IARMJ report

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Breaking / notsobreaking / news

Sister,
when did we broadcast this channel?
The one where the news,
stopped being the news,
and instead; a crackling radio
of our internal monologues;
sound bytes and flashing images
of our darkest day;
or as they say,
New Zealand's darkest day.

Sister,
when did the news stop being a
sit around the dinner table and lets learn what is happening in the world
become
rewind, press play, rewind, press play, rewind, press play–
was that an update on the investigation of my fathers murder?
Lisa says,
families of those who lost loved ones on that very tragic day, are to embark on a lengthy, and difficult process, replaying the atrocities of the 15th of March, to the very second.

Sister,
sometimes I forget
it is we, who are family.
I miss the once mundane insignificance
of the 6 o'clock hour.
The background noise has now scuttled and
scooched itself to the foreground
and the 6 o'clock hour
feels awfully long now.

by Sara Qasem

15 March 2024 is the fifth anniversary of the tragedy at Al Noor Mosque and the Linwood Islamic Centre in Christchurch, New Zealand.

In memory of the 51 people who lost their lives, and the 40 who were injured, and in sympathy for their families and friends who continue to bear the burden of that day.

From the Editors

Judith Gleeson
Co-Editor

Dear friends and colleagues,

Sara Qasem's poem above was published in newspapers in New Zealand on March 15 2024, honouring those who lost their lives five years earlier, in the Mosque attacks there. We remember Prime Minister Jacinda Ardern's focus on the victims, not the perpetrators, whom she refused ever to name. Qasem's poem is a salutary reminder of the human cost of conflict and of terrorism, at a time when both are very much in the news. It is particularly poignant that this year, the anniversary falls in the first week of Ramadan, a time of prayer and reflection for Muslims everywhere.

There is good news to celebrate in our IARMJ family: four members have added to the store of knowledge of asylum and migration law worldwide by publishing new books. We congratulate our President Isaac Lenaola, Hugo Storey, a past President of the European Chapter and Bostjan Zalar, the current President of that Chapter on their publications which came out in 2023 and 2024. We look forward to the publication of a forthcoming book in Greek by our Vice-President, Catherine Koutsopoulou. Details of all these publications can be found in the Library section of this newsletter.

All of our IARMJ authors have made an incalculable contribution to the development of refugee and migration law, and of this Association, over several decades, reaching back into the last century. Isaac Lenaola's book, co-authored with Arnold Ochieng Oginga, a respected advocate before the High Court of Kenya, gives expert guidance on the correct approach to constitutional law and doctrines, and the litigation of fundamental rights and freedoms: as colleagues will know, he has led the way by giving judgments in most, if not all, of the important constitutional cases decided under Kenya's new 2010 constitution. Nobody is better placed to comment on that area of Kenyan law.

Bostjan Zalar has contributed to an anthology published by the University of Ljubljana, which provides for the first time an introduction to the law of migration and international protection, written in the Slovenian language. Catherine Koutsopoulou's forthcoming book on the determination of refugee status, and the use of exclusion and inclusion clauses, will add expert guidance to the materials available in the Greek language.

Special congratulations to Hugo Storey, who despite having retired as a judge, and published in 2023 a book which will undoubtedly become a vital tool in the interpretation of international human rights law, began 2024 by being appointed an Adjunct Professor at the Kaldor Centre for International Refugee Law at the University of New South Wales, Australia. He is returning to his Australian roots. Hugo tells me he is excited at the prospect of working with the young minds at UNSW: many of us, including me, have benefited from his quiet mentorship and encouragement, particularly early in our careers.

2023 was a busy and challenging year for asylum and migration judges around the globe, with new flows of refugees to Europe from both the Israel/Gaza conflict which began on 7 October 2023, and also from the ongoing Ukraine/Russia conflict. Other conflicts continue to provide heavy flows of new refugees and displaced persons. 2024 looks to be just as busy, with migration from Afghanistan continuing: short term leave to remain in host countries is running out and for many of those who did leave, their position in the countries which first took them in is becoming more precarious by the day.

The expertise of a body such as ours has never been more important or necessary.

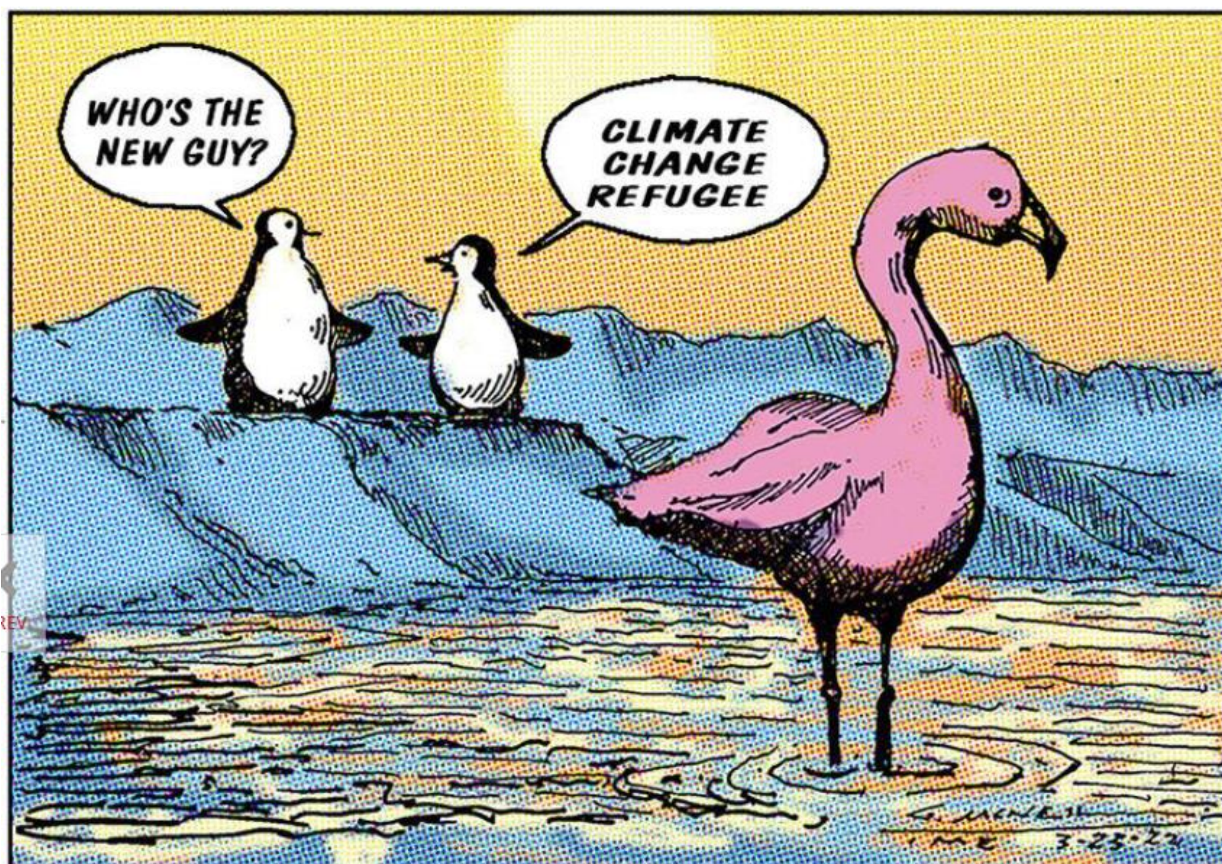
It is a privilege and an honour to be a member of the IARMJ. I look forward to meeting with old and new colleagues and friends, in person at the regional Chapter meetings this year, and of course, at the Global Conference in Kenya in 2025.

With best wishes,

Judith Gleeson

Co-Editor

CONTENTS (click for the article)		**Page**
President's Report		4
News from the Chapters -	**Africa**	5
	Americas	8
	Asia Pacific	11
	Europe	12
Working Party Update		16
Supervisory Council		17
In the Library – Recent Publications		18
Articles of Interest in the Media		20
Recent Case-Law of Interest From Around the World		21



Courtesy of the Idaho Mountain Express

HABARI KUTOKA NAIROBI

Update from the President

Greetings to you all,

The year 2024 is an exciting one as our Chapters prepare for their conferences and Kenya begins the journey towards hosting the **2025 World Conference**. I can confirm that a vibrant Local Organizing Committee has already been set up under my Chairmanship and I am confident that it will deliver a world-class event.

As we mull over the theme for the World Conference, one issue has become increasingly urgent and intertwined with our global social fabric: the profound impact of climate change on the plight of migrants and refugees. As Judges at the forefront of decisions that shape the lives of individuals seeking refuge and safety, it is crucial for us to understand and respond to the multifaceted ways climate change is reshaping migration patterns and exacerbating the challenges faced by those forced to leave their homes. The fact that we launched a Working Party on Climate Change at the 2023 Hague Conference is testimony to how seriously our Association is taking the matter.

The reality is stark. As temperatures rise, extreme weather events become more frequent, and land becomes less hospitable, individuals and communities are compelled to relocate in search of safer and more sustainable living conditions. The resulting displacement spans a spectrum, from those fleeing sudden natural disasters to those contending with the slow violence of environmental degradation, all of whom navigate complex legal landscapes to find sanctuary and stability.

This intersection of climate change and migration demands our unwavering attention and conscientious action. It calls for a paradigm shift in the way we approach the protection of human rights, the administration of justice, and the crafting of policies that respond to these interconnected challenges.

