law. We had an attendance of over 100 Judges from South Africa, Malawi and Botswana. My presentation covered the most recent jurisprudence from the South African Constitutional Court, featuring *non refoulement*. This emerging jurisprudence has generated a lot of interest, in the country and regionally, due to the unabating economic migration directed at this country. SAJEI has agreed that it will make refugee law a permanent part of its programme in its future offerings. This is great news as a lot of South African Judges are called upon on an increasing scale, to preside over refugee law related cases.

I am also involved in discussions with the South African Department of Home Affairs and the UNHCR's office based in South Africa, to see if we can host a refugee law conference that involves South African role players. This discussion is long overdue in view of the centrality and interest that is generated about refugee law cases in this country especially coming from the Constitutional Court.

Two weeks ago, a Full Court in the Gauteng Division, in three judgements, ruled offside the decision of the Minister of Home Affairs in terminating the Zimbabwe Exemption permits (ZEP) issued to some one hundred and seventy-eight thousand Zimbabweans who have lived in South Africa for some 10 years. In another development, in fact in the most recent judgment coming out of the Constitutional Court i.e., *Ashebo vs Minister of Home Affairs and Others*, the Constitutional Court has deviated somewhat from the stance it adopted in *Ruta vs Minister of Home Affairs* and *Abore vs Minister of Home Affairs*, in which it ruled that the detention of illegal foreigners, who had delayed applying for asylum, no matter how long, was illegal and violated the principle of *non refoulement*. In the recent matter (*Ashebo*), the Constitutional Court has affirmed amendments to the Refugees Act and ruled that, despite an expression of an intention to apply for asylum, the detention of illegal foreigners aimed at establishing good cause for their illegal entry into the country and their delay to apply for asylum, did not negatively impact the principle of *non refoulement*.

Lastly, I confirm that the training programme run by our Centre of Excellence at the University of Cape Town, is progressing smoothly. We hope to make progress in the establishment of French and Portuguese Centres of Excellence.

Mlambo JP

President, Africa Chapter

AMERICAS CHAPTER

Dear Colleagues,

In my last report, I discussed the challenge to the Safe Third Country Agreement. This report provides a summary of a proceeding asking that the Canadian Government repatriate Canadian citizens detained abroad, in light of a recent development in a case by the Federal Court of Appeal. This case has garnered attention from the public, namely media, activists, and academics.

Background

In 2011, the conflict in Syria developed into a protracted crisis causing one of the most severe humanitarian disasters in the 21st century. This conflict attracted extremists from all over the globe. The Global Coalition between Kurdish forces and other states led to a significant defeat of Daesh in March 2019. After this defeat, the Autonomous Administration of North and East Syria ("AANES") took *de facto* control over north-eastern Syria.

Many foreign fighters who came to join the conflict or other third-country nationals remain in AANES territory. One report estimates the number to be approximately 12,000 individuals, including 7,300 children. AANES has urged that countries repatriate their citizens, and has recently announced that it will be putting foreign nationals on trial after their home countries refused to repatriate them. Several countries have repatriated women and children, including but not limited to Kazakhstan, Tajikistan, Uzbekistan, Kosovo, Albania, Kyrgyzstan, Germany, Denmark, the United States of America and Canada.

This Canadian court case involves individuals who remain in AANES territory. The acronym used to describe this group of individuals is "BOLOH," which stands for "Bring Our Loved Ones Home." Canadian citizens (the "Applicants") travelled to Syria and found themselves detained for a number of years in centres controlled by AANES on suspicion that they fought for or assisted Daesh. One of these individuals has alleged that he was tortured; the courts have agreed that the men are being held in deplorable conditions.

Federal Court

In September 2021, a legal challenge was brought to the Federal Court by 6 Canadian women, 13 Canadian children, and 4 Canadian men. The Canadian Government agreed to repatriate the women and children, but the claims of the 4 men remained unresolved.

The Applicants sought that the Canadian Government repatriate them to Canada, arguing *inter alia* that the Canadian Government's failure to repatriate them breached subsection 6(1) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). This provision provides that "[e]very citizen of Canada has the right to enter, remain in and leave Canada."

Justice Henry Brown found that subsection 6(1) of the *Charter* is aimed at prohibiting the banishment or exile of Canadian citizens, which included preventing the Canadian Government from severing or interfering with the right of Canadian citizens to return to Canada. Relying on jurisprudence from various courts, he found that this constitutional right was "expansive, generous and powerful," and was "foundational" and "fundamental," facilitating the "right to have rights". His reading of the jurisprudence and the interpretation that subsection 6(1) included a "right to return" was informed, in his view, by Canada's commitment to international law, treaties, and bodies, Canadian constitutional history, and jurisprudence stating that Canada's Government is not exempt from constitutional scrutiny in international affairs.

With this interpretation of subsection 6(1), Justice Brown had "no difficulty" finding that the Applicants had established a right to obtain emergency travel documents from the Canadian government. He further found that the Applicants' ability to return to Canada would be "illusory" without the Canadian government first asking AANES for repatriation. Justice Brown also concluded that the Applicants were entitled to a declaration requiring Canada to appoint delegates or representatives to accept the hand over from AANES.

Federal Court of Appeal

The Canadian Government appealed this decision to the Federal Court of Appeal. They maintained that the Federal Court erred in its interpretation of subsection 6(1) of the *Charter* and in its remedies. In a decision dated May 31, 2023, The Honourable Acting Chief Justice Stratas, writing unanimously for the Federal Court of Appeal, agreed.

Acting Chief Justice Stratas first began with an analysis of interpreting constitutional rights under the *Charter*. He found that recent Supreme Court of Canada decisions determined that the text of a *Charter* right or freedom has "primordial significance" in the interpretive task, guiding courts' search for the scope and purpose of the right in considering the philosophical and historical context, larger objects of the *Charter*, and, where applicable, the meaning and purpose of associated *Charter* rights. He also found that an analysis of Canada's constitutional structure can shed light on the theories upon which the text of the

Charter is based, and that international and foreign law can play a role in interpreting *Charter* rights by supporting or confirming the approach that looks for the purpose of a *Charter* right.

