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Web links are marked in blue.

STOP PRESS: For the first time, Israeli court orders the Government of Israel to grant asylum

Yonatan Berman, founder and head of the Clinic for Migrant and Refugee Rights at the Academic Center of Law and Business, Ramat Gan, Israel, discusses a case in which the Government of Israel has been ordered to grant asylum, a historic moment for Israeli refugee rights lawyers. While the full text of the decision is available only in Hebrew, a short summary in English can be found at the University of Michigan Refugee Caselaw website.

On 14 August 2011, the Israeli Central District Court (which is the intermediate level court in a three-level system) issued the first judgment ever in Israel cancelling a government decision to reject an application for asylum and recognising a person as a refugee, meeting the criteria of the 1951 Convention and 1967 Protocol (Administrative Petition 3415-05-10 *Hernandez v. Ministry of Interior*). Shortly afterwards the Government of Israel appealed the judgment to the Supreme Court (Administrative Appeal 7126/11), which will hear the case on February 2012.

The applicant's mother, a Colombian national living in Israel for several years, testified a couple of years ago in criminal proceedings in Israel against members of an international document forgery network whose leaders are in Israel and Colombia. As a result, some of its members were tried and convicted and others were deported from Israel to Colombia. Consequently, members of the network made threatening phone calls to the applicant, who was still living in Colombia, and physically attacked and seriously injured him. His attempts to seek protection of law enforcement agencies in Colombia were fruitless. Shortly afterwards, he fled the country and entered Israel clandestinely through the Sinai Desert in April 2010. The Israeli Ministry of Interior conducted RSD proceedings, and determined that he did not meet the Refugee Convention criteria and should be deported.

The Court points out serious procedural flaws in the Ministry of Interior's decision and then reviews the merits of the case. The Court points out that while Israel has not incorporated the 1951 Refugee Convention and 1967 Protocol into its domestic legislation, the Government of Israel has repeatedly declared in several court proceedings that it sees itself as bound by the Convention and Protocol, and therefore the Court regards these documents as domestically-binding and rules based on their provisions.

The Court then examines, based on the Convention's standards, the Government's decision to reject the application for asylum. It asserts that while according to UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status, subjective fear of being persecuted must be supported by an objective fear, this does not mean that corroborative evidence must be presented, adding that in some cases the applicant's claims would suffice, as long as they are reasonable. Citing the US Supreme Court decision *INS v. Cardoza-Fonseca*, the Court determines that a fear of being persecuted may be well-founded even in the event where there is a less than a 50 percent chance of persecution occurring, and that asylum applicants should enjoy the benefit of the doubt.

Additionally, the Court examines and criticises the Government's assertion that the applicant is not a refugee since he is not being persecuted based on a Convention ground but rather on a 'criminal background'. The Court frames the question as whether the persecution faced by the applicant on account of his family relations with his mother is based on membership in a particular social group. It reviews different approaches to defining this term and considers the ones

Continued page 14

Also in this issue:

Resettlement in exchange for protection and 'local integration' in Egypt: a dubious bargain

The following article, written by Merrill Smith, is a response to a recent American University in Cairo Center for Migration and Refugee Studies publication, in which the author, Michael Kagan, puts forth a refugee protection strategy which he states 'addresses both the rights of refugees under law and the interests of Egypt as a country'. If you have further comments on the paper, please email us.

In 'Shared responsibility in a new Egypt: A strategy for refugee protection', Michael Kagan of Asylum Access and the University of Las Vegas School of Law makes an argument for the strategic use of resettlement of refugees currently in Egypt (American University in Cairo, School of Global Affairs and Public Policy, Center for Migration and Refugee Studies, September 2011). In exchange for resettlement countries accepting refugees who have remained in Egypt for five years or more without prospects for other durable solutions, the Government of Egypt would grant 'local integration' as durable solution — the correct and legally more precise term from the 1951 Convention relating to the Status of Refugees is *naturalisation*, i.e., acquiring a new nationality (articles 1C(3) and 34) — for others in similar circumstances. It would also grant those remaining their rights under the 1951 Convention, particularly the right to work and access to public education and relief on par with nationals. The number that Egypt accepts for permanent status 'could be tied to the number who are resettled out of Egypt... For example, if 2000 are resettled then 2000 may be eligible for permanent residency' (pp. 38, 43).

There is much to admire in this paper, particularly the fact that it addresses one of the major lacunae of the international refugee protection regime, the stunning lack of systematic and rights-based international responsibility and burden sharing. Poor countries host most of the world's refugees and the rich ones that effectively keep them out and subsidise their human 'warehousing' without rights refuse to shift their commitment to funding more integrative forms of aid. The paper also offers a clear analysis of the onerous burdens Egyptian law places on the right of refugees to work and to enjoy social benefits, often obscured or ignored by other writers.

But, as Kagan acknowledges,

> There are reasonable concerns about resettling large numbers of refugees who lack urgent vulnerabilities, including the obvious need to prioritise cases given limitations of resettlement capacity (p. 37).