Now, more than ever, it is incumbent upon us to adapt our legal frameworks, consider precedents that respond to climate-induced migration, and advocate for the rights of those who are forced to seek refuge due to environmental upheaval.

I urge each of us, as Judges and legal experts, to not only recognize the plight of those impacted by climate-induced migration but to also lead the charge in creating adaptive and compassionate judicial responses. It is through our collective commitment and vision that we can strive to ensure that the rights and dignities of migrants and refugees are protected, irrespective of the complex forces compelling their movement.

Let us continue to advocate for legal structures that acknowledge the intersection of climate change and migration, and let us remain steadfast in our dedication to upholding the fundamental principles of justice, empathy, and protection for those who rely on our decisions for their very survival.

Thank you for your unwavering dedication to the pursuit of justice in an ever-evolving world.

With best wishes,

Isaac Lenaola

President, IARMJ

NEWS FROM THE CHAPTERS

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

AFRICA CHAPTER

Judge President Dunstan Mlambo

Dear friends and colleagues,

From the African continent, I can report that our arrangements regarding our next Regional Chapter conference are now in full swing. Having received confirmation from the Ministry of Justice in Egypt, that we may convene our regional conference in that country. We have now reached agreement with the Egyptian Justice Ministry that the Regional Conference be hosted at Sharm el Sheikh from 18 to 22 November 2024.

I reiterate what I mentioned during our bilateral meeting with the UNHCR, that as a chapter we will intensify our efforts regarding the training of Judges in particular. We will also include members of the legal profession especially those involved in refugee and migration law litigation.

Subsequent to meeting with the UNHCR Regional representative and her team, a draft concept for the engagement was developed. We are now refining same with a view to coming up with concrete plans for the Refugee and Migration law colloquium in South Africa. The colloquium idea was borne out of the realisation that the mushrooming refugee and migration litigation in this country was a consequence of economic migration and widely reported incidents of suspected asylum system abuse incidents.

An example that has been widely reported in the media is the matter of a Rwandan national, a certain Fulgence Kayishema, who has been living in South Africa for more than 10 years based on suspect refugee status documentation. He is apparently a wanted fugitive for alleged genocide activities in Rwanda. In addition to facing extradition efforts to stand trial in Rwanda, he is also facing fraud charges based on how he obtained his refugee status in South Africa. The planned colloquium will involve the Home Affairs Department, Legal NGO's involved in refugee and migration litigation, the Judiciary as well as the legal profession.

It is also worth reporting that the Government in South Africa issued a white paper calling for public comment towards the end of 2023. The objectives of the white paper are, according to the Home Affairs Minister, to harmonise the Refugees Act, Immigration Act and Citizenship Act. This move has been criticised and is feared in certain quarters as the first step to withdrawal from the Refugee Conventions by the SA Government. So far the process is unfolding and we await to see what Government does next.

I'm excited to confirm what I said during the bilateral with UNHCR in September. This is in relation to intensifying our training efforts. We intend to have regional bilaterals with UNHCR which will be more focussed on those regions and spearheaded by our Sub Regional Convenors. This is also based on our realization that we have trained in excess of a thousand Judges and Refugee appeal authority members since we made our GRF pledge in 2019.

The sub regional bilaterals are intended to link our members in those respective regions and foster collaboration with universities, the judiciary, legal professional associations as well as government officials involved in status determination processes as well as members of refugee appeal authorities, in those regions. As a chapter we made another pledge at the 2023 GRF and we are serious about fulfilling it.

We continue our discussions with the UNHCR regarding our efforts to establish a Portuguese speaking Centre of Excellence either in Maputo, Mozambique or Luanda, Angola. We hope to reach consensus in this regard as UNHCR prefers the centre to be in Luanda, Angola.

We have also initiated discussions with the UNHCR in West Africa to firm up our footprint in French speaking Africa. We are eyeing that region for our regional conference in 2026 and it makes sense to prepare the ground, so to speak.

Our President, Justice Isaac Lenaola, has now secured important support from the Kenya Chief Justice to host the next World Conference in Kenya. Securing the support of the Chief Justice ensures valuable collaboration with the Kenya judiciary and the Kenya Judicial Training Institute. As a chapter we will bring our collective endeavours to ensure a successful World Conference.

On the jurisprudence front it has been a quiet period in the continent. In South Africa, the Zimbabwean Permit case is now headed to the Constitutional Court. The government is seeking leave to appeal the decision that stopped it from terminating these permits. This involves some 178,000 Zimbabweans who now live and work in South Africa. The government's argument is that the Court encroached on its executive power domain and thus was in violation of the separation of arms principle. Its argument is, further, that it is a polycentric decision meaning that Courts should be slow to interfere in such matters. We wait to see how the Constitutional Court will deal with it.

Another matter handed down early this year is the *Degefa Lembore and Others vs Minister of Home Affairs and Others* (2023-097427; 2023-097292; 2023-097111, 2023-097076, 2023-100081 and 2023-100526) [2024] ZAGPJHC 102 (8 February 2024)[1]. I wrote the judgment for the Full Court, and followed the judgment of the Constitutional Court in *Ashebo*[2] which I mentioned in a previous report. This judgment is based on amendments of the Immigration Act, which penalise illegal entry and stay for prolonged periods without applying for status.

The law established by these cases is that the detention of illegal entrants is now permissible until they establish good cause for contravening the Immigration Act by not entering at ports of entry and failing to apply for status after their entry.

Mlambo JP

President, Africa Chapter

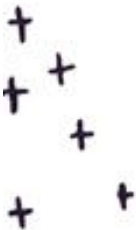
[1] **https://www.saflii.org/za/cases/ZAGPJHC/2024/102.html**

[2] *Ashebo v Minister of Home Affairs and Others* (CCT 250/22) [2023] ZACC 16; 2023 (5) SA 382 (CC); 2024 (2) BCLR 217 (CC) (12 June 2023) (**https://www.saflii.org/za/cases/ZACC/2023/16.html**)

SAVE THE DATE

Regional Conference

Sharm El Sheikh
EGYPT



18 - 22 NOVEMBER 2024

AMERICAS CHAPTER

Justice Shirzad Ahmed
President,
Americas Chapter

Dear friends and colleagues,

In my last report, I discussed the case of *Canada v Boloh 1(A)*, 2023 FCA 60. That case was appealed to the Supreme Court of Canada ("SCC"), and the SCC did not grant leave (*Boloh 1(a), et al v His Majesty the King, et al*, 2023 CanLII 106674 (SCC)).

The decision of the Federal Court of Appeal therefore stands.

In this report, I discuss the SCC's decision in *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21. While largely a summary of a previous administrative law decision from the SCC[3], the reasoning in this case provides interesting insights regarding the interaction between Canadian administrative and immigration law.

Background

In May 2012, Mr Mason allegedly shot a gun eight times at a concert, injuring two individuals. Despite the charges of attempted murder being stayed, Canada Border Services Agency ("CBSA") issued a report claiming that Mr Mason was inadmissible to Canada. The grounds were "for engaging in acts of violence that would or might endanger the lives or safety of persons in Canada" under paragraph 34(1)(e) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA").

The Immigration Division ("ID") of Canada's Immigration and Refugee Board was tasked with determining whether Mr Mason's alleged actions fell under paragraph 34(1)(e) of the *IRPA*.

In a decision dated March 20, 2018, the ID found that they did not. The ID determined that "there must be an element to s 34(1)(e) that elevates the acts of violence beyond regular criminality" (*Mason v Canada (Public Safety and Emergency Preparedness)*, 2018 CanLII 57522 at para 19), with Mr Mason's alleged actions being "mere criminal offences, although very serious ones" (at para 24). Mr. Mason was therefore not found to be inadmissible under paragraph 34(1)(e) of the *IRPA*.

The Government of Canada appealed the ID's decision to the Immigration Appeal Division ("IAD"). The IAD agreed with the Government *(Mason v Canada (Public Safety and Emergency Preparedness)*, 2019 CanLII 55171 (CA IRB)). In a decision dated February 6, 2019, the IAD found that:

> [37] Inadmissibility under paragraph 34(1)(e) does not require that the conduct have a link to national security or the security of Canada. Parliament intended that the provisions of subsection 34(1) relate to security in a broader sense. That includes ensuring that individual Canadians are secure from acts of violence that would or might endanger their lives or safety.

The IAD therefore set aside the ID's decision.

Federal Court

Mr Mason brought an application for leave and judicial review of the IAD's decision, maintaining that the decision was unreasonable and should be set aside. In a decision dated October 2, 2019, the Honourable Mr Justice Sébastien Grammond of the Federal Court agreed with Mr Mason.

After a comprehensive review of the standard of review when examining decision-makers' interpretation of statutes, Justice Grammond found that there was a "knockout punch" to the IAD's interpretation—namely, that

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[3] That decision being *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*").

"the structure of the provisions of the [IRPA] regarding inadmissibility is incompatible with the IAD's interpretation" (at para 38). Justice Grammond found that certain differences within the IRPA's inadmissibility provisions (ie, sections 33-43) reflected the fact that:

> [49] [t]he IAD's decision upsets the carefully crafted structure of the [*IRPA*]. The IAD's interpretation of paragraph 34(1)(e) brings under that provision a vast range of criminal offences that "would or might endanger the lives or safety of persons in Canada." It does not require a conviction. It may relate to the likelihood of future events, instead of offences that have been committed.