With this interpretive framework, Acting Chief Justice Stratas found that subsection 6(1) of the *Charter* does not include a right to return to Canada, determining that such an interpretation "overshoots its proper scope." He relied upon jurisprudence from various Canadian courts, as well as international law, in support of this interpretation. Acting Chief Justice Stratas ruled that:

> "*[c]an the Government of Canada voluntarily try, through diplomacy or other means, to help a citizen in distress abroad? Of course it can. But, as a matter of constitutional law, does it have to? Of course not. Subsection 6(1) of the Charter, the right to enter, remain in and leave Canada, is not a golden ticket for Canadian citizens abroad to force their government to take steps—even risky, dangerous steps—so they can escape the consequences of their actions*."

Having determined that subsection 6(1) of the *Charter* did not extend to the repatriation of individuals abroad, Acting Chief Justice Stratas found that Justice Brown's declarations were "disguised mandatory orders or disguised *mandamus* remedies against the Government of Canada". He found that the prerequisites for mandatory obligations or *mandamus* were not met and that the Federal Court accorded insufficient deference to the Canadian Government in crafting these remedies. Finally, he rejected that subsection 6(1) of the *Charter* imposes a positive obligation on the Canadian Government to repatriate these individuals, as such an interpretation of this provision would create a right with "potentially limitless scope. It would cover cases ranging from the repatriation of someone detained abroad for whatever reason, including the alleged violation of foreign law in a foreign land, to the payment of ransom to foreigners holding a Canadian citizen hostage." Nonetheless, Acting Chief Justice Stratas stated that while the Constitution does not demand the Canadian Government repatriate these men, "these reasons should not be taken to discourage the Government of Canada from making efforts on its own to bring about that result."

The Federal Court of Appeal therefore allowed the appeal, set aside the Federal Court's judgment, and dismissed the application.

Supreme Court of Canada

On August 23, 2023, an application for leave to appeal was filed at the Supreme Court of Canada.

Shirzad Ahmed

President, Americas Chapter

ASIA PACIFIC CHAPTER

Dear Colleagues,

This quarter, the Asia Pacific Chapter has continued planning for the regional conference to be held next year. In Australia at the Administrative Appeals Tribunal (AAT), we were lucky to be able to host our Norwegian colleague Johan Berg for a visit. We have also had an influx of new members to the chapter with the appointment of new AAT members.

Johan Berg attended the Sydney registry of the AAT, where we had a fruitful discussion about the special status and significance of child applicants and their treatment in Norway and Australia. Johan was able to sit in on a hearing, and we were lucky to have him join us for a lunch in his honour overlooking the water. Please come back soon Johan!

This quarter the AAT in Australia has undertaken the largest recruitment process in its history. I have been heavily involved in the training which has included intensive RSD training for the new decision makers, using a number of IARMJ resources!

Planning continues for the regional conference, and we are looking forward to announcing this shortly.

Sean Baker

President, Asia Pacific Chapter

EUROPE CHAPTER

Dear colleagues,

The list of some invitations to the IARMJ-Europe for recent and forthcoming training services and round table discussions for judges/lawyers in Europe:

Boštjan Zalar

5 October 2023, Kiev (on-line): roundtable for judges of appellate courts in Ukraine: "*The role of judges in harmonization of international protection in Ukraine to the EU standards",* organised by the UNHCR and the Right to Protection in Partnership with HIAS; presentation of the topic: "*Challenges for national judges in push-back cases in the context of rule of law crisis in Europe.*"

13 October 2023, Belgrade (on-line): *Round table on experts' opinion as evidence in the asylum procedure* (for judges, refugee counsellors and decision makers)organised by the UNHCR and Belgrade Centre for Human Rights (BCHR), presentation of the topic: "*Use of expert evidence in international protection cases in the context of European standards on rigorous assessment of risk of persecution or serious harm and rigorous judicial control of administrative decisions*".

27 October 2023: on-line round table on "*Death Penalty in America*", organised by the American Constitution Society and European Law Institute; in the capacity of being a President of the IARMJ-Europe and co-chair of the European Law Institute's Special Interest Group on Fundamental Rights, Boštjan Zalar presented the topic: "*European evidentiary standards and procedural rules concerning protection against death penalty or prohibition of (torture or) inhuman or degrading treatment or punishment in four different situations"* (asylum and non-refoulement cases / life sentence without parole in domestic context / life sentence without parole in extradition context / extradition in cases of citizens of the EU or EFTA countries).

23 November 2023, Belgrade: Training event for judges of the Administrative Court of the Republic of Serbia on extradition (and its interplay with asylum disputes), organised by the UNHCR office in Serbia.

30 November 2023, Cyprus: training event for judges of the International Protection Administrative Court organised by the UNHCR and European Council on Refugees and Exile (ECRE); presentation of the topic: "*Introduction and credibility assessment in asylum cases under Article 4 of the Qualification Directive".*

7 December 2023, Ljubljana: conference on *Preventing, Combating and Responding to Trafficking in Human Beings in the Context of Asylum and Migration* organized by UNHCR, the Council of Europe, Ministry of the Interior of the Republic of Slovenia and NGO "Ključ"; presentation of the topic: "*Experiences with (early) identification of vulnerability in relation to (possible) trafficking of applicants in asylum cases".*

In early October, the UNHCR (Carole Dahan) extended an invitation to the IARMJ for a training event in Israel. Talks with experts of the local UNHCR have started, but the event is postponed due to war circumstances.

Opinion of Advocate General in the case X (C-392/22, 13 July 2023).

This case relates to the interpretation of the principle of mutual trust between Member States under Dublin Regulation 604/2013 in situations where it is established that the applicant has been already subjected, more than once, to summary refoulement from the external borders of the competent Member State, and to allegedly unlawful detention at the border control post of that Member State in conditions that did not meet applicant's needs (paras. 2, 18, 27).

This case is highly relevant for several reasons. Some national courts in the Member States in the period from 2020 onwards, for example in Germany (Hannover, Stuttgart, Braunschweig), in the Netherlands, Switzerland or Belgium have quashed certain decisions on transfers to another Member State in situations where border procedures and access to (asylum) procedure were (also) taken into account while applying the principle of mutual trust. In those cases national courts sent cases back to administrative authorities to obtain special guarantees that basic human rights of applicants will not be violated in case of a transfer.

The Advocate General (AG), in the case of X, stated that the practice of summary refoulement from the border of a Member State affects the proper functioning of the Common European Asylum System in its external dimension, in that it does not guarantee access to international protection (para. 32; se also para. 30). However, he made an assessment that, even if the aforementioned arguments about border procedures are attested by objective, reliable, specific and properly updated information, that information isnot sufficient to displace the principle of mutual trust and thus preclude implementation of the transfer decision adopted pursuant to Article 29 of the Dublin Regulation 604/2013 (paras. 27-28).