To this, one should add concerns about prioritising the resettlement of large numbers of refugees from a country far from the top of the list of those hosting the largest numbers of refugees. According to UNHCR statistics for 2010, Egypt, with 109 thousand refugees, does not even make the top 10, eclipsed by such other poor nations as Pakistan, with 1.9 million; Iran, with 1.1 million; Syria, with 1 million; Jordan, with 450 thousand; Kenya, with 403 thousand; and Chad, with 348 thousand (UNHCR, *Global Trends 2010*, p. 14). How a special resettlement dispensation with respect to Egypt constitutes equitable international responsibility sharing is unclear — one could also cite the outrageously disproportionate amount of foreign aid (most of it military) that Egypt already receives and what 'protection dividend' that might yield but that is a subject for another article.

Another fault is the degree to which the paper buys into the dubious notion that rich countries may induce poorer ones to allow some of the refugees they host to naturalise and/or enjoy Convention rights they presently deny them in exchange for the former agreeing to accept other refugees from that country for resettlement. This aspect of the 'strategic use of resettlement' has a problematic and unreliable history. Also, Kagan seriously underestimates the damage that large scale resettlement does to the cause of protection by undermining its

Continued page 14

O P P O R T U N I T I E S

Opening for executive director at St Andrew's Refugee Services, Cairo, Egypt

St Andrew's Refugee Services seeks a qualified candidate for the position of executive director of its Refugee Services Programme. The executive director will be responsible for all aspects of the programme, including strategic planning and budgeting. More information on the position as well as requirements and application procedures, is available through email.

Vacancy for development studies fellowship

Applications for the Joyce Pearce Junior Research Fellowship in Development Studies (Refugees and Forced Migration) are now open. The program is for three years and will commence in January 2012. It will be held in conjunction with the Refugee Studies Centre, University of Oxford. For more information, please visit the fellowship website.

Human Rights Watch policy and advocacy vacancies

HRW is seeking full-time researchers on South Asia, Vietnam & Cambodia, Libya and the Philippines (click on each location for more information). Candidates are encouraged to apply immediately for the first two vacancies. The deadline for the Libya position is **15 November 2011**, and for the Philippines position, **21 November 2011**.

Internship opportunites in Cairo, January 2012

Africa and Middle East Refugee Assistance (AMERA) has opened applications for the positions of psychosocial intern and unaccompanied minors psychosocial intern at its office in Cairo, Egypt. These are full time, unpaid positions commencing in January 2012 for a duration of 7.5 months. Interested applicants should send a CV and cover letter by email no later than **30 November 2011**.

UNHCR's incentive salary policy violates international human rights laws and local labour laws

Contributed by M. Angela Buenaventura, a recent volunteer legal advocate with Asylum Access in Quito, Ecuador, where she represented refugees asserting their rights to refugee status, employment, security, education and social services. She previously worked with the National Immigrant Justice Center and the Midwest Immigrant and Human Rights Center's Anti-Trafficking Project. For further discussion on the topic, see 'Refugees and the right to work: promoting refugee empowerment through employment', an Asylum Access blog.

The *right to work and the incentive salary policy of UNHCR*

The right to work, as defined by Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), is the right 'of everyone to the opportunity to gain his living by work which he freely chooses or accepts.' The right to work and related labour rights are enshrined in several human rights instruments. For example, the Universal Declaration of Human Rights (UDHR) guarantees the right to just and favourable remuneration, reasonable limitation of working hours and periodic holidays with pay. The UDHR and the African Charter on Human and Peoples' Rights (African Charter) provide for the right to equal pay for equal work. The UDHR, the African Charter, the ICESCR, and the International Labour Organization Convention No. 111 state that individuals may not be denied access to work on the basis of gender, ethnic or national origin, religion, or social or *other status* (emphasis added). In addition to these international instruments, the national laws of host states also guarantee the right to work and other labour rights.

Human rights practitioners are working to ensure that refugees' right to work and other economic, social, and cultural rights are placed on an equal footing with their civil and political rights. Yet in the midst of this effort, UNHCR has been employing a troubling 'incentive salary' policy throughout refugee camps which violates refugees' right to work. The term 'incentive salary' refers to the salary paid to a refugee employed by UNHCR or an organisation responsible for the implementation of UNHCR programs ('implementing partner"). UNHCR and its implementing partners employ refugees in camps for jobs ranging from laundry workers to certified clinical nurses or doctors. However, rather than paying these refugees salaries equal to those of nationals performing identical jobs, UNHCR and its implementing partners pay refugees much lower fees, referred to as 'incentive'. According to UNCHR, such paltry salaries are justified because refugees already receive food and other necessities in camps; UNHCR and NGOs lack resources to pay refugees salaries on par with those received by nationals; and refugees should be eager to assist their own communities without the expectation of compensation. (Verdirame and Harrell-Bond (2005) 'Rights in Exile - Janus-Faced Humanitarianism' pp. 256-266)

UNHCR's incentive scheme has been a problem for years in refugee camps worldwide. In 1997, refugee teachers working in Ugandan refugee camps went on strike, supported by their Ugandan co-teachers. These refugee teachers were only being paid 'incentives' while their Ugandan co-teachers, working in the same camps, not only earned salaries at the national scale, but were also awarded 'hardship' allowances because conditions in camps merited them.