Justice Grammond's ruling was supported by his findings that the IAD's interpretation of paragraph 34(1)(e), being "the most severe category of inadmissibly," would even capture conduct that was not captured under a less severe category of inadmissibility (namely, section 36 of the IRPA), and remove certain threshold requirements for inadmissibility for offences under section 36 of the IPRA (at para 50). Justice Grammond further found that the Government of Canada failed to provide "equally strong arguments" to "buttress" the IAD's decision (at paras 52-62). He therefore allowed Mr Mason's application for judicial review, quashed the IAD's decision, and restored the ID's decision (at paras 65-66).

To allow an appeal of decisions of the IRPA, Justices of the Federal Court must "certify a question". In this case, Justice Grammond certified the following question:

> Is it reasonable to interpret section 34(1)(e) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, in a manner that does not require proof of conduct that has a nexus with "national security" or "the security of Canada?"

Federal Court of Appeal

The Minister of Citizenship and Immigration appealed Justice Grammond's decision to the Federal Court of Appeal ("FCA").[4] In a decision dated July 29, 2021, the FCA granted the appeal.

Upon reviewing how courts are to conduct an analysis of whether a decision-maker's interpretation of a statute is reasonable, and upon reviewing Justice Grammond's decision, the FCA disagreed with Justice Grammond's approach and the outcome reached. The FCA found that the IAD was "very much 'alive to [the] essential elements' of text, context, and purpose of paragraph 34(1)(e)" of the *IRPA* (at para 46, citing *Vavilov* at para 120).

To the FCA, this represented the proper approach to reviewing decision-makers' interpretations, rather than having courts create "their own yardstick" regarding the proper interpretation of a statute and then measure the decision-maker's interpretation against that yardstick (at paras 12, 17, 20, 24-25). While the FCA found that the IAD's approach to interpreting paragraph 34(1)(e) of the *IRPA* may, to a "second-guessing reviewing court," seem "a little loose, perhaps even a little overwrought" (at para 50), the FCA determined that the IAD's interpretation of this provision was reasonable (at paras 45-59). The FCA also rejected Mr. Mason's reliance upon international law as a countervailing factor against the IAD's interpretation (at paras 72-74). The judgments of the Federal Court were thus set aside the applications for judicial review dismissed.

Supreme Court of Canada

The FCA's decision was appealed to the SCC. In a decision dated September 27, 2023, a majority of the SCC's Justices allowed the appeal.

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[4] Included in this FCA decision is the appeal of the case *Dleiow v Canada (Citizenship and Immigration)*, 2020 FC 59, which followed Justice Grammond's decision.

(a) The Majority's Reasons

Before evaluating the IAD's interpretation of paragraph 34(1)(e), the majority first had to determine which standard of review applied: in this instance, correctness, or reasonableness.

The majority found that there were insufficiently compelling reasons to depart from the presumption, in Canadian administrative law, that administrative decisions are reviewed for their reasonableness. The majority specially rejected the proposition that the existence of a "certified question" under the IRPA warranted correctness review (at paras 48-53).

Nonetheless, the majority found that the IAD's interpretation of paragraph 34(1)(e) was unreasonable. The majority found that with its decision, the IAD was insufficiently responsive to both the submissions raised regarding the proper interpretation of paragraph 34(1)(e) and the "broad consequences" of the interpretation the IAD provided (at paras 86-103). The majority concluded that there was only one reasonable interpretation of paragraph 34(1)(e): that the conduct in question under paragraph 34(1)(e) requires "a nexus to national security or the security of Canada" (at para 121).

Unlike the FCA's decision, the majority's interpretation was informed by international law. Upon canvassing Canada's commitment to international law under the IRPA, the majority had a "concern that the IAD's interpretation of s. 34(1)(e) would, as a general rule, allow for a removal order without protection from *refoulement*, contrary to Article 33(1) of the *Refugee Convention*" (at para 110). To the majority, the principle of *non-refoulement* is "'the cornerstone of the international refugee protection regime', and a critical legal constraint on interpretation of the IRPA" (at para 117). The IAD failing to abide by this constraint rendered its decision unreasonable (at para 117).

The appeals and applications for judicial review were therefore allowed.

(b) Justice Côté's Reasons

The Honourable Madame Justice Suzanne Côté agreed with the majority's result, but disagreed with the majority's choice of reasonableness as the standard of review.

She found that the certified question regime under the IRPA called for correctness review of the IAD's decision, the certification provision showing that Parliament intended for appellate standards of review to apply (at paras 146-157). She also found that the rule of law called for correctness review on certified questions, as these questions called for a "singular, determinate and final answer" (at para 159, citing *Vavilov* at para 32). Justice Côté was "unable to tolerate the risk of arbitrariness" in the context of certified questions (at para 168) and further found that the certified questions tended "to have significant consequences for the justice system as a whole or for other institutions of government" (at para 174, citing *Vavilov* at para 59).

Equipped with correctness review, Justice Côté agreed with the majority's interpretation of paragraph 34(1)(e). She found that their interpretation of paragraph 34(1)(e) was further supported by legislative context, other provisions of the IRPA, appeal rights, another immigration statute, and a previous interpretation of paragraph 34(1)(e) (at paras 176-186). Thus, she too would allow the appeals and the applications for judicial review, thus restoring the ID's decision for Mr Mason.

Shirzad Ahmed

President, Americas Chapter

ASIA PACIFIC CHAPTER

Dear friends and colleagues,

This quarter Asia Pacific Chapter representatives in the Administrative Appeals Tribunal (AAT) in Sydney were pleased to welcome our very own colleague, Hugo Storey.

Sean Baker
President,
Asia Pacific Chapter

Hugo spoke with us about the UK Upper Tribunal Country Guidance Decisions. His presentation attracted a lot of interest and discussion and continues to do so!

IARMJ committee members Christine Cody and Sue Zelinka were on hand to capture the event.

The AAT has also welcomed the final members of our large-scale recruitment of some 90 new members into the protection stream, which will allow the Tribunal to address the large number of protection applications outstanding.

Planning continues for the 2024 Asia-Pacific regional conference, and we are looking forward to announcing more details about this shortly. I can advise that the conference will be in November 2024 (one day for Introductory and Advanced Workshops and two days for the conference proper). The conference will take place in Melbourne, Australia. The Asia Pacific Council has appointed both an Organising Committee and a Programme Committee and announcements will be made shortly as to the theme. We hope to have a firm programme in place by the end of April 2024 because we realise that it makes it much easier to seek funding for attendance at a conference if the relevance and benefit of the content is available and any application can be made as early as possible.

As I write, it is Ramadan and the Islamic community is commemorating the revelation of the Qur'an, and fasting from food and drink during the sunlit hours, as a means of drawing closer to God and cultivating self-control, gratitude, and compassion for those less fortunate. It is seen as an opportunity for self-reflection and spiritual improvement, and as a means to grow in moral excellence. It is important that, as decision-makers, we bear in mind the hardship of fasting for a month on those who might be appearing before us for interviews or hearings. Being questioned about one's claim is challenging enough. To be questioned while fasting is an added level of challenge for which we, as decision-makers, need to have tolerance and understanding. Perhaps keep the hearing short, or allow more frequent breaks. Ensure that breaks for prayers are factored in.

Sean Baker

President, Asia Pacific Chapter

EUROPE CHAPTER

Bostjan Zalar,
President,
Europe Chapter

AFTER A QUARTER OF A CENTURY IS THERE SOMEWHERE ON THE HORIZON A RECONCILIATION BETWEEN "DISCRETIONARY CLAUSE" UNDER EU LAW ON ASYLUM AND INTERNATIONAL HUMAN RIGHTS LAW?

Dear friends and colleagues,

Around 26 years ago, Lord Justice Woolf in the case of *Iyadurai*[5] developed a test of legal conditions under which the UK was allowed to remove or transfer an asylum seeker to another Member State of the EU when it is expected that in another Member State substantial provisions of the Convention relating to the Status of Refugees (the Geneva Convention) will most likely be differently interpreted and applied as this is the case in the UK.[6]

One year later, the Court of Appeal of the U.K. based on the aforementioned judicial test in the context of Dublin Convention (OJ C 254/1, 19.8.1997) annulled decisions of the Home Secretary to remove asylum seekers to two Member States of the EU due to the fact that there were substantially more restrictive interpretations of the Geneva Convention in those two Member States in comparison to the interpretation and case law in the UK.[7] In 2003, the newly adopted Dublin Regulation introduced the so-called "discretionary clause" not as an obligation of the Member State, but rather as an option, which is not subject to any condition, to accept a competence to examine asylum application and not to transfer an asylum seeker to another Member States which would otherwise be responsible for examination of that asylum application according to criteria in the Dublin Regulation.[8]

Then came a wave of wrongful (re)interpretations of the seminal judgment of the Grand Chamber of the ECtHR from the case of *MSS v Belgium and Greece*[9] by many courts in Europe. Three years after the *MSS* judgment, the Grand Chamber of the ECtHR in the case of *Tarakhel v Switzerland*[10] tried to clear up those misunderstandings in reading and applying standards from *MSS* judgment. The ECtHR has made, albeit not very clearly, that "*systemic deficiencies*" in asylum proceedings or/and in reception conditions in another Member States are not a necessary condition, which the applicant must prove in order to prevent his/her transfer to another Member State and to gain protection against inhuman treatment under Article 3 of the ECHR, since this is an absolute human right. The IARMJ-Europe has discussed this issue at the second tripartite meeting of the CJEU, ECtHR and IARMJ-Europe in Luxembourg on 10th November 2014. Around 2-3 years later the Court of Justice of the EU (CJEU) followed the aforementioned clarification from the *Tarakhel* case in preliminary rulings in the cases *Ghezelbash*,[11] *Karim*[12] and *CK and others v Slovenia*[13] and, probably, in the most clear way, in the case of *Jawo* from 2019.[14] Whereas in the earlier case of *NS and ME* from late 2011, the CJEU rather emphasised (still in the light of the systemic deficiencies) on the argumentation that the Dublin Regulation is about the principle of "*mutual trust*" between Member States, so that it needs to be assumed that "*all the participating States, whether Member States or third States, observe fundamental rights, including the rights based on the Geneva Convention and on the ECHR, and that the Member States can have*

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5 *Thayaparan Iyadurai v Secretary for the Home Department [1998] Imm Ar 470 (CA) 476.*

6 This paper has been jointly prepared and researched by Bostjan Zalar, President of the IARMJ's European Chapter, and Martina Greif, Senior Expert Associate, Administrative Court of the Republic of Slovenia.