Those arguments, in so far as they concern practices relating to the conditions prevailing over the crossing of the external borders of a Member State and over the making of applications for international protection at those borders, do not cast light on the conditions which can be expected to prevail over the taking in charge of the applicant in the event of a transfer to that Member State (para. 29; see also paras. 33, 34, 35).

The nature and seriousness of the risk of inhuman or degrading treatment faced by the applicant by reason of the transfer to the Member State must be assessed in the light of "*specific information*" relating to the flaws or deficiencies exhibited by that Member State "*in circumstances objectively comparable to those in which that applicant would be after the transfer had been carried out*," in his or her capacity as applicant during the process of examination of the application, and then in his or her capacity either as beneficiary of refugee status or subsidiary protection upon conclusion of that process, or in his or her capacity as third-country national awaiting removal in the event of the application being rejected (para. 34).

The AG concludes that, in the absence of objective, reliable, specific and properly updated information capable of demonstrating the existence, in the Member State normally responsible, of systematic or generalised flaws affecting the system of international protection or of flaws affecting the taking in charge and treatment of an "*objectively identifiable group of persons to which the applicant belongs,*" there is no valid reason for the competent authority to presume that the treatment that will be given to the applicant, during the process of examination of his or her application and upon conclusion of that process, will expose him or her to a risk of inhuman or degrading treatment (para. 34).

On the contrary, the competent authority is required to make its assessment on the basis that fundamental rights, including those deriving from the Convention Relating to the Status of Refugees, as well as from the ECHR, will be respected, in accordance with the principle of mutual trust (para. 36). In those circumstances, the competent authority cannot therefore be authorised to require the Member State to provide further information or individual guarantees as to the reception and living conditions of the applicant during the examination of the application and upon conclusion of that examination, as that would be contrary to the principle of mutual trust between the Member States.

Furthermore, given that such actions would require additional time, they would not make it possible to guarantee the rapid determination of the Member State responsible and the rapid processing of applications, despite these being objectives which the EU legislature was seeking to achieve through the Dublin Regulation 604/2013 (para. 37).

In the opinion of the AG, where the assessment "*reveals the existence of substantial grounds for believing that the applicant would be at risk of inhuman or degrading treatment if he or she were transferred"* to the Member State responsible, in such a case, the principles of mutual trust and administrative cooperation on which the Dublin Regulation is based require, that the competent authority asks the Member State normally responsible, on a case-by-case basis, to provide further information or adequate individual guarantees as regards the reception conditions that the applicant will encounter or the conditions under which it will take charge of the applicant, in order to implement the transfer decision in accordance with Article 4 of the Charter (para. 68).

It remains to be seen to what extent this opinion will be confirmed by the CJEU given that the opinion combines legal interpretation (of the principle of mutual trust) with the factual assessment and whether the CJEU will take into account that principle of presumption of equivalent protection under case law of the ECtHR requires that rigorous assessment of a risk is required when the applicant has an "arguable claim" in relation to Article 3 of the ECHR. It is worth comparing this issue with the interpretation of the CJEU in the case B (C-233/19, paras. 63-66).

Boštjan Zalar

President, Europe Chapter

Berlin Workshop

From 2 June 2024 to 4 June 2024, IARMJ-Europe will hold its traditional Berlin-Workshop- this time dedicated to Climate Change, Socio-Economic Deprivation and the Non-Refoulement Principle and thus laying an emphasis on the "Migration-M" in IARMJ.

In a world order that is threatened by climate change and that suffers from numerous armed conflicts, persecution in the meaning of the Refugee Convention is no longer the main driving factor for migratory movements and for protection claims.

Jacob Schewe, Working Group Leader at the Potsdam Institute for Climate Impact Research, will present ideas and models on the impact of climate change on migratory movements. Which movements are to be expected in the upcoming decade(s)? The workshop will then turn to legal standards for protection against socio-economic deprivation and climate related threats in the country of origin. Camilla Schloss, judge at the Administrative Court of Berlin with a prominent research interest **in non-refoulement and climate migrants**, will present standards as they are set out in or can be derived from supra- and international jurisprudence – "*Sufi & Elmi*, *Teitiota* (and others?)".

The final part of the morning session shall than treat standard(s) and burden of proof in cases related to climate, socio-economic deprivation or medical conditions. As a working assumption, there is a cacophony of standards in the different jurisdictions across Europe. The workshop wants to present different perspective from three randomly chosen (not only EU) countries. We will see whether the working assumption will stand our presentations and discussions.

The afternoon will then, as always, be open for some case studies. The team of organiser (Antonia Vischer, Benjamin Schneider, Dirk Maresch and Michael Hoppe) will soon contact some colleagues and ask for case examples derived from case law form different countries. If You are willing to contribute, please feel free to contact info@iarmj.org with ideas or even a finalised case study (max 2 pages).

On Tuesday, the participants will have the opportunity to meet two members of the Home Affairs Committee of the Deutsche Bundestag (First Chamber of German Parliament) who will be discussing law making processes in the highly unionised and highly politically disputed field of migration and refugee law. Time permitting, we might have a tour of the Reichstag (parliament building) before the workshop ends around 1 pm.

The full programme will be available and registration will be open most likely in December 2023.

Antonia, Benjamin, Dirk and I are looking forward to meeting you on the premises of the European Academy Berlin next spring!

Michael Hoppe

Vice-President, Europe Chapter

Peter SHOWLER Obituary

PETER SHOWLER

February 17, 1944 - October 30, 2023

Peter spent his early eras of idealistic, sometimes dangerous, self-indulgent, and errant foolishness in Europe, the west coast of Vancouver Island, and the Kootenay Mountains.

He was eventually led back to civilization by Tibetan Buddhism, finding Dalhousie Law School and marriage to Ellen Zweibel. He embarked on a career of social justice advocacy in Ottawa and soon found himself one among many: a group of brilliant, idealistic lawyers, legal workers, community workers, and academics. Peter worked as a co-director of Community Legal Services of Ottawa.

Peter became a member of the Immigration and Refugee Board of Canada in 1993 and the Chair of the Board in 1999. He also taught immigration and refugee law at the University of Ottawa Faculty of Law. In 2003, he was appointed the Gordon Henderson Chair in Human Rights; from 2006-2013, he was Director of Refugee Forum: a research and education project housed in the university's Human Rights Research and Education Centre. With the UNHCR, he undertook training and development projects in Malawi, Ireland, Lebanon, Tanzania, Japan, South Africa, Switzerland and Mexico.