In 2006, an article by two UK-based organisations that have worked closely with Bhutanese refugees since the 1990s lamented that '[c]amps teachers are paid a basic incentive salary whereas teachers working outside the camps earn at higher levels enabling them to provide support to the rest of their families. The current teacher turnover rate in the camps is [not surprisingly] at an all-time high'. More recently, in August 2011, Kakuma News Reflector (an independent news magazine produced by African journalists operating in Kakuma Refugee Camp in Kenya) noted that officers in various NGOs in Kenya earn 100,000 Kenyan shillings (KSh), the equivalent of USD1,000.50, and NGO managers earn 200,000 KSh and more. These officers and managers also receive insurance, accommodation and meals for themselves and their immediate family members. By contrast, under UNHCR's incentive scheme for the Kakuma camp, a refugee security guard earns a meager 2,500 KSh (USD25.01).

UNHCR incentive worker guidelines in Ethiopia

UNHCR is currently attempting to institutionalise its incentive salary policy in Ethiopia. Fahamu Refugee Programme was provided a document entitled Guidelines on the Standardisation of Incentives and their Allowances for Refugees (Inter-Agency Policy), which UNHCR had distributed to its implementing partners in Ethiopia. UNHCR informed partners that these guidelines are 'national binding law'.

The guidelines divide jobs performed by refugees into four grades based on the qualifications and responsibilities that the job entails and dictate precisely the salaries that NGOs must pay refugees employed at each grade. Fahamu's source noted that the salaries listed *are less than half of normal salaries paid to nationals*. The guidelines also require that '[a]ny increase (if made) should be implemented by all [implementing partners], as this would otherwise result in refugees' preference of some agencies over the other'. In other words, these incentive salaries are fixed across all employers so that refugees have no power to bargain for better wages and benefits or to seek the salaries they deserve.

The guidelines also encourage NGOs to persuade refugees to provide free labour. Asserting that '[e]very agency should promote the importance of encouraging community to participate in matters affecting their lives without expectations of incentives and handout', the document notes that refugees may be expected to construct schools, pave roads, plant trees, and participate in 'cleaning campaigns' without any compensation. The policy contains no provisions for sick leave, maternity leave or holidays.

Continued page 18

Experts speak out on situation of human rights in Rwanda

One of the topics we focused on in our October issue was the implementation of the cessation clause of the 1951 Convention relating to the Status of Refugees with regards to Rwanda, initially scheduled to occur on 31 December 2011. The Fahamu Refugee Programme mounted a campaign against this withdrawal of protection accorded to Rwandan refugees and, along with other campaigners, achieved a partial victory when the date of the implementation of the clause was pushed to 30 June 2012. For further background see 'Rwanda: Cessation of Refugee Status is Unwarranted', a memorandum of fact and law, from where the following excerpt is taken.

Human Rights Watch (HRW) has documented

> a longstanding pattern of intimidation and harassment of human rights defenders by Rwandan officials, including threats to their security, administrative obstacles, public and personalised attacks, and allegations that they are complicit with political opponents. Several human rights organisations, once active in Rwanda, have also been silenced through infiltration by people close to the government who have taken over these groups' leadership ('Rwanda: stop intimidating regional human rights group', 23 August 2011).

Also according to HRW,

> Independent civil society in Rwanda has been seriously decimated. It is one of the areas in which state intimidation, threats and infiltration have succeeded in silencing criticism. In the aftermath of the genocide, a number of independent Rwandan human rights organisations were still able to investigate and report on human rights violations, albeit at great risk. Over the subsequent years, they have been silenced one by one. In 2011, there are barely two or three active human rights organisations left in Rwanda, and even they are struggling to remain active ('Working effectively in fragile and conflict affected states: DRC, Rwanda and Burundi', May 2011, citing Front Line, 'Front Line Rwanda: disappearances, arrests, threats, intimidation and cooption of human rights defenders 2001-2004', 2005; and Timothy Longman, 'Limitations to Political Reform: The Undemocratic Nature of Transition in Rwanda',pp. 26–27 in Scott Straus and Lars Waldorf, eds., *Remaking Rwanda: state building and human rights after mass violence*, University of Wisconsin Press, 2011).