7 Court of Appeal, Civil Division *R v Secretary of State for the Home Department, ex parte Adan; R v Secretary of State for the Home Department, ex parte Subaskaran, R v Secretary of State for the Home Department, ex parte Aitseguer*, 23 July 1999.

8 See also a discretionary clause in the Procedures Directive 2013/32/EU (Article 33(2)).

9 App no 30696/09, 21.1.2011.

10 App no 29217/12, 4.11.2014.

11 C-63/15, 7.6.2016, para 36-37.

12 C-155/15, 7.6.2016, para 22.

13 C-578/16 PPU, 16.2.2017, paras 91-93.

14 *Jawo*, C-163/17, 19.3.2019, para 87.

confidence in each other in that regard".[15] In addition, the CJEU asserted that premise implies that national legal systems of Member States "*are capable of providing equivalent and effective protection of the fundamental rights recognised by the Charter"*.[16] However, the CJEU also stated that the aforementioned presumption must be regarded as rebuttable.[17]

Within these developments, the preliminary ruling in the case *CK and others v Slovenia* from February 2017 is particularly important. Here, the CJEU says that the discretionary clause read in the light of Article 4 of the Charter, cannot be interpreted, "*in a situation such as that at issue in the main proceedings",* as meaning that it implies "an obligation" on that Member State to make use of that discretion.[18] Particular situation as that at issue in *CK and others* was such that Slovenian authorities did not yet conduct any of the possible preventive measures in communications with the authorities of Croatia to protect the applicant against inhuman treatment and that is why the CJEU said in that particular case that the discretionary clause does not imply an obligation.

In February 2023, the CJEU developed an interpretation "*it is true /.../ that in paragraph 72 of the judgment of 23 January 2019, M.A. and Others (C-661/17), the Court held /.../ that Dublin Regulation does not require a Member State which is not responsible, under the criteria laid down in /.../ that regulation, for examining an application for international protection to take into account the best interests of the child and to examine that application itself /.../. However, it must be noted that it follows just as much from that judgment that there is nothing preventing a Member State from examining such an application on the ground that such an examination is in the best interests of the child".* [19] Judges, members of the IARMJ-Europe, again discussed this issue at the last High Level Round Table between CJEU, the ECtHR, IARMJ-Europe, UNHCR and EU Agency for Asylum on 23-24 March 2023 at he premises of the CJEU.

Then, in November 2023, the CJEU passed the preliminary ruling in the case *DG and others*, which in some parts of argumentation might cause uncertainties if those parts are considered separately from the entire corpus of the case law of the CJEU. Namely, it is possible to understand the preliminary ruling in the case of *DG and others* that if the Member State does not find that there are, in the requested Member State, systemic flaws in the asylum procedure and in the reception conditions for applicants for international protection, then the objectives of having effective method for determining the Member State responsible and to prevent secondary movements of asylum seekers between Member States preclude the court examining the transfer decision from carrying out a substantive assessment of the risk of refoulement in the event of transfer to another Member State. That court must in fact regard as established the fact that the competent asylum authority of the Member State responsible will correctly assess and determine the risk of refoulement.[20] The CJEU added, which is in itself not (necessarily) problematic, that "*differences of opinion between the authorities and courts in the requesting Member State, on the one hand, and those of the requested Member State, on the other hand, as regards the interpretation of the material conditions for international protection do not establish the existence of systemic deficiencies"*.[21] Not separately, but in the aforementioned context, the paragraph 150 needs to be interpreted, which says that the court of the requesting Member State can not compel the latter to apply the discretionary clause laid down in Article 17(1) of the Dublin Regulation on the ground that there is, in the requested Member State, a risk of infringement of the principle of non-refoulement.

The EU Agency for Asylum, in collaboration with the *Scuola superiore della magistratura* on 26 January 2024 organised a big conference and training event for Italian judges with the participation of international experts and judges, where participants tried to explain and understand all contentious aspects of the preliminary ruling in the

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15 *NS and ME,* C-411/10 and C-493/10, 21. 12. 2011, paras 78, 80, 83, 86, 89, 94, 106.

16 *XXXX*, C-483/20, 22. 2. 2023, para 27; see also paras 28-31.

17 Ibid. para 104.

18 *CK and others v Slovenia*, para 88.

19 *LG*, C-745721, 16. 2. 2023, paras 48-49.

20 *DG and others*, C-228/21, C-254721, C-297/21, C-315/21 and C-328/21, 30. 11. 2023, paras 141-142, 148-19.

21 Ibid. para 142.

case of *DG and others.*

In fact, we think that discretionary clause under EU asylum law is not a problem, but rather a solution, which can be used by judges and decision makers to bring together EU law on asylum and standards for the protection of human rights from the ECHR into a harmonised co-existence.

Twelve methodological points in the form of a checklist as a possible way towards reconciliation[22]

1. There must necessary be consistency between the EU Charter of Fundamental Rights (the Charter) and the ECHR, without thereby adversely affecting the autonomy of EU law and that of the CJEU. In addition, an EU measure must be interpreted, as far as possible, in such a way as not to affect its validity and in conformity with primary EU law as a whole and, in particular, with the provisions of the Charter.[23]

2. Article 4 of the Charter corresponds to Article 3 ECHR, and of which the meaning and scope are therefore, in accordance with Article 52(3) of the Charter, the same as those laid down by the ECHR.[24] The EU legislature stressed, in recitals 32 and 39 of the Dublin Regulation 2013/604, that the Member States are bound, in the application of that regulation, by the case-law of the ECtHR and by Article 4 of the Charter.[25]

3. In case of Dublin Regulation 604/2013, it needs to be recognised a possible fundamental difference between an approach under the EU principle of "*mutual trust"* and the rigorous assessment of a risk under case law of the ECtHR, when the applicant has an "*arguable claim*" as regards prohibition of inhuman treatment from Article 3 of the ECHR or Article 4 of the Charter, since under the case law of the ECtHR due to discretionary clause in the Dublin Regulation Member States are fully responsible for the protection of rights from the ECHR and the principle of "*equivalent protection"* is not applicable.

4. Hence, it is necessary to distinguish between the situation where the applicant has an arguable claim as regards Article 3 of the ECHR[26] or Article 4 of the Charter,[27] which under case law of the ECHR already triggers the need for a rigorous examination of risk (but not yet a suspension of a transfer),[28] and situation where there are substantial grounds for believing that the transfer would result in inhuman or degrading treatment of asylum seeker from Article 4 of the Charter (Article 3 of the ECHR), which is a different (higher) standard of proof, since this standard prevents a transfer of asylum applicant to another state.[29] Arguable claim basically means that the applicant's claim "*does not appear to be manifestly unfounded".[30]*

5. However, not just Article 4 of the Charter (or Article 3 of the ECHR), but also other important human rights,[31] particularly Article 8 of the ECHR (private and family life)[32] or Article 7 of the Charter in conjunction with the best interests of a child (Article 24(2) of the Charter),[33] may be relevant in the light of the discretionary clause, as well as the right to a fair trial – an effective, independent and impartial legal remedy (Article 47 of the

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22 The following twelve points are taken from the judgment of the Administrative Court of the Republic of Slovenia I U 1604/2023 from 15 February 2024.

23 *JN,* C-601715 PPU, paras 47-48.

24 *Jawo*, C-163/17, 19.3.2019, para 91.

25 *CK and others v Slovenia*, C-578/16 PPU, para 63.

26 *Soering v. the UK,* App no 14038/88, 7.7.1989, paras 85, 117; *MSS v Belgium and Greece*, para 288, 294, 297.

27 See *mutatis mutandis*: *B,* C-233/19, 30. 9. 2020, para 60, 64-65.

28 *Tarakhel v Switzerland*, App no 29217/12, paras 88-91; *MSS v Belgium and Greece*, App no 30696/09, paras 338-340; *mutatis mutandis*: *Avotinš v Latvia*, app no 17502/07, 23.5.2016, para. 116; compare this with: *CK and others v Slovenia*, paras 55-96, particularly paras 64 and 76.

29 *NS and ME*, C-411/10 and C-493/10, paras 82, 84-86.

30 *B,* C-233/19, para 66.