The following obituary was published in the Globe and Mail shortly after his death:

> In recognition of his contributions to refugee law and for his mentorship of the next generation of refugee lawyers, Peter was awarded the Order of Canada in a private ceremony in September of this year. He was thrilled to receive the honour from Governor General Mary Simon, whom he greatly admired. Peter wasn't a big fan of awards - he preferred to acknowledge all contributors - but was deeply moved by the depth and detail of nomination letters from the refugee advocacy community, former students, refugees, and translators. Throughout his career, it was his honour to work with many refugees who brought their courage and talents to this country along with their need for protection.
>
> Peter is the author of Refugee Sandwich: Stories of Exile and Asylum and co-author of Flight to Freedom: Stories of Escape to Canada, as well as innumerable reports, plays, and policy briefs. He is also the author of a novel, television series, film script, and non-descript poetry – all inexplicably unpublished.

> Peter leaves his daughter Dr. Adrienne Showler, her husband, Jack Morgan, and their twin daughters, Caroline and Julianne Showler Morgan. He also leaves his daughter Suzannah Showler, a writer, her husband, Andrew Battershill, and their daughter Djuna Battershill. They have all been an endless joy in his life. And finally, he leaves his wife and heart companion of 42 years, Professor Ellen Zweibel, without whom: chaos.
>
> As refugees we all pass by, pass into, one another, often unknowingly, sharing the secret we too often forget. Remembrances can be made in the form of contributions to Daricha: an independent organisation sustaining underground schools for girls in Afghanistan (www.darichaschool.com)
>
> *Published by The Globe and Mail*
>
> *Nov. 4 to Nov. 8, 2023.*

Peter will be a huge loss, to his family, to his colleagues, and to the global refugee and migration law community. IARMJ is grateful for all his contributions to our work, and for all the fun when we were at play.

To plant trees in Peter's memory, please visit the Sympathy Store**.**

WORKING PARTY UPDATES

Climate, Migration and Protection Pathways

The working party came into existence at the IARMJ Conference held in Netherlands in May 2023, led by Nurjehan Mawani from Canada as Rapporteur, with Judge Makesh D Joshi, from the United Kingdom as Associate Rapporteur.

The goal of the working party is, ultimately, to develop a set of guidelines that can be shared with all the chapters of the IARMJ in the coming years to be incorporated as a series of professional development courses and topics. This will assist in addressing refugee and migration caused by climate events around the world.

The first step to achieve that goal is to enhance our knowledge base on this topic. The working party has held virtual meetings over the summer to share academic materials and databases of case law dealing with climate change in the context of protection.

This will provide us with a platform to develop a toolkit, which will be further developed through feedback as and when we receive it.

Toolkit: Knowledge base to assist decision makers on the topic of addressing refugee and

The working party has planned more virtual meetings over the next months and will be in a better position to provide further updates at that time.

IN THE LIBRARY

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

"They Fired on Us Like Rain"

Human Rights Watch (HRW), 21 August 2023

According to Human Rights Watch, Saudi border guards have killed hundreds of Ethiopian migrants and asylum seekers who sought to cross the Yemen-Saudi border between March 2022 and June 2023. In this 73-page report, HRW asserts that Saudi border guards have used explosive weapons to kill many migrants in a widespread and systematic pattern of attacks.

Sudan: "Death came to our home": War crimes and civilian suffering in Sudan

Amnesty International, 3 August 2023

Since 15 April 2023, thousands of people in Sudan have been killed or injured in deliberate and indiscriminate attacks as part of the conflict between the Rapid Support Forces and the Sudanese Armed Forces. Some of the violations committed by those party to the conflict amount to war crimes. This report is based on research carried out between 15 April and 26 July 2023.

International protection considerations with regard to people fleeing Colombia

UNHCR, August 2023

This report details developments within Colombia that may impact the ongoing assessment of international protection needs. It covers issues relating to the political, security, human rights and humanitarian situation up to June 2023.

Cults and online violent extremism

Global Network on Extremism and Technology, 31 July 2023

The term 'cult' or 'cultic' has taken on an array of new connotations as the internet has become an embedded part of human society. A cult following is, by some measures, an aspirational trait for brands, influencers or musicians, and the term in some uses no longer implies the kind of idolatry or religious fervour it did even 20 years ago. However, more traditionally cultic environments persist in online spaces, and this report explores the ways in which all forms of online 'cult' cross over, as well as the nuances necessary for decision makers to understand when making assessments about an individual's engagement with such environments.

The State of Bangladesh's Political Governance Development and Society: According to Its Citizens

The Asia Foundation, 29 August 2023

This report is a national-level citizen perception survey conducted by The Asia Foundation in Bangladesh. A key focus of the survey includes citizens' perception of Bangladesh's society, politics, and economy, perception of political governance and representation, the Rohingya issue, and gender dynamics, among other contemporary issues. The fieldwork for this report covers the period from November 2022 to January 2023.

Asia-Pacific Migration Data Report 2023

IOM, 15 August 2023

The Asia–Pacific Migration Data Report 2022 is a comprehensive collection and analysis of the latest available migration data, offering valuable insights into the observed trends throughout 2022. The report is structured around the six core, thematic pillars of the IOM Asia-Pacific Regional Data Hub, including Migration Statistics, Types of Migration, Migration and Vulnerability, Migration and Development, Migration Policy and Migration and Innovation, providing a holistic framework for understanding the multifaceted nature of migration in the region.

ARTICLES OF INTEREST IN THE MEDIA

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

What's behind the violence that has displaced 60,000 in India's Manipur?

The New Humanitarian, 23 August 2023

A month-long conflict between the Kuki and the Meitei erupted in the Indian state of Manipur. The unrest erupted after a High Court order directed the state government to grant "Scheduled Tribe" status to the Meitei. The status offers the Meitei (who have suffered historical disadvantage) opportunities in education, jobs, electoral posts, and land rights. According to the article, the Kuki people perceive the new tribal status as a threat to their survival.

Turkey: Police step up shadow campaign to deport immigrants and refugees

Middle East Eye, 22 August 2023

This article reports that Turkey launched "a silent campaign" to reduce the number of refugees and migrants within its borders. According to the article, police increased spot checks on the streets of Turkish cities. Police often stop those suspected of being in Turkey illegally and check the validity of their residency documents.