According to Amnesty International,

> Rwanda's vague and sweeping laws against 'genocide ideology' and 'divisionism' under 'sectarianism' laws criminalise speech protected by international conventions and contravene Rwanda's regional and international human rights obligations and commitments to freedom of expression. The vague wording of the laws is deliberately exploited to violate human rights. …
>
> These broad and ill-defined laws have created a vague legal framework which is misused to criminalise criticism of the government and legitimate dissent. This has included suppressing calls for the prosecution of war crimes committed by the Rwandan Patriotic Front (RPF). In the run-up to the 2010 elections, legitimate political dissent was conflated with 'genocide ideology', compromising the freedom of expression and association of opposition politicians, human rights defenders and journalists critical of the government ('Safer to stay silent: The chilling effect of Rwanda's laws on "genocide ideology" and "sectarianism"', 23 August 2010).

Also according to HRW,

> Freedom of expression, more broadly, continues to be severely restricted in Rwanda. A variety of laws have been used to prosecute critics — in particular, a law on 'genocide ideology' adopted in 2008. Ill-defined, vague and open to abuse, this law has been used, among other things, to target critics of the government or of the RPF. [c] Critics have also been charged with other serious offences such as endangering national security. …
>
> [T]he media environment in Rwanda is still extremely restrictive. Two journalists are in prison after being sentenced in 2011 to 17 and seven years respectively for writing articles which were viewed as critical of the government and the president; several other independent journalists have gone into exile; and most others are afraid of investigating sensitive issues. Almost all active media outlets in Rwanda are now either controlled by the government or compliant with its directives (May 2011, citing Amnesty International August 2010; and Lars Waldorf, 'Instrumentalising genocide: the RPF's campaign against "genocide ideology"', Straus and Waldorf 2011).
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> .

Anneke Van Woudenberg, an HRW authority on the Great Lakes region, declared in 2010 that

> any attempt to present the information contained in [the UNHCR-commissioned draft report by Richard Gersony detailing horrific atrocities by Rwandan government affiliated forces in the Democratic Republic of Congo] has been blocked, subverted or really discouraged. The report starkly shows the consequences of a culture of impunity. You see the same crimes being committed again and again. And we're continuing to document those same abuses today. This is the kind of horrific cycle you get when you bury the truth, when you don't hold perpetrators to account (James Traub, 'Judgment Day for Rwanda', *Foreign Policy*, 3 September 2010).

Also according to Amnesty International,

> The mandate of the International Criminal Tribunal for Rwanda (ICTR) was extended until the end of 2011 for first-instance trials and to the end of 2012 for appeals. Ten suspects subject to arrest warrants by the ICTR remained at large. The ICTR Prosecutor made new applications in November to transfer cases to Rwanda. Past applications failed after Trial Chambers decided that the accused would not receive fair trials.
>
> Judicial proceedings against genocide suspects took place in Belgium, Finland, Netherlands, Spain, Switzerland and the USA. Sweden consented to extradition in 2009, but the case has yet to be decided before the European Court of Human Rights. No country extradited genocide suspects to Rwanda due to fair trial concerns (*Annual Report 2011*, 'Rwanda', 17 May 2011).

As the invocation of the cessation clause is still scheduled to occur, albeit later, there is still reason to endorse the petition against the cessation clause, which can be done online here. •

*The Fahamu Refugee Legal Aid Newsletter is distributed in **Pambazuka News**, the authoritative pan-African electronic weekly newsletter and platform for social justice in Africa. With over 1000 contributors and more than 500,000 readers, Pambazuka News provides cutting edge commentary and in-depth analysis on politics and current affairs, development, human rights, refugees, gender issues and culture in Africa. Visit online or subscribe by email.*

International Association of Refugee Law Judges conference presentations: a challenge to legal aid providers

Fahamu Refugee Programme Intern Rebecka Jonsson provides an overview of two papers presented at the the recent Ninth World Conference of the International Association of Refugee Law Judges (IARLJ) in Bled, Slovenia.

Refugees seeking asylum are unlikely to have information about what is required from them, let alone know where they may access free legal aid. The importance of the availability of free and high quality legal aid for asylum cases and how it is vital to the success of an asylum application was emphasised in two papers presented at the IARJL Conference by Professor Elspeth Guild and Hon Mr Justice Nicholas Blake.

In 'The Asylum Seeker's Right to Free Legal Assistance and/or Representation in EU Law', Professor Guild pointed out that today, any asylum seeker who enters the European Union (EU) should be guaranteed free legal aid. Some of the developments described are the Common European Asylum System, along with the more recent EU law Article 6(1) Treaty on European Union, which are provided in the EU Charter of Fundamental Rights.

In Justice Blake's presentation, 'Between border control, security concerns and international protection; Current problems in asylum and protection law: the UK Judicial Perspective', he lists the many obstacles to providing effective judicial access to asylum seekers, and emphasises the responsibility that judges face in making transparent and credible decisions.