31 See *Jawo*, C-163/17, para 82; *DG*, C-228/21, para 132.

32 See *AS v Switzerland*, App no 39350/13, 30.6.2015.

33 See *LG*, C-745/21.

Charter).[34] However, if a particular right is not an absolute right, then the principle of proportionality from Article 52(1) of the Charter is applicable.[35]

6. The applicant should not be expected to bear the entire burden of proof especially if the general situation in another Member State is known or ought to have been known to the authorities.[36] It is expected that asylum seekers will provide information about their own personal circumstances. Therefore, as far as the individual circumstances are concerned, the burden of proof should in principle lie on the applicants.[37]

7. For certain type of country information concerning another Member State it is much easier for the authority of the Member State to collect relevant information or guarantees from the authorities of another Member State under the principle of mutual trust and cooperation.[38] In respect of certain matters, examining authorities have full access to information, which may not be the case for the applicant.[39]

8. Where sufficient evidence, relevant material or information is adduced by the applicant under the standard of what is to the "*greatest extent practically possible*" for him/her, it is then for the Government "*to dispel any doubts"* about the alleged risk of violation of Article 4 of the Charter (Article 3 of the ECHR).[40]

9. Special attention and approach (guarantees) must be provided in relation to burden and standard of proof in cases of particularly vulnerable applicants,[41] for example, in cases of family with minors[42] or applicants with special health care needs.[43]

10. It is for each Member State to determine the circumstances in which it wishes to use a discretionary clause from the Dublin Regulation.[44]

11. Discretionary clause from Dublin Regulation must be interpreted as not precluding the legislation of a Member State from requiring the competent national authorities, on the sole ground of the best interests of the child, to examine an application for international protection even though the criteria set out in that regulation indicate that another Member State is responsible for that application.[45]

12. It is essential that the provisions on fundamental rights are interpreted and applied in a manner which renders the guarantees "*practical and effective and not theoretical and illusory".* [46]

Boštjan Zalar

President, Europe Chapter

34 See *mutatis mutandis*: *LM*, C-216/18 PPU, which relates to the principle of mutual trust under Framework Decision on Europen Arrest Warrant, but in this secondary law there is no discretionary clause and recital 10 of the European Arrest warrant does not correspond to any recital or provision of the Dublin Regulation 604/2013.

35 See in this respect: *XXXX*, C-483/20, 22.2.2023, para 36.

36 *MSS v Belgium and Greece*, App. no. 30696/09, para 352.

37 *JK and others v Sweden*, app. no. 59166/12, para. 96.

38 See *CK and others v Slovenia*, C-578/16 PPU, paras. 76, 84; *mutatis mutandis*: *Aranyosi and Cãldãraru*, C-404/15 and C-659/15 PPU, paras 88-103, particularly, paras 95-96; *Dorobantu*, C-128/18, paras 67-69; *LP*, C-354/20 PPU and C-412/20 PPU, paras. 54-55; *LM*, C-216/18 PPU, paras 75-77; XY, C-562/21 PPU and C-563/21 PPU, 22. 2. 2022, paras 85, 96-97*, JK and others v Sweden*, App no 59166/12, 23.8.2016, paras 91-92, 96, 98, 101.

39 Ibid. para 98; *mutatis mutandis*. *MM*, C-277/11, 22. 11. 2012, paras 65-66.

40 *JK and others v Sweden*, App no 59166/12, 91-92, 97; *MSS v Belgium and Greece*, App 30696/09, paras 353-354, 359; *CK and others v Slovenia,* C-578/16 PPU, paras 76, 84.

41 See *XXXX*, C-483/20, 22. 2.2022, para 32.

42 See *Tarakhel v Switzerland*, paras 111-115, 120-122.

43 See *CK and others v Slovenia*, C-578/16 PPU; L.G., C-745/21.

44 *MA, SA and AZ*, C-661/17, para 71; *DG and others*, C-288/21, para, 147; *LG*, C-745/21, para 50.

45 *LG,* C-745/21, 16. 2. 2023, para 54, see also *mutatis mutandis*: *Parliament v Council*, C-540/03, 30. 6. 2006, para. 104, *H.R.,* C-582/17 and C-583/17, paras 37-85 *SM*, C-129/18, 26.3.2019, paras 64-65, 67-68, 71. Compare this with the case *MA, SA and AZ*, C-661/17, 23.1.2019, para 71.

46 *Hirsi Jamaa and others v Italy*, App no 27765/09, 23.2.2012, para 175.

WORKING PARTY UPDATES

Presently, the IARMJ Working Parties Process has a dozen active Working Parties. Following the last IARMJ World Conference in The Hague, The Netherlands, two new Working Parties were added, the Climate Migration and Protection Pathways and the Professional Development Working Parties. IARMJ Working Parties play an important role for the association by keeping members abreast of the latest developments in the field of refugee and migration law. The following are examples of the contributions which our working parties are making:

1. IARMJ Inter-Conference Working Parties Coordinator to present at the Refugee Law Initiative Conference in June 2024

The IARMJ Inter-Conference Working Parties Coordinator, Dr James C Simeon, will be presenting a paper at the 8th Annual Refugee Law Initiative (RLI) Conference, between June 3-5 2024, at the University of London. The IARMJ has a long and productive association with the RLI and we are delighted that Dr Simeon can be present in person, as he is spending time at the Lauterpacht Centre for International Law in Cambridge this year. This year's RLI Conference is titled, "*Pacts, Promises, and Refugee Protection*,[47]" and will be held exclusively in-person.

The title of Dr Simeon's paper is, "*The Inter-Conference Working Parties Process: Striving to Achieve Judicial Harmony in International Refugee and Migration Law*," and focuses on the how the Inter-Conference Working Parties Process functions within the association and conducts its research and presents its findings, reports, and recommendations.

2. Working Party on Country of Origin Information, Expert Evidence and Social Media Working Party

The rise of social media has been one of the most significant phenomena of the 21st century. It has increasingly been relied on by parties in protection litigation as relevant evidence. The Working Party has produced a background paper and guidelines for analysing social media evidence in asylum appeals. The Working Party suggests key criteria by way of malleability, reliability, durability, visibility, deletability, accessibility and the attitude shown by the country of origin's authorities. This work is currently going through IARMJ approval processes.

Members of this Working Party have recently provided training to Australia's Administrative Appeals Tribunal and Canada's Immigration and Refugee Board on the draft guidelines and usage of social media in asylum appeals.

3. Working Party on Artificial Intelligence, Information Technology, and Judicial Decision-Making

The Working Party is considering the general impact of technology, beyond the specific area of social media accounts. In particular, the significant change in migration processes and decision-making, driven by societal factors such as COVID-19; the key importance of electronic devices (particularly mobile telephones) to migration; and the rise of "big data" mean that the nature of decision making has fundamentally changed in the last decade.

10-15 years ago, few jurisdictions had IT at the core of their decision-making process but this is now central to most, if not all, jurisdictions. The Working Party will consider practical issues in understanding how technology used by migrants and decision-makers works, how it affects the quality of evidence and how it is generating new evidence (such as mobile geographic data, aside from social media) which did not exist before. Another key area is the extent to which it can manufacture evidence with ease, such as "deepfake" AI-generated documents.

How to join a working party

If you are interested in participating on one of our IARMJ Working Parties, please contact Dr James C Simeon at **jcsimeon@yorku.ca**. The IARMJ Working Parties are always looking for new members to join them as they undertake interesting legal research projects and activities at IARMJ Regional and World Conferences. We look forward to hearing from you.

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[47] See **https://rli.sas.ac.uk/rli-annual-conference**

SUPERVISORY COUNCIL

The Supervisory Council meets annually to supervise the work of the Management Board, in accordance with para 3.10 of the IARMJ Constitution. The Supervisory Council will hold its annual oversight meeting on 9 April 2024. The meeting will be held by video link.

The Council's responsibilities include formally appointing Chapter Presidents, who have been validly elected by Chapter members, to be Board Members, and approving certain Management Board resolutions:

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).

There have been no new regional or sub-regional Chapters, disestablishment or amalgamation. The places of business of the Association remain unchanged and we have not been asked to approve borrowing by the Association or any Chapter. The duties of the Supervisory Council also include the determination of appeals against refusal of IARMJ membership or full membership under Articles 2.3.4 or 2.4.2.c of the Constitution. There have been no such appeals this year.

We have, however, considered and approved the appointment of a replacement Treasurer, dealing with the issue expeditiously without a formal meeting. A new Treasurer was needed following the untimely death of John Bouwman. Sebastiaan de Groot kindly agreed at the Global Conference in the Hague in 2023 to be appointed as an interim Treasurer until a replacement could be found.

On 15 February 2024, the Management Council unanimously approved the appointment of Judge Steffie van Lokven as Treasurer, subject to the approval of the Supervisory Council. Steffie van Lokven has a proven track record as a judge in immigration and migration law, and is a Member of the EUAA Judicial Experts' Pool and an European Judicial Training Network trainer on asylum law. The Supervisory Council unanimously approved her appointment, which will take effect on 1 April 2024.

Judith Gleeson

Chair, Supervisory Council

Our new IARMJ Treasurer, Steffie van Lokven
Welcome on board, Steffie!