Maritime Chessboard: The Geopolitical Dynamics of the South China Sea

Dr Hasim Turker – Geopolitical Monitor, 18 August 2023

This article discusses South China Sea's strategic importance, the geopolitical environment and "intensified rivalry". South China Sea accounts for 12% of the world's total fish catch and has untapped reserves of oil and natural gas. "These resources contribute to the wealth and potential economic growth of bordering nations".

Southern African Leaders Silent over Abuses in Mozambique

Zenaida Machado - Human Rights Watch, 18 August 2023

Civilians in the Cabo Delgado region of Mozambique have suffered serious human rights abuses at the hands of the Islamic State-linked armed group Al-Shabab and the Mozambican forces fighting them. Since 2021, soldiers from different countries of the Southern African Development Community (SADC) have been deployed to assist the Mozambique government's fight against the armed group. Although the regional troops have been credited with helping to secure towns, enabling safer passage of humanitarian aid and the return of displaced people, "they have also been implicated in abuses, notably the mistreatment of the dead."

Military's Gain is Democracy's Loss in Peru

Caleb Mills - Geopolitical Monitor, 18 August 2023

Peru is set to increase military spending. In 2023 alone, the budget is set to expand by nearly $100 million, with a final budget projection of $2.6bn by 2028. The expansion of military strength raises questions for the future of Peruvian democracy.

Mobs burn Christian churches, homes in Pakistan after blasphemy allegations

Al Jazeera, 16 August 2023

Armed mobs have attacked at least two churches in Punjab province's Jaranwala town, accusing two Christian residents of blasphemy. Police also filed a report against two local Christian residents under Pakistan's controversial blasphemy laws. Blasphemy is a sensitive issue in Pakistan as mere accusations can lead to widespread violence. Rights groups say Pakistan's blasphemy laws have often been used for personal reasons.

Malaysia Threatens Prison for Possession of LGBTQ-Themed Swatch Watches

The Diplomat, 11 August 2023

Anyone buying or selling LGBTQ-themed Swatch watches could face arrest and up to three years in prison, Malaysia's government said yesterday, the latest sign of growing official intolerance toward the country's LGBTQ community. In May, authorities raided 11 Swatch outlets and confiscated 164 watches from its Pride Collection. In Malaysia, same-sex sexual activity remains prohibited under Section 377 of the country's colonial-era Penal Code.

RECENT CASE-LAW OF INTEREST FROM AROUND THE WORLD

AFRICA

LIDHO and Others v Republic of Cote d'Ivoire

(Application 041/2016) [2023] AfCHPR 21 (5 September 2023) (**English**) (**French**)

On 19 August 2006, the cargo ship MV Probo Koala, chartered by Trafigura Ltd, docked at Abidjan and discharged 528m3 of highly toxic waste which was dumped at several sites in Abidjan. No site had chemical waste treatment facilities. Air pollution ensued and a stench spread through Abidjan. Thousands of people went to health centres with nausea, headaches, vomiting, rashes and nosebleeds. 17 people died of toxic gas inhalation. Hundreds of thousands were affected and there was severe groundwater contamination.

Côte d'Ivoire attempted to settle with Trafigura by an MoU under which Trafigura would pay 95 billion CFA (73 billion for the State and the victims and 22 billion for the clean up) in return for immunity in respect of any further claims and the dropping of charges against three Trafigura executives.

In 2008, criminal proceedings were commenced against 12 individuals for toxic dumping. An Association of Victims attempted to have the case stayed (presumably to ensure they received compensation from Trafigura via the State) but the matter proceeded and the 12 were convicted.

Proceedings were then brought against Trafigura by the families of 11 victims who died and more than 16,000 people who had been affected. On 27 July 2010, the Court of First Instance found Trafigura and its subsidiary, Puma Energy, liable and ordered them each to pay 100,000,000 CFA to the families of7 of the 11 victims. The Court of Appeal then overturned this on the grounds that the State was obliged, under the MoU, to "settle all

compensation claims". However, the Supreme Court overturned the decision of the Court of Appeal and found Trafigura and Puma Energy liable to pay damages of 50,000,000 CFA to the families of the 7 deceased persons.

The applicant human rights organisations then brought proceedings in the African Court of Human and People's Rights, alleging the following violations:

> i. The right to an effective remedy and the right to seek redress for harm suffered, protected by Article 7(1)(a) of the African Charter on Human and Peoples' Rights (the Charter), read in conjunction with Art 26 of the Charter, 2(3) of the ICCPR, 2(1) of the ICESCR, 4(1) and 4(4)(a) of the Convention on the Ban of the Import into Africa of Hazardous Wastes and the Control of Transboundary Movements of Hazardous Wastes within Africa;
>
> ii. The right to respect for life and physical and moral integrity of the person, protected by Arts 4 of the Charter and 6(1) of the ICCPR;
>
> iii. The right to enjoy the best attainable state of physical and mental health, protected under Arts 16 of the Charter 11(1), and 12(1) and (2)(b)and (d) of the ICESCR;
>
> iv. The right of peoples to a general satisfactory environment favourable to their development, protected under Art 24 of the Charter;
>
> v. The right to information, protected by Arts 9(1) of the Charter and19(2) of the ICCPR;
>
> vi. The rights protected by the 2003 African Convention on the Conservation of Nature and Natural Resources.

Many remedies were sought, including compensation. There is room here to discuss only one issue in the case.

Among many defences, the State argued that the Court lacked jurisdiction because Article 3 of the Protocol to the Charter extends the jurisdiction of the Court only to cases about the interpretation and application of the Charter, the Protocol and any other relevant human rights instrument ratified by the States concerned. The Convention on the Ban of the Import into Africa of Hazardous Wastes and the Control of Transboundary Movements of Hazardous Wastes within Africa was not, it was argued, a human rights instrument.

In dismissing this argument, the Court noted that the Convention is not framed in terms of specific rights for individuals. However, certain provisions impose obligations on States to implement the rights for individuals or groups in various human rights treaties. It noted that Art 2 of the Convention prescribed that States shall:

> [...] adopt the measures necessary to ensure conservation, utilization and development of soil, water, flora and faunal resources in accordance with scientific principles and with due regard to the best interests of the people.