In the discussion of these papers, Professor Guild reminded the participants:

> the role of judges in ensuring that impecunious asylum seekers actually receive free legal assistance and representation as early as possible in the proceedings is not simply based on self-interest. It is an obligation arising from both EU and ECHR. It is for the EU national judges to ensure this important human right is respected in accordance with the guidance, which they have been given by their supranational courts. … A well-prepared and presented asylum claim is much less likely to be rejected. Where it is refused, the issues of contention between the parties will be clearer on appeal. The judge's job will be simplified, as there will be nearer equality among the parties.

One participant commented, 'sadly, none of we judges will ever see a refugee case unless there are lawyers to represent refugees'. IARLJ President Justice Sebastiaan de Groot remarked, 'I would go a step further by saying that legal aid provision is not the end of the story, but that a system of quality control with the legal aid practitioners in asylum and immigration is essential to make a legal aid system of any use. This is particularly true in a situation where the clients have no idea about the level of their legal assistance and if it is any good.' ●

P U B L I C A T I O N S

'Many authorities processing LGBT asylum cases base their standards on stereotypes, dismissing non-stereotypical gays and lesbians and completely dismissing bisexuals and transgender individuals' — *Fleeing homophobia: Asylum claims related to sexual orientation and gender identity in Europe*. Sabine Jansen and Thomas Spijkerboe. COC Netherlands and University of Amsterdam. September 2011.

'[Stateless persons in Kenya] face difficulties in their quest to enjoy fundamental rights and freedoms relating to work, movement, education, property and health' — *Out of the shadows: Towards ensuring the rights of stateless persons and persons at risk of statelessness in Kenya*. Edwin Abuya. Kenya National Commission on Human Rights in partnership with UNHCR. July 2010.

'Asylum seekers returned to Serbia face a real danger of chain *refoulement*' — *Serbia as a safe third country: A wrong presumption*. Aniko Bakonyi, Julia Ivan, Grusa Matevzcic and Tudor Rosu. Hungarian Helsinki Committee. September 2011.

'Persons belonging to minorities continue to suffer from serious discrimination' — *Respect for and protection of persons belonging to minorities 2008-2010*. European Union Agency for Fundamental Rights. September 2011.

'In [2008 and 2009] forced returns outnumbered voluntary returns' — Comparative study on best practices in the field of forced return monitoring. Matrix Insight Ltd and International Centre for Migration Policy Development, for the European Commission Directorate-General Justice, Freedom and Security. July 2011.

The Refugee Voice is a grassroots newspaper created in April 2011 by African asylum seekers and Israelis in Israel in collaboration with a Tel Aviv University student. 10,000 copies of each edition are distributed free of charge, and it can also be read online. Articles focus on news stories pertinent to asylum seekers residing in Israel.

'From its 2005 adoption of a controversial asylum law...to its 2009 referendum banning the construction of minarets, Switzerland's reaction to immigration has become increasingly antagonistic in recent years' — Immigration detention in Switzerland: A Global Detention Project special report. Michael Flynn and Cecilia Cannon. Global Detention Project. October 2011.

'The EU and its Member States have undertaken, and are bound under successive EU Treaties, to establish a Common European Asylum System (CEAS) in line with the 1951 Convention and other relevant treaties...and seek to provide a

common approach to interpreting protection criteria' — Further developing asylum quality in the EU (FDQ): Summary project report. UN High Commissioner for Refugees. September 2011.

'Refugees in Mtabila camp have been resisting return for more than two years despite significant pressure from the government of Tanzania' — Resisting repatriation: Burundian refugees struggling to stay in Tanzania. International Refugee Rights Initiative and Rema Ministries. September 2011.

'This DIIS Brief explores the consequences of EU migration policies for West African migration, particularly irregular migration, and calls for consideration of their human consequences' — DIIS policy brief: Europe fighting irregular migration – consequences for West African mobility. Nauja Kleist. Danish Institute for International Studies. October 2011.

'This chapter contributes to recent research by conceptualising the institutional perpetrators of [Purported Forced Marriage[PFM], shifting the focus to the courts and the bureaucracy in which asylum and refugee claims are processed' — Asylum and the 'Forced Marriage' Paradox: Petitions, Translation, and Courts as Institutional Perpetrators of Gender Violence. Benjamin N. Lawrence. Rochester Institute of Technology. September 2011.

'This legal opinion is written in reply to a request made by Release Eritrea on available legal recourse to tackle the recent development of trafficking in persons that has victimised thousands of Eritrean asylum seekers or immigrants' — Kidnapping, Hostage-Taking and Ransoming of Eritrean Asylum Seekers in the Sinai Desert. Simon M. Weldehaimanot. Notre Dame Law School. March 2011.

Forced Migration Review issue 38, titled 'The Technology Issue', is now available. The effects of changes in technology — particularly in communications technology — on displaced people and those who work with them are the main focus of the 32 articles and short pieces in this issue.