IN THE LIBRARY

RECENT PUBLICATIONS

BOOKS BY IARMJ MEMBERS

Constitutional Law, Doctrines and the Litigation of Fundamental Rights and Freedoms
Isaac Lenaola and Arnold Ochieng Oginga, 2024

This book by the IARMJ President, Justice Isaac Lenaola MBS SCJ, a Justice of the Supreme Court of Kenya, jointly authored with Arnold Ochieng Oginga, an Advocate of the High Court of Kenya, presents guidance and perspective on these important issues from two acknowledged experts in constitutional law and fundamental rights and freedoms. It is available through LawAfrica (+254797734012 or **info@lawafrica.com**).

The Refugee Definition in International Law
Hugo Storey (Oxford University Press, 2023)

Following his retirement from the UK judiciary, Hugo Storey has produced a seminal work on the refugee definition in international law which provides a clearly set out and systematic interpretive approach, based on the Vienna Convention on the Law of Treaties. Storey's book provides a forensic analysis of the main debates over the meaning of key terms of the refugee definition, carefully differentiating the state of the law from his own evaluations. He offers practical solutions and a path to providing more content to key terms of the refugee definition in the form of a working definition.

Introduction to the law of migration and international protection [online]
BARDUTZKY, Solo, FAJDIGA, Mohor, GREIF, Martina, LIPOVEC ČEBRON, Uršula, REGVAR, Urša, SAMOBOR, Ana, ZAGORC, Saša, ZALAR, Boštjan and ZORN, Jelk (Faculty of Law, Publishing house of the Faculty of Law, Ljubljana, 2023, ISBN 978-961-7162-08-0)

In 2023, the Faculty of Law, University of Ljubljana, Slovenia, published the first student text book on migration and international protection to be written in the Slovene language. The work followed the establishment of refugee law as a new subject at the Law Faculty in Ljubljana. The book is edited by Prof Samo Bardutzky, with forewords by James Hathaway and Roland Schilling, Representative of the UNHCR for Central Europe. It is available online at: https://repozitorij.uni-lj.si/IzpisGradiva.php?lang=slv&id=148156.

COMING SOON:
The determination of refugee status: inclusion and exclusion clauses
KOUTSOPOULOU, Catherine [to be published by Nomiki Bibliothiki Publications (www.nb.org**)**

The determination of refugee status is governed by the rules set by the Geneva Convention of 1951 and, in Europe, the Directive 2011/95/EU. To this day, there is no absolute certainty regarding the conditions that must be met in order for a person to be recognized as a refugee, since the jurisprudence appears quite diversified.

Dr Koutsopoulou studies the inclusion and exclusion clauses from refugee status and seeks, through the systematisation of the jurisprudence, to search for jurisprudential consensus regarding the real semantic content of the clauses.

In this effort, she uses as a tool the jurisprudence of the Court of the European Union (CJEU) as well as that of important European and international jurisdictions with a historic tradition of interpreting refugee law, such as France, Germany, the United Kingdom, the United States of America, Canada, Australia and New Zealand.

In the final chapter, the author demonstrates the compatibility of the EU legal order with the Refugee Convention, but raises questions regarding the need for a new Refugee Convention.

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

Working with Child and Adolescent Mental Health : The Central Role of Language and Communication
Susan McCool (Routledge, Abingdon, United Kingdom, 2023)
This book includes practical advice and guidance to help readers competently and compassionately identify and respond to the needs of children and young people with complex combined communication and mental health needs. It includes real-life case studies from a wide range of settings, to help illustrate topics discussed in the book.

World Report 2024 - Events of 2023
Human Rights Watch, 11 January 2024
The 34th HRW Annual World Report summarises human rights conditions in over 100 countries and territories worldwide in 2023. It was a formidable year, not only for human rights suppression and wartime atrocities but also for selective government outrage and transactional diplomacy that carried profound costs for the rights of those not in on the deal.

DFAT Country Information Report: Thailand
Australian Department of Foreign Affairs and Trade (DFAT), 18 December 2023
The DFAT report covers topics related to protection status determination including but not limited to: the demography, political system, human rights framework, and security situation of Thailand, as well as information regarding race/nationality, religion, the death penalty, and torture within the country.

Afghanistan - Country Focus
European Union Agency for Asylum (EUAA), December 2023
The purpose of the EUAA report is to provide information relevant for international protection status determination, including refugee status and subsidiary protection, as well as for use in updating EUAA's country guidance development on Afghanistan. The report covers the period 1 July 2022 to 30 September 2023, and includes information on the situation of the general populace under Taliban rule.

Shadow Play
Australian Strategic Policy Institute (ASPI), 14 December 2023
ASPI has reportedly observed a coordinated inauthentic influence campaign originating on YouTube that promotes pro-China and anti-US narratives in an apparent effort to shift English-speaking audiences' views of those countries' roles in international politics, the global economy and strategic technology competition. This new campaign, involving a network of at least 30 channels, uses entities and voiceovers generated by artificial intelligence as a tactic that enables broad reach and scale.

Africa: We are facing extinction: Escalating anti-LGBTI sentiment, the weaponization of law and their human rights implications in select African countries
Amnesty International, 9 January 2024
Across Africa, LGBTI persons face a regression of progress, enduring relentless protests, and formidable obstacles to their rights. This review exposes an alarming trend: the weaponization of the law to target and marginalise the LGBTI community, exacerbating a deteriorating state of human rights. During 2022/23, there was a surge in fear, attacks, increased oppression, and growing hostility towards their identities.

Chairperson's Guideline 8: Accessibility to IRB Proceedings - Procedural Accommodations and Substantive Considerations

Immigration and Refugee Board of Canada [31 October 2023]

The Chairperson's Guidelines are a major policy tool used by the IRB to achieve consistency in decision-making. Updating these guidelines was a major endeavour for the IRB. They had last been updated in 2012. The revised guideline commits to the following, among many other things:

- Adjudicative staff should apply trauma-informed adjudication principles to cases where trauma impacts a person's ability to fully participate in the proceedings.
- The guideline sets out principles for when documentation, such as a medical note, should be required to support a request for accommodation in the hearing process. It provides that the need for such documentation should be proportionate to the accommodation being requested. For example, a Member may determine that no supporting documentation is required to allow for more breaks in a hearing while a request for priority scheduling of a hearing may require supporting documentation.
- The revised guideline also commits to intersectionality in decision-making, and affirms Canada's approach to finding a nexus, determining whether harm rises to the level of persecution, and assessing state protection and internal flight alternative in such cases involving disability, vulnerability, and other such personal characteristics.
- This guideline removed the need to designate and label an individual as a "vulnerable person" and a previous requirement for an individual to establish that their ability to present their case was "severely impaired" in order for them to receive accommodations.

Chairperson's Guideline 3: Proceedings Involving Minors at the Immigration and Refugee Board

Immigration and Refugee Board of Canada [31 October 2023]

These guidelines had last been updated in 1996. The revised guideline commits to the following, among many other things:

- How the IRB will assess persecution, nexus, internal flight alternative, state protection, and subjective fear in cases of minors.
- How the IRB will proceed in cases of potential abduction of a minor where the other parent is the alleged agent of harm.
- The guidelines articulate a child-sensitive approach to questioning that all participants in IRB proceedings should apply.
- The guidelines affirm the approach in Canadian legislation to minors under 14 testifying. For example, they shall not take an oath or make a solemn affirmation before testifying and shall not be asked if they understand what promising to tell the truth means.
- Provide more explicit guidance on the application of the Best Interests of the Child (BIOC) principle.

Articles of Interest in the Media

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

Will BRICS Expansion Finally End Western Economic and Geopolitical Dominance?

Geopolitical Monitor, 26 January 2024

This article provides commentary around the expansion of the BRICS group of emerging market economies, which is to admit five new member countries: Egypt, Ethiopia, Iran, Saudi Arabia and the United Arab Emirates. The author concludes that “the expanded BRICS are economically strong(er), yet geopolitically weak(er)”. The BRICS “may rebalance the global order”, but will not replace it.

Another Canadian Province to End Immigration Detention in its Jails

Human Rights Watch, 25 January 2024

The Canadian province of Prince Edward Island has joined eight other provinces to block the Canada Border Services Agency (CBSA) from using provincial jails to incarcerate migrants and asylum seekers on administrative grounds. The use of provincial jails for immigration detention is punitive, inconsistent with international human rights standards, and devastating to people’s mental health.

Trouble Among Neighbors: Iran, Pakistan, and China’s Offer of Mediation

The Diplomat, 25 January 2024

The recent security situation between Iran and Pakistan created consternation in a world already concerned with rising conflict in the region, but it also brought to fore the rising presence of China as a mediator. China has immediate security concerns for state-owned Chinese firms and Chinese nationals in the region, including those working on China-Pakistan Economic Corridor (CPEC) projects in Pakistan.

Elbit Systems Scandal Forces Hard Choices on Danish Government

Geopolitical Monitor, 24 January 2024

The Danish government is facing reputational challenges related to acquiring weapon systems from Israeli defence partner Elbit Systems. Elbit’s platforms are suspected of having killed many more civilians than actual military targets. Defence Minister Jakob Ellemann-Jensen has resigned altogether from politics.

Rohingya Refugees and the Shifting Tide in Indonesia

The Diplomat, 23 January 2024

A surge in Rohingya arrivals has marked a shift in Indonesia’s response. The province of Aceh, once heralded for its open and welcoming approach to Rohingya arrivals, is now increasing pushbacks and hostilities towards new arrivals. The article notes that, according to UNHCR, 41 boats carrying 4,490 Rohingya refugees embarked on sea journeys from Bangladesh and Myanmar to other countries in 2023. The majority (62 percent) arrived in Indonesia.