The Court further noted that in Article 3, States undertook to be guided by the following principles:

> 1. the right of all peoples to a satisfactory environment favourable to their development;
>
> 2. the duty of States, individually and collectively to ensure the enjoyment of the right to development;
>
> 3. the duty of States to ensure that developmental and environmental needs are met in a sustainable, fair and equitable manner.

Those provisions reflected a clear commitment by States to act in a manner that prevents harmful effects on the

environment, especially those resulting from toxic waste and hazardous waste.

In linking such commitment to individual/group rights, the Court recalled that, pursuant to Art 16 of the Charter, "[e]very individual shall have the right to enjoy the best attainable state of physical and mental health. In addition, Art 24 of the Charter provided that "[a]ll peoples shall have the right to a general satisfactory environment favourable to their development".

A combined reading of these provisions showed that, through the Convention, States had signed up to obligations that guaranteed the enjoyment of the rights provided for in Arts 16 and 24 of14the Charter, namely, the right to the enjoyment of the best attainable state of physical and mental health and the right to a general satisfactory environment conducive to development. The Court confirmed that the Convention is, in its relevant provisions, a human rights instrument within the meaning of Article 3 of the Protocol.

The case is important for the Court's willingness to look at the object and purpose of treaty provisions in order to understand them and its willingness to look across treaties for the same reason. In a world of climate change, pollution and the destruction of the environment for commercial gain, the case highlights the role human rights can have in holding states accountable.

ASIA PACIFIC

CO (Philippines) v Immigration and Protection Tribunal

[2023] NZCA 416

The appellant claimed that the Tribunal had erred in failing to take into account country information said to identify a relevant risk of persecution, and that its decision was unreasonable. The Court of Appeal held, however, that an incorrectly dated witness statement in the Tribunal's decision was of no moment, and that it was not seriously arguable that the absence of a specific reference to a newspaper article amounted to a reviewable error. In particular, the Court helpfully noted that the Tribunal is not required to refer to every piece of evidence filed.

EUROPE

Joined Cases C-608/22 and C-609/22, AH (C-608/22) and FN (C-609/22), intervener: Bundesamt für Fremdenwesen und Asyl

Opinion of Advocate General Richard de la Tour delivered on 9 November 2023

ECLI:EU:C:2023:856

According to the Court's Press Release Advocate General Richard de la Tour, finds that the discriminatory measures adopted against Afghan women by the Taliban regime amount, on account of their cumulative effect, to persecution There is nothing to prevent a Member State from recognising, in respect of those women, the existence of a well-founded fear of persecution on grounds of their gender, without having to look for other factors specific to their personal situation Since the return of the Taliban regime to Afghanistan, the situation of women has deteriorated to the point that their very identity can be said to be denied. That regime is characterised by an accumulation of acts and discriminatory measures which restrict, or even prohibit, inter alia, their access to health care and education, their gainful employment,

their participation in public and political life, their freedom of movement and their right to take part in sports, which deprive them of protection against gender-based and domestic violence and require them to cover their entire body and face. An Austrian court asks the Court of Justice whether such treatment can be classified as an act of persecution justifying the grant of refugee status. It also asks whether, for the purposes of the individual assessment of the application for international protection, a Member State can conclude that there is a well-founded fear of persecution taking into account only the gender of the applicant.

Advocate General Jean Richard de la Tour considers that the accumulation of discriminatory acts and measures adopted against girls and women by the Taliban in Afghanistan constitutes persecution. In his view, those acts and measures, because of the seriousness of the deprivations that they entail, are liable to jeopardise their physical or mental integrity, as much as more direct threats to their life. On account of their cumulative effect and their deliberate and systematic application, those measures are evidence of the establishment of a social organisation based on a system of segregation and oppression against girls and women, in which they are excluded from civil society and deprived of the right to lead a dignified and decent life in their country of origin. Those measures therefore result in flagrant and persistent denial of the most essential rights of girls and women, on the basis of their gender, depriving them of their identity and rendering their daily life intolerable. The Advocate General also considers that that regime is imposed on them solely on account of their presence on the territory, regardless of their identity or personal circumstances. Although a woman may not be affected by one or more of the measures at issue on the basis of her particular characteristics, she remains exposed to restrictions and deprivations which, taken individually or as a whole, reach a level of severity equivalent to the level of severity required in order to be classified as persecution. In such circumstances, there is, in his view, nothing to prevent a Member State from considering that it is not necessary to establish that the applicant is targeted because of distinctive characteristics other than her gender.

Case C-294/22 Office Français de Protection des Réfugiés et Apatrides, v SW,
ECLI:EU:C:2023:733

S.W. is a stateless person of Palestinian origin who was born and spent most of his life in Lebanon. Due to a severe genetic disease, he was being treated by UNRWA (UN Relief and Works Agency for Palestine Refugees in the Near East) until this ceased due to lack of funds. Following this, he went to France and applied for international protection. French migration authorities considered that under Article 12(1)(a) of the recast Qualification Directive he was excluded from refugee protection within the meaning of

Article 1(D) of the Geneva Convention. The French Council of State contended that a voluntary decision to leave Lebanon does not ipso facto entail a cessation of UNRWA's assistance to the applicant.

The second sentence of Article 12(1)(a) of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted must be interpreted as meaning that the protection or assistance of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) must be regarded as having ceased when that agency becomes unable to ensure that a stateless person of Palestinian origin enjoying such protection or assistance has access to the healthcare and medical treatment without which that person is exposed to a real risk of imminent death or to a real risk of suffering a serious, rapid and irreversible decline in his or her state of health or a significant reduction in life expectancy. It is for the national court to ascertain whether there is such a risk. The CJEU referred back to the national court the task of ascertaining whether such a risk is extant in this case.

Case C-151/22* S, *A* *v* *Staatssecretaris van Veiligheid en Justitie, *intervening party:* ***United Nations High Commissioner for Refugees (UNHCR)***
ECLI:EU:C:2023:688

The case concerned two Sudanese nationals who claimed asylum based on their political activity in the Netherlands against the Sudanese government. Their applications were rejected on the grounds that their actions did not amount to political opinion within the meaning of Article 10 (1)(e) Directive 2011/95/EU. The Council of State subsequently stayed the proceedings and referred questions to the CJEU on the interpretation of political opinion under the aforementioned directive. The UNHCR intervened in this case.