COUNTRY OF ORIGIN & LEGAL NEWS

GLOBAL

Croatia, Nigeria, and the Philippines become parties to one or both of the international treaties on statelessness

Private companies profit from the outsourcing of immigration detention enforcement

UNHCR official urges 'improved protection for the displaced', focusing on Libya, Somalia and Ivory Coast emergencies

Equal Rights Trust calls on states to end legislation criminalising same-sex sexual conduct, currently prohibited in 42 of 54 Commonwealth countries

New York Times: 'camps are not only routinely violating refugees' rights, the whole camp system is based on their violation'

Asylum applications in industrialised countries rise 17 percent in first six months of 2011

AFRICA

BURUNDI: 41 people killed, 'violent deaths...reported on an almost daily basis'

SOMALIA: Women in Mogadishu camps 'not safe from attack'

SOUTH AFRICA: 'Recent migration developments may affect the administrative justice accorded to asylum seekers'; stateless persons 'falling through the cracks'

SUDAN: Aerial bombings in Blue Nile state force nearly 2,000 people to flee to Ethiopia

TANZANIA: Thousands of Burundians struggling against forced repatriation

UGANDA: Thousands of Rwandan refugees remain sceptical of UNHCR's intended invocation of the Cessation Clause

AMERICAS

BRAZIL: African refugees find safety in the Brazilian Amazon

CANADA: Over 100 members register with Canadian Association of Refugee Lawyers, pledge to fight 'bad bills'; Hungarian Roma account for 13 percent of Canada's refugee claims

USA: Judge rules that women who would be subjected to honor killings if returned to Jordan form a coherent social group and are entitled to seek withholding of removal; Iowa energy company's agriculture project in Tanzania may displace 162,000 Burundian refugees who have been living on the land for 40 years; Number of refugees to be admitted to the USA for resettlement in 2012 to be reduced by 4,000, with 3,000 of this reduction affecting those from Africa; DHS rescinds approval of refugees submitted for resettlement based on secret evidence; Board of Immigration Appeals approves motion to reopen case based on worsening country conditions for LGBTI people in Russia

ASIA-PACIFIC

AUSTRALIA: Lawyer defending accused people smuggler tells court that the passengers his client was transporting had a right to go to Australia and apply for refugee status under international laws

BURMA: COI: Human rights activists reporting increased incidence of rape against Kachin women in areas of recent military attacks by government forces in northern Myanmar

INDIA: Court rules against deportation of a Tamil refugee, says 'India needs to live up to its humanitarian goals'

NEPAL: 23 Tibetan refugees detained for illegal entry released into UNHCR custody after rights groups protest Chinese interference

MALAYSIA: Unregistered Chin refugees and asylum seekers fear possible deportation

SRI LANKA: Chinese asylum seeker allowed to remain in the country; Despite 'frantic efforts by lawyers in London', up to 50 asylum seekers sent back to Sri Lanka from the UK

Spousal rights, children and resettlement: a continuing discussion

Child custody rights, UNHCR resettlement and the Hague Convention on the Civil Aspects of International Child Abduction

The following, by Amanda Sam, was first written as a memo for an Iraqi Refugee Assistance Project case, in which UNHCR would not allow an applicant to be resettled without a guardianship document from a disappeared and abusive former husband.

This memo explores how the Hague Convention on the Civil Aspects of International Child Abduction affects the custody rights of women seeking international resettlement with their children through UNHCR without the father's express permission. The Hague Convention on the Civil Aspects of International Child Abduction is a multi-lateral treaty with 85 contracting states, which do not include Syria, Jordan, Iraq and most Middle Eastern countries (see Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, hereinafter Convention, Status Table). Under the Hague Convention, 'courts consider only the claim that the child was improperly removed, and not the merits of an underlying custody claim' (The Hague Convention on International Child Abduction: A Child's Return and the Presence of Domestic Violence, September 2005, p. 3). This memo will consider relevant legal standards and interpretation of the Convention, and highlight matters that refugee applicants and their advocates should consider in cases where the Hague Convention might apply.

The Convention applies to 'wrongful removal'

The Convention seeks to 'secure the prompt return of children wrongfully removed to or retained in any Contracting State; and… to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States' (Art. 1). According to the Convention, the removal or retention of a child is considered wrongful where

> a) it is in breach of rights of custody attributed to a person… under the law of the State in which the child was habitually resident immediately before the removal or retention; and b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention (Art. 3).

The state to which the child has been taken, and thus to which the 'left behind' parent addresses his request (the 'requested State') may take notice of the law formally recognised in the child's state of habitual residence in determining if the removal or retention was 'wrongful' (Convention Art. 14).

'Rights of custody' and the exercise of custody

Article 3 makes it a prerequisite that the requesting party possesses custody rights for the Convention to be applicable. The Convention's accompanying Explanatory

Continued overleaf

Resettlement, divorce and visitation/custody rights

Contributed by Dr Barbara Harrell-Bond, OBE, director of the Fahamu Refugee Programme. Dr Harrell-Bond can be contacted through the Southern Refugee Legal Aid Network.

'Does a mother have the right legally to travel with [my children] without my knowledge, although she agreed before the court that the custody will be my right after the children are eight years old?'