Iran strikes put Balochistan’s neglected conflict and its victims in the spotlight

The New Humanitarian, 22 January 2024

Iranian missile and drone attacks in Balochistan has brought attention to the decades-long conflict there, where thousands of young men have allegedly been “disappeared” by Pakistan's security forces. The Baloch Yakjehti Committee (BYC), a rights group that campaigns against the disappearances and extrajudicial killings, calls for a UN fact-finding mission to be established and sent to Balochistan to investigate alleged human rights violations.

Afghan Women Accuse Taliban Of Torture And Extortion Amid Dress Code Crackdown

Radio Free Europe Radio Liberty, 16 January 2024

The Taliban’s religious police detained scores of women and girls in recent weeks for violating the Islamic dress code – the latest blow to Afghan women. Since seizing power in 2021, the Taliban has severely curtailed women's right to work and study, and imposed restrictions on their appearances and freedom of movement.

Recent Case-Law of Interest from Around the World

AFRICA

KM v Minister of Home Affairs

High Court of South Africa, Gauteng Division **Case Number: 056910/22**, (25 January 2024)

The applicants, a citizen of Nigeria and a citizen of Uganda, had both had their refugee claims declined by a Refugee Status Determination Officer as manifestly unfounded. Their cases were referred, as required, to the Standing Committee for Refugee Affairs, which had upheld the decisions. For unknown reasons, however, the Refugee Status Determination Officer failed to furnish the applicants with the written reasons for the rejection of their applications. Section 24(4)(a) of the Refugees Act provides that the officer must furnish the applicant with written reasons within five working days after the date of rejection.

The applicants did not have a right of appeal to the Refugee Appeals Board ('unfounded' claims generate such a right but 'manifestly unfounded' claims do not). Because of the decline of their applications, the Director General of Home Affairs refused to issue further 'asylum seeker' work visas to the applicants – a decision which was the subject of the application to the High Court.

In allowing the applications (in spite of the non-attendance of the applicants and the failure of their lawyers to make submissions), the High Court held that the failure of the officer to notify the applicants of the reasons for the rejection of their refugee claims meant that decisions on the applications had not been finalised and the Minister was duty bound to grant further work visas to the applicants until such time as the decisions were finalised. A hollow victory perhaps, given that the Department of Home Affairs would be likely to serve the applicants with their decisions as soon as they came in to get their visas.

Rudasingwa v Minister of Home Affairs

High Court of South Africa, Gauteng Division **Case No: 31862/2022** (1 December 2023)

The applicants, Rwandan nationals, sought review of the decision of a Refugee Status Determination Officer, declining his refugee claim as "fraudulent and manifestly unfounded", as well as the decision of the Standing Committee, which had upheld the first instance decision. The High Court had little hesitation in setting aside the decisions. As to whether it should remit the matter or substitute its own decision, the Court found:

> "[36] … It will be a waste of time to order the RSDO to reconsider the matter because the decision was confirmed by the Standing Committee and Home affairs. Furthermore, looking at the tone it used in the papers before this court, the RSDO seem to be highly convinced that the applicant facts are not true, they highlight inconsistencies in the description of events made by the applicants. The RSDO could at the very least, have called upon a [UNHCR] representative and elicited the relevant information on the situation in Rwanda as provided for in section 24(1)(b)of the Refugees Act, as well as the abductions in Uganda, before conclusively rejecting the applications. It is thus unlikely that if the matter is remitted back to the RSDO a different outcome will ensue.
>
> [37] Having regards to the evidentiary material supplied by the First Applicant which is attached to this application and was made available to the Third and Fourth Respondents, it is abundantly clear that they failed to exercise their discretion properly or at all. In line with the principles set out in *Trencon*, there now exist exceptional circumstances permitting this court to grant an order substituting or varying the administrative action by the Respondents."

In substituting its own decision, the Court recognised the applicants as refugees. Of note, the applicants had argued their own case before the Court. The respondents (the Minister of Home Affairs, the Director-General of the Department of Home Affairs, the Chairperson of the Standing Committee for Refugee Affairs and the Refugee Status Determination Officer), in contrast, all failed to appear.

AMERICAS

Contreras Callado v Canada (Citizenship and Immigration)
2024 FC 79 (18 January 2024)

Social Media and Being Discreet. A common issue that is arising in Canadian refugee cases relates to the use of social media and the circumstances in which a claimant may be expected to use privacy settings in it. In *Contreras Callado v Canada*, Canada's Federal Court upheld a determination that the Immigration and Refugee Board of Canada (IRB) could expect an applicant to refrain from using her real name on social media upon return to her country. This decision is consistent with a long line of Canadian jurisprudence that it is not an error for the IRB to expect a refugee claimant to exercise care and caution in their use of social media (see ***Adeyig Olusola v Canada*** 2021 FC 659, at para 24).

Being discreet in accessing social media and making use of privacy settings therein has been upheld in Canada to be a reasonable expectation, and not akin to requiring a claimant to live in seclusion or hiding (see ***Iwuanyanwu v Canada*** 2022 FC 837, at para 10) or a human rights violation.

Ortiz Celedon v Canada (Citizenship and Immigration)
2023 FC 1718 (18 December 2023)

Forsaking Property and Human Rights. Another common issue that is arising in Canadian refugee cases relates to claimants renouncing a property interest to free themselves of a risk of harm. This was the subject of *Ortiz Celedon v. Canada*, 2023 FC 1718.

Canadian refugee law holds that claimants who are able to make reasonable choices and thereby free themselves of a risk of harm must be expected to pursue those options (see ***Sanchez v Canada*** 2007 FCA 99). In order to succeed with a claim for refugee protection, the onus is on the claimant to establish that taking specified actions either would not be reasonable, for example because it would deprive them of a basic human right such as an adequate standard of living, or because doing so would not in fact lead to safety (see ***Singh v Canada (Citizenship and Immigration)*** 2021 FC 595, at para 16).

Relinquishing a claim to property is generally seen as, in itself, a reasonable thing to expect of a claimant given that there is no human right to property as such (see ***X (Re)*** 2013 CanLII 92104 (CA IRB), at para 56). The way that this was phrased in *Ortiz Celedon v Canada* is that refugee law protects people, not their property, and forcible loss of land is not a recognised ground of protection under the Convention.

ASIA PACIFIC

NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs

[2023] HCA 37 (28 November 2023)

The plaintiff was a stateless Rohingya Muslim who arrived in Australia by boat in 2012. He was granted a bridging visa in 2014. In 2016, he criminally offended and was sentenced five years' imprisonment. On release, he was taken into immigration detention. He had applied for a protection visa, however, and was found to be a refugee. Having regard to his conviction, however, the delegate found reasonable grounds for considering him a danger to the community and so failing to satisfy the criterion for a protection visa.

Since 1994, the Migration Act has provided for the mandatory detention and removal of an "unlawful non-citizen". The duration of detention is governed by s 196(1), which provides that an unlawful non-citizen "must be kept in immigration detention until" the occurrence of, inter alia, that "he or she is granted a visa" or that "he or she is

removed from Australia".

Ten years later, in *Al-Kateb v Godwin*, the High Court considered the case of an unlawful non-citizen in respect of whom there was no real prospect of removal becoming practicable in the reasonably foreseeable future. It held that ss 189(1) and 196(1) required the continuing detention of such a person. The Court also held that ss 189(1) and 196(1) did not contravene the Constitution.

While finding that the statutory interpretation reached in *Al-Kateb* was unimpeachable, the High Court in *NZYQ* looked at whether the constitutional holding in *Al-Kateb* should be overruled, given the earlier decision in *Lim v Minister for Immigration, Local Government and Ethnic Affairs*.

The principle in *Lim* was that a law enacted by the Commonwealth Parliament which authorises the detention of a person, other than through the exercise by a court of the judicial power of adjudging and punishing criminal guilt, will contravene Ch III of the Constitution unless the law is reasonably capable of being seen to be necessary for a legitimate and non-punitive purpose. In other words, detention is penal or punitive unless justified as otherwise.

In *Al-Kateb*, McHugh J had observed:

> "A law requiring the detention of the alien takes its character from the purpose of the detention. As long as the purpose of the detention is to make the alien available for deportation or to prevent the alien from entering Australia or the Australian community, the detention is non-punitive."

The High Court was unanimous in concluding that this was incomplete and inaccurate. It held that whether the power is properly characterised as punitive requires an assessment of both means and ends, and the relationship between the two. Applying that principle where there is no real prospect of the removal of an alien from Australia becoming practicable in the reasonably foreseeable future, it cannot be said that the "purpose of the detention is to make the alien available for deportation" or "to prevent the alien from entering Australia or the Australian community" pending the making of a decision as to whether or not they will be allowed entry.

The primary submission of the defendants was that a legitimate and non-punitive purpose of detention of an alien is separation from the Australian community pending removal (if ever). The High Court rejected this, finding that the principle in *Lim* necessitates that the purpose of detention, in order to be legitimate, must be something distinct from detention itself. If "separation from the Australian community" is equated with separation from the Australian community by means of detention, as was necessarily implicit, then the postulated purpose impermissibly conflated detention with the purpose of detention and rendered any inquiry into whether a law authorising the detention is reasonably capable of being seen to be necessary for the identified purpose circular and self-fulfilling.