The Court ruled that Article 10(1)(e) and (2) of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted must be interpreted as meaning that, in order for the opinions, ideas or beliefs of an applicant who has not yet attracted the negative interest of the potential actors of persecution in his or her country of origin to fall within the concept of 'political opinion' or 'political characteristic', it is sufficient for that applicant to claim that he or she has or expresses those opinions, thoughts or beliefs. That is without prejudice to the assessment of whether the applicant's fear of being persecuted on account of his or her political opinions is well

founded. Moreover, the Court concluded that Article 4(3) to (5) of Directive 2011/95 must be interpreted as meaning that, for the purposes of assessing whether an applicant's fear of persecution on account of his or her political opinions is well founded, the competent authorities of the Member States must take account of the fact that those political opinions, owing to the degree of conviction with which they are expressed or the possible engagement by that applicant in activities to promote those opinions, could have attracted or may attract the negative interest of the actors of potential persecution in that applicant's country of origin. It is not however required that the same opinions be so deeply rooted in the applicant that he or she could not refrain, if returned to his or her country of origin, from manifesting them, thereby exposing himself or herself to the risk of suffering acts of persecution within the meaning of Article 9 of that directive.

Case-402/22 Staatssecretaris van Justitie en Veiligheid v MA

ECLI:EU:C:2023:543

In 2018, MA had been sentenced by a Netherlands court to imprisonment for 24 months for three sexual assaults, an attempted sexual assault and the theft of a mobile telephone, all committed on the same evening.

On 5 July 2018, MA lodged an application for international protection in the Netherlands. The State Secretary rejected the application on 12 June 2020, finding MA had a reasonable fear of persecution in his country of origin, but that he had been convicted of a particularly serious crime by a final judgment and consequently represented a danger to the community. MA appealed against the decision of 12 June 2020.

The European Court of Human Rights found that the assessment of whether a crime for which a third-country national has been convicted by a final judgement has such a degree of seriousness that it undermines the legal order of the community concerned, must include an assessment of all the circumstances. Account must be taken, inter alia, of the penalty provided for and the penalty imposed for that crime, the nature of that crime, any aggravating or mitigating circumstances, whether or not that crime was intentional, the nature and extent of the harm caused by that crime and the procedure used to punish it.

The Court also found that the required degree of seriousness cannot be attained by a combination of separate offences. The Court further found that the existence of a danger to the community cannot be regarded as established by the mere fact that the third-country national has been convicted by a final judgement of a particularly serious crime.

Case C-756/21 *X v International Protection Appeals Tribunal*

ECLI:EU:C:2023:523

In assessing the general credibility of an applicant for international protection, the Court found that the duty of cooperation by a Member State to assess relevant elements of the application required the determining authority to obtain (i) up-to-date information concerning all the relevant facts as regards the

general situation prevailing in the country of origin of an applicant for asylum and international protection and (ii) a medico-legal report on their mental health, where there is evidence of mental health problems resulting potentially from a traumatic event which occurred in the country of origin and the use of such a report is necessary or relevant in order to assess the applicant's need for protection, provided that the use of such a report complies, inter alia, with the rights guaranteed by the Charter of Fundamental Rights of the European Union. The Court found that a breach of the duty of cooperation need not necessarily entail, by itself, an annulment of a decision, and the applicant may be required to demonstrate that the decision dismissing the appeal might have been different in the absence of that breach.

AAA (Syria) & Ors, R (on the application of) v Secretary of State for the Home Department
[2023] UKSC 42 (15 November 2023)
(The Rwanda Case)

This case concerns the policy of the Secretary of State for the Home Department (the Home Secretary) to relocate certain asylum seekers to Rwanda to have their appeals considered there, rather than in the UK courts and tribunals. That policy was supported by arrangements between the UK and Rwandan governments, announced on 14 April 2022 and contained in a Memorandum of Understanding and a number of diplomatic "Notes verbales" ("the MEDP").

Under paragraphs 345A to 345D of the UK Immigration Rules, if the Home Secretary decided that an asylum claim was inadmissible, the Immigration Rules purported to allow him to remove that asylum claimant to any safe third country that agreed to accept the claimant.

These appeals arose out of claims brought originally by ten individual asylum seekers ("the claimants") who travelled to the UK in small boats (or, in one case, by lorry) from a number of source countries. The Home Secretary declared the claimants' protection claims inadmissible, intending that they should be removed to Rwanda where their asylum claims would be decided by the Rwandan authorities. Based on the MEDP, monitoring arrangements in place and other enquiries carried out by the UK Government, Rwanda was treated as a "safe third country" under paragraphs 345A–345D of the Rules ("The Rwanda Policy").

The claimants brought proceedings in the Divisional Court challenging both the lawfulness of the Rwanda Policy generally and the Government's decisions specifically to remove each of them to Rwanda. The Divisional Court held that the Rwanda Policy was, in principle, lawful, but that the Home Secretary's decisions in all ten cases were procedurally flawed. The decisions were quashed and the claims remitted to the Secretary of State for consideration afresh.

All the claimants appealed to the Court of Appeal against the finding that the Rwanda Policy was lawful. UNHCR intervened and provided evidence of the failings of the Rwandan asylum determination system. The Court of Appeal accepted UNHCR's evidence that:

(1) Rwanda has a poor human rights record. In 2021, the UK government criticised Rwanda for "extrajudicial killings, deaths in custody, enforced disappearances and torture". UK government officials have also raised concerns about constraints on media and political freedom [75]-[76].

(2) There are serious and systematic defects in Rwanda's procedures and institutions for processing asylum claims, including:

(i) concerns about the asylum process itself, such as the lack of legal representation, the risk that judges and lawyers will not act independently of the government in politically sensitive cases, and a completely untested right of appeal to the High Court;
(ii) the surprisingly high rate of rejection of asylum claims from certain countries in known conflict zones from which asylum seekers removed from the UK might well emanate;
(iii) Rwanda's practice of refoulement, which had continued since the MEDP was concluded; and
(iv) the apparent inadequacy of the Rwandan government's understanding of the requirements of the Refugee Convention [77]-[94].

(3) Rwanda had recently failed to comply with an explicit undertaking to comply with the non-refoulement principle, given to Israel in an agreement for the removal of asylum seekers from Israel to Rwanda which operated between 2013 and 2018 [95]-[100].

By a majority, the Court of Appeal allowed the claimants' appeals, concluding that given the deficiencies in the asylum system in Rwanda, there were substantial reasons for believing that there was a real risk of refoulement. In that sense Rwanda was not a safe third country. The Court of Appeal unanimously rejected the claimants' other grounds of appeal.