This is the case of a refugee, formerly a judge in Eritrea, his country of origin, who has been arbitrarily denied access to his children whom he had the responsibility to support, visitation and custody rights after they reached the age of eight years.

Due to Ethiopian aircraft bombardment in Eritrea, in 1976, he, as a nine-year-old child, and his birth family fled as refugees to a camp in Sudan. He pursued his education through secondary school in Sudan where he lived with his family as a refugee, and subsequently studied law in Morocco. In 1992 he returned to Eritrea which had gained independence in 1991, formally declared in 1993.

After the border war ended between Eritrea and Ethiopia, the Ethiopian judge sought and was granted permission to return to Sudan to marry an woman and to bring her to live in Eritrea. At the time she was living with her family in a refugee camp. Her family had fled to Sudan in 1970 and was living in Wedelhelew refugee camp at the time of her birth in 1978.

The couple divorced on 27 April 2006 at Sharia Court in Mendefra, Eritrea. The court gave the father visitation rights and the responsibility to support the children until they were eight years old, when the children's custody would be returned to their father. In 2006, after their divorce, the woman and the two sons, one born in 2002 and one born in 2003, returned to her family where they continued to live as refugees in Sudan.

In 1995 the father was appointed as a judge of a regional court and in 1997, transferred to another regional court, where, from 1998–2002, he was made president. In 2002 he was transferred to a high court; in 2004, he was made president of that court. In 2005, he was transferred as president of a different high court., but that court did not start its work until 2006 'for reasons beyond' his knowledge. The same year, he requested Mr Menkerious Barakhi, the Acting President of the High Court of Eritrea, to transfer him to the B. High Court where he started work in 2006. On 27 April 2007, as part of his duties, he visited the police station with a colleague. He discovered two detainees in solitary confinement. One of the police officers 'whispered' that they were political prisoners detained on the request of

Continued page 12

Spousal rights, children and resettlement: a continuing discussion

Child custody rights and UNHCR resettlement *continued from previous page*

Report by Ms E. Pérez-Vera (note that the Explanatory Report is not adopted by the Convention) confirms that the Convention is not largely perceived to include access rights in the assessment of wrongful removal, but only custody rights (Elisa Pérez-Vera, Explanatory Report, Hague Conference on Private International Law, Acts and Documents of the Fourteenth Session, Child Abduction 426 (1982), hereinafter Explanatory Report, § 65). According to the Pérez-Vera report, 'custody *ex lege* can be based either on the internal law of the State of the child's habitual residence, or on the law designated by the conflict rules of that state.' The report stresses that a custody decision within the meaning of Article 3 can be either a judicial or administrative decision (§ 115).

Article 3 also demands that the requesting party actually exercised custody for the Convention to be applicable. While the Convention does not define the exercise of 'custody,' according to the Pérez-Vera report, custody is exercised when 'the custodian is concerned with the care of the child's person, even if … the child and its guardian do not live together' (§ 11).

According to the UNHCR Guidelines on Determining Best Interests of the Child, there may be a finding that custody was not being exercised by the left-behind parent 'if the relevant person or body has not, without any reason, been in contact with the child or care-giver of the child for an extended period of time' (p. 43). Under such conditions, the Hague Convention would not apply.

There are defences to Convention's applicability

Note that refusal to return the child is not necessitated if the conditions of Article 12, 13 or 20 defenses are met; this would simply render the requested State's decision to return the child discretionary, rather than mandatory. Article 18 allows the requested State to return the child in spite of the fulfillment of Article 12, 13 or 20 conditions.

The Convention applies to 'contracting states' and to children under 16 years of age

As a preliminary matter, Article 4 states: 'The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights.' As Iraq, Syria, Jordan and most other Middle Eastern countries are not contracting states to the Convention, by its own terms, the Convention does not apply to children who were habitually residents of those states prior to removal. Furthermore, Iraq, Syria and Jordan are also not among the countries involved in Non-Hague Convention bi-lateral agreements on child abduction. Additionally, the Convention only applies to children under the age of 16 (Art. 4).

Although the Convention, by its own terms, applies only between Contracting States, Convention countries tend to remain faithful to the terms of the Convention, even when the requesting State is a Non-Convention country that is not part of any other relevant agreement on international child abduction. This approach is in keeping with the Convention on the Rights of the Child: 'States Parties shall take measures to combat the illicit transfer and non-return of children abroad' (Art. 11(1)).

There appears to be more room for discretion where a Non-Convention country is the requesting State. Whereas some courts adhere closely to the Convention when dealing with a Non-Convention requesting country, others are more open to finding that the legal system in the Non-Convention requesting country could not act in the best interests of the child, and thus to reject the return request on that basis (Re J. (A child), [2005] UKHL 40, [2006] 1 A.C. 80. [2005] 3 WLR 14, [2005] 2 FLR 802).