As a final note, the defendants conceded that they bore the legal burden of proving that the constitutional limitation was not transgressed. The Court considered this correct, having regard to the common law principle in relation to a writ of habeas corpus (that where a person in detention adduces sufficient evidence to put its lawfulness in issue, the legal burden of proof shifts to the detainer to establish its lawfulness), and to the principle of constitutional law that "it is the duty of the Court in every constitutional case to be satisfied of every fact the existence of which is necessary in law to provide a constitutional basis for the legislation".

EUROPE

Begum v Secretary of State for the Home Department

[2024] EWCA Civ 152, 23 **February 2024**

On 17 February 2015, Shamima Begum and two friends, giving their families untrue reasons for their absence, travelled to Istanbul on a Turkish Airways flight and arrived at a point near the Syrian border the following day. The

Secretary of State concluded, having taken the advice of the Security Service (MI5), that once there, the claimant had aligned with the organisation ISIL. Ten days after arriving in Syria, the claimant, still aged only 15, was "married off" to a Dutch national who was an adult considerably older than her.

On 19 February 2019 Ms Begum, then aged 19, was deprived of her British citizenship by a decision under s 40(2) of the British Nationality Act 1981 ("BNA 1981"), made personally by the then Secretary of State for the Home Department, the Rt Hon. Sajid Javid MP.

In 2021, the Supreme Court held that the Secretary of State had acted lawfully in refusing to allow Ms Begum to come to the UK to pursue her appeal against deprivation of citizenship: *R (Begum) v Special Immigration Appeals Commission* ("*Begum UKSC*") **[2021] UKSC 7**; **[2021] AC 765**.

Her appeal to the Special Immigration Appeals Commission ("SIAC") continued in her absence and on 22 February 2023 it was dismissed. Ms begum appealed to the Court of Appeal against SIAC's decision, with permission granted by the Chairman of SIAC, Mr Justic Jay. The issue in this appeal is whether SIAC was right to conclude that the Secretary of State's decision to deprive her of her citizenship was lawful.

The Court acknowledged that deprivation of citizenship often had severe consequences, and that the decision in Ms Begum's case could be seen as harsh, however, it concluded that the decision under section 40(2) of the British Nationality Act 1981 was not unlawful. The public sector equality duty under section 192 of the Equality Act 2010 did not avail Ms Begum: the Secretary of State's exercise of the section 40 deprivation power was a proportionate act for the purpose of safeguarding national security.

The Court of Appeal found that SIAC had not erred in dismissing her appeal. It is understood that Ms Begum is once more seeking permission to appeal to the Supreme Court.

AA v Bundesrepublik Deutschland

(Common procedures for granting and withdrawing international protection - Conditions for rejecting such an application as inadmissible - Concept of 'new elements or findings' - Judgment)

[2024] EUECJ C-216/22 (08 February 2024) **(English / French / German)**

This was a request for a preliminary ruling from the Administrative Cour in Sigmaringen, Germany on the interpretation of Article 33(2)(d), Article 40(2) and (3) and Article 46(1)(a)(ii) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection. The applicant was a Syrian national who had arrived in Germany and claimed asylum on 26 July 2017, having left Syria in 2012, stayed in Libya until 2017, and then crossed both Italy and Austria to enter Germany. On 16 August 2017, he was refused international protection but granted subsidiary protection. The applicant did not challenge that decision.

On 15 January 2021, relying on the Court of Justice's judgment in ***EZ v Bundesamt für Migration und Flüchtlinge (Military service and asylum)*** (C-238/19, EU:C:2020:945) (19 November 2020, the applicant made a further asylum application, arguing that *EZ*'s case constituted a change in the legal position, by reference to relevant national laws, and that his fresh claim should be examined on the merits. The German authorities rejected that as inadmissible and the applicant challenged that decision in the Sigmaringen Administrative Court, which referred the question to the Court of Justice, to establish whether German national law was compatible with EU law.

The Court (Grand Chamber) held that:

1. Article 33(2)(d) and Article 40(2) and (3) of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection must be interpreted

as meaning that any judgment of the Court of Justice of the European Union, including a judgment which is limited to interpreting a provision of EU law already in force at the time that a decision on a previous application was adopted, constitutes a new element, within the meaning of those provisions, irrespective of the date on which it was delivered, if it significantly adds to the likelihood of the applicant qualifying as a beneficiary of international protection.

2. Article 46(1)(a)(ii) of Directive 2013/32 must be interpreted as allowing – but not requiring – Member States to authorise their courts or tribunals, where those courts or tribunals annul a decision rejecting a subsequent application as inadmissible, to rule themselves on that application, without having to refer the examination of that application back to the determining authority, provided that those courts comply with the safeguards provided for by the provisions of Chapter II of that directive.

MA v Republic of France

Cour Nationale du Droit D'asile, Case no 22054816 [12 February 2024]

The National Court for Asylum (CNDA) found that the Gaza Strip is experiencing a situation of indiscriminate violence of exceptional intensity where civilians are at risk to their lives simply by their presence on Gaza territory.

The case concerns an applicant originating from the Gaza Strip who entered France in September 2021. The applicant argued that he had well-founded fear of persecution by Hamas on grounds of his political opinions. He submitted an international protection application which was rejected by the French Office for the Protection of Refugees and Stateless Persons on 26 August 2022.

In its decision, the CNDA found that the applicant failed to provide precise and credible factual evidence of the actual risk he would face in the Gaza Strip. Consequently, the Court held that his application failed under the Refugee Convention. However, the CNDA, applying Article L.512-1 of the Code of Entry and Residence of Foreigners and of the Right to Asylum (CESEDA) and recalling the CJEU case law, found that the Gaza Strip is experiencing a situation of indiscriminate violence of exceptional intensity which would represent a severe, direct and individual threat against the applicant's life as a civilian in case of return.

Therefore, the CNDA granted the applicant subsidiary protection.

MH and SB v Hungary

European Court of Human Rights nos 10940/17 and 15977/17 [22 February 2024]

The two applicants, both minors, entered Hungary in 2016 and initially declared themselves to be adults but then, shortly afterwards, declared to be minors and requested that their age be assessed.

The first applicant, an Afghan citizen, was issued with a deportation order and a one-year entry ban for illegally crossing the borders. On the same day, he expressed his wish to apply for asylum, following which the deportation order was suspended. The Office of Immigration and Nationality (OIN) ordered that he be held in asylum detention and decided not to carry out an age assessment as the applicant had initially indicated that he was an adult. The OIN also stated that if the applicant was able to prove his age by presenting identity documents, an age assessment could be carried out at his own expense. After presenting identity documents proving his minority, the asylum authorities ended his detention.

The second applicant is a Pakistani national who was apprehended by the Hungarian authorities. He applied for asylum in Hungary, the OIN ordered that he be held in asylum detention and suspended asylum proceedings pending a Dublin transfer to Bulgaria. Later, the applicant stated that he was a minor and submitted a request to be placed in an open reception facility, he then requested for his age to be assessed. Both requests were denied by the Hungarian authorities.

The Bulgarian authorities indicated that they had registered the applicant as a minor and that he could therefore not be returned in Bulgaria. The OIN initiated an age assessment procedure which concluded that the applicant was a minor. Consequently, the OIN ended his asylum detention.

After recalling the general principles concerning Article 5(1) of the Convention and the principles and considerations relevant to the detention of migrant children, the Court ruled that Hungary had violated Article 5(1) of the Convention as regards the periods of detention after the applicants notified their minority to the authorities. The Court recalled its case law stating that the child's extreme vulnerability takes precedence over considerations relating to her/his status as an irregular migrant.

The Court found the domestic authorities failed to act expeditiously and with due regard to the children's best interests, and that the applicants' detention, after they claimed to be minors, was not carried out in good faith and was therefore arbitrary.

Applicant v State Secretary for Justice and Security (Staatssecretaris van Justitie en Veiligheid))
NL22.23286, ECLI:NL:RBDHA:2023:357 (18 January 2023) (**Dutch** / **English (abstract)**)

Italy's request for suspension of Dublin transfers may affect mutual trust, but does not yet indicate structural deficiencies. The case concerns a transfer to Italy under the Dublin procedure. The applicant challenged the decision according to which Italy was responsible for examining his asylum application due to the absence of a timely response from the State following the transfer request submitted by the Netherlands.

The Court relied on the provisions of Article 16 of the Dublin Regulation concerning rules for dependent persons. Considering that the applicant is responsible to advance plausible elements regarding his father's dependency, the Court noted that he did not sufficiently substantiate the alleged dependency. The Court further examined Italy's Circular of the 5th of December 2022 requesting the temporary suspension of Dublin transfer because of the unavailability of reception facilities. In that regard, the Court held that the Circular's provisions should, for the time being, only be regarded as a temporary impediment to a factual transfer due to its alleged temporary nature. In its view, the text indicates a problem potentially affecting the principle of mutual trust but does not yet indicate structural and fundamental deficiencies in the Italian reception facilities.

To conclude, the Court did not rebut the presumption of the mutual trust in the case at stake. However, it declared that the Secretary would need to assess the asylum application if the temporary impediment lasts longer than the transfer deadline under the Dublin Regulation.

The stigma of citizenship stripping has an intergenerational component and is not confined to the individual who has been deprived of citizenship.

- Office of the High Commissioner for Human Rights

"The Human Rights Consequences of Citizenship Stripping in the Context of Counter-Terrorism with a Particular Application to North-East Syria" (February, 2022)

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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