The Secretary of State appealed to the Supreme Court, identifying a number of legal questions. The issues on which its decision turned were as follows:

1. Was the Court of Appeal right to conclude that Rwanda was not a safe third country because asylum seekers would face a real risk of refoulement?
2. Did the Home Secretary fail to discharge her procedural obligation under article 3 to undertake a thorough examination of Rwanda's asylum procedures to determine whether they adequately protect asylum seekers against the risk of refoulement?
3. Were there substantial grounds for believing that asylum seekers sent to Rwanda will face a real risk of treatment contrary to article 3 in Rwanda itself, in addition to the risk of refoulement?
4. Does the Asylum Procedures Directive continue to have effect as retained EU law? This is relevant because the Directive only permits asylum seekers to be removed to a safe third country if they have some connection to it. None of the claimants has any connection to Rwanda.

The Supreme Court heard the appeal in October2023 in a five-judge panel which included both the President and Deputy President of the Court. Judgment was handed down on Wednesday 15 November 2023. Lord Reed PSC and Lord Lloyd-Jones JSC gave a joint judgment with which the other members of the Court agreed.

The Court's judgment focused primarily on the grounds of appeal concerning: (1) refoulement, and (2) retained EU law. Some of the asylum seekers were granted permission to cross-appeal on two other grounds, but given the Court's conclusion on the refoulement ground, it was unnecessary for the Court to determine them [17], [106].

The Supreme Court accepted that the Rwandan government entered into the MEDP in good faith, that the MEDP contained incentives to ensure that it would be adhered to, and that monitoring arrangements provided a further safeguard. The changes and capacity-building needed to eliminate that risk might be delivered in the future, but they were not shown to be in place when the lawfulness of the Rwanda policy had to be considered in these proceedings [101]-[105].

The Supreme Court unanimously dismissed the Home Secretary's appeal, and upheld the Court of Appeal's conclusion that the Rwanda policy was unlawful, and that there were substantial reasons for believing that there was a real risk of refoulement.

Ground 1: Refoulement. Non-refoulement is a core principle of international law. Asylum seekers are protected against refoulement by several international treaties ratified by the UK. These protections are set out in article 33(1) of the United Nations 1951 Convention relating to the Status of Refugees and its 1967 Protocol ("the Refugee Convention") and article 3 of the European Convention on Human Rights ("the ECHR"), among others [19]-[26].

The UK Parliament had given effect to both the Refugee Convention and the ECHR in domestic law. Asylum seekers were protected against refoulement by the Human Rights Act 1998, section 6 of which made it unlawful for the Home Secretary to remove asylum seekers to countries where there were substantial grounds to believe that they would be at real risk of refoulement leading to treatment contrary to article 3 ECHR.

Further protection was provided by provisions in the Asylum and Immigration Appeals Act 1993, the Nationality, Immigration and Asylum Act 2002 and the Asylum and Immigration (Treatment of Claimants etc) Act 2004, under which Parliament had given effect to the Refugee Convention as well as the ECHR [27]-[33].

The European and domestic case law was clear: the Court was required to consider how the asylum system in the receiving state, in this case Rwanda, operated in practice, taking account of deficiencies identified by expert bodies such as UNHCR. Where safety in the receiving state depended on assurances given by its government about the treatment of individuals who were sent there, the court was required to carry out a fact-sensitive evaluation of how the assurances would operate.

Relevant factors included the general human rights situation in the receiving state, the receiving state's laws and practices, its record in complying with similar assurances given in the past and the existence of monitoring mechanisms [44]-[49]. In these appeals, having regard to the UNHCR evidence, the Court of Appeal had been entitled to conclude that there were substantial grounds for believing that asylum seekers would be at real risk of ill-treatment by reason of refoulement if they were removed to Rwanda [73].

That evidence demonstrated that there were substantial grounds for believing that there was a real risk that asylum claims would not be determined properly, and that asylum seekers would therefore be at risk of being returned directly or indirectly to their country of origin. Accordingly, Rwanda was not a safe third country and the Rwanda Policy was unlawful.

The Home Secretary's appeal was dismissed.

Ground 2: Retained EU law

The Supreme Court also dismissed the cross-appeal brought by *ASM (Iraq)* on the ground that the Rwanda policy is unlawful because it is incompatible with retained EU law. Articles 25 and 27 of the EU Procedures Directive no longer have effect in UK domestic law as retained EU law. They ceased to have effect in the domestic law of the United Kingdom when the transition period came to an end on 31 December 2020 [148].

Neither the Explanatory Notes from when the Bill was debated in Parliament, nor the Parliamentary Committee reports and materials relied upon by ASM, displaced the clear and unambiguous meaning of the statute [140]. The rule of interpretation known as the principle of legality did not apply, as the relevant protection afforded by articles 25 and 27(2)(a) of the Procedures Directive did not relate to a fundamental or constitutional right [142].

The full judgment will be available at **www.supremecourt.uk/decidedcases/index.html**.

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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Contact:
Liesbeth van de Meeberg, Office Manager, IARMJ
office@iarmj.org or +31 6150 42782

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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**. The Working Parties' Rapporteurs are:

	Rapporteurs	
Artificial Intelligence	**John Keith**	**uppertribunaljudge.keith@ejudiciary.net**
Asylum Procedures	**Michael Hoppe**	**Michael.Hoppe@vgkarlsruhe.justiz.bwl.de**
Climate Change, Adaptability and the Migration Nexus	**Nurjehan Mawani**	**nurjehan.mawani@gmail.com**
Deportation	**Martin Treadwell**	**Judge.Treadwell@courts.govt.nz**
Detention	**Julian Phillips**	**residentjudge.phillips@ejudiciary.net**
Exclusion, Cessation and Deprivation of Citizenship	**Johan Berg**	**jbe@une.no**
COI, Expert Evidence and Social media	**Mark Symes**	**marks@gclaw.co.uk**
Human Rights Nexus	**Judith Gleeson**	**UpperTribunalJudge.Gleeson@ejudiciary.net**
Judicial Resilience and Well-Being	**Martha Roche**	**Martha.Roche@justice.govt.nz**
Particular Social Group	**Hilkka Becker**	**hcbecker@protectionappeals.ie**
Training	**Anna Bengtsson**	**annadotbengtsson@gmail.com**
Vulnerable Persons	**Declan O'Callaghan**	**UpperTribunalJudge.O'Callaghan@ejudiciary.net**