The International Child Abduction Database (INCADAT) website remarks,

> [w]hen a parent seeks the return of a child outside the scope of the Hague Convention, or another international or regional instrument, the court seised will have to decide how to balance the interests of the child with the general international policy of combating the illicit transfer and non-return of children abroad.

Requested State may refuse a return if certain conditions are met

According to Article 12, a defence may be asserted if it has been over a year since the child's wrongful removal, and the child has since adjusted to its new environment.

Article 13 states that the requested State is not bound to order the return of a child if it is established that,

> a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

Additionally, Article 13 states that the requested state is not bound to return the child if it finds the child objects to the return and is sufficiently mature for its views to be relevant. The same Article states that all of the above considerations 'shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence'.

Acquiescence and exercise of custody

Regarding the Article 13(a) exception the Explanatory Report states, 'proof that custody was not actually exercised does not form an exception to the duty to return the child if the dispossessed

Spousal rights, children and resettlement: a continuing discussion

Child custody rights and UNHCR resettlement *continued from previous page*

guardian was unable to actually exercise his rights precisely because of the action of the abductor' (§ 115). Thus if, for instance, a dispossessed father did not exercise his custody rights because the child's mother had removed the child with her to a place of hiding, this would not fall within the Article 13(a) exception as the dispossessed father would have been prevented from exercising his rights because of the 'abductor' mother's action. If, however, the father had consented or acquiesced to the removal, the exception would apply.

To establish such acquiescence, American courts look to acts or formal statements, including court testimony, written renunciations of rights, an attitude over a length of time, or even the absence of effort to obtain the child's return (The Hague Convention on International Child Abduction: A Child's Return and the Presence of Domestic Violence, Hague Convention Chapter Advisory Committee, September 2005, (citing Friedrich v. Friedrich, 78 F.3d 1060, 1070 (6th Cir. 1996); In re Ponath, 829 F.Supp. 363, 368 (D. Utah 1993)).

'Grave risk' and 'intolerable situation'

The Article 13(b) defence is generally interpreted and applied by courts in one of two ways: it is applied (1) where the requested State decides it may be dangerous to return the child because of civil strife in the requesting State; or (2) because the requested State decides a domestic abuse situation would imperil the life of the child and/or the mother.

The first approach appears to be the traditional and prevailing application of the 13(b) defence. An article by Sudha Shetty and Jeffrey L. Edleson remarks:

> W. M. Hilton's (1997) review of the use of the grave-risk defence reveals that court decisions and official interpretations of the Convention usually limit the application of this defence to cases in which there is internal strife in the country of habitual residence or where the courts of the country of habitual residence cannot or will not protect the child and his or her family (Adult Domestic Violence in Cases of International Parental Child Abduction, Violence Against Women, 2005 Vol. 11 No.1, pp. 115–138, 124).

However, the 'grave risk' and 'intolerable situation' defence has also been applied more broadly, albeit less frequently. Recently, the European Court of Human Rights, considering the 13(b) defence under the gloss of the European Convention of Human Rights, ruled that a child's best interests at the time of the adjudication must be considered when this defence is asserted in return cases, and refused to return a child on that basis (*Neulinger & Shuruk v. Switzerland*, App. No. 41615/07, Eur. Ct. H.R. (2010) (unreported)).

In domestic violence situations, requested States have refused to return children based on a petitioner's previous abuse of the child or even of the child's mother (if the mother threatened not to return with the child), with courts finding the child's return would present a grave risk to the child under the circumstances. The USA, Canada and New Zealand are among countries that have exercised their 13(b) discretion and opted not to return the child in such situations of abuse (See, e.g., *Blondin v. Dubois*, 19 F. Supp. 2d 123 (S.D.N.Y. 1998); *Walsh v. Walsh*, 221 F.3d 204, 219 (1st Cir. 2000); *Pollastro v. Pollastro*, [1999] D.L.R. 848 (Can. Ont.); *El Sayed v. Secretary for Justice*, [2003] 1 NZLR 349 (H.C.)). However, for the most part, courts require a strong evidentiary showing that the child would be in grave danger to apply the 13(b) exception in this manner. A restrictive interpretation, endorsed by the Pérez-Vera Explanatory Report (§ 34), was reaffirmed by the Common Law Judicial Conference on International Child Custody Best Practices, which remarks that the 13(b) exception 'has generally been narrowly construed by courts in member states' and this is 'in keeping with the objectives' of the Convention.

Maturity and the child's objection

The Convention is silent on the age at which a child reaches requisite maturity for its objection to be considered; Pérez-Vera, however, suggests that a 15-year-old child's objections should be taken into account in an example in her report (Explanatory Report § 30). American case law has not established a minimum age for a child's objections to be considered (See generally *Blondin v. Dubois*, 238 F.3d 153 (2d Cir. 2001)). Germany and Switzerland have also refused to declare a minimum age for a child's objection to be considered and upheld, although a Swiss case recognised that child psychology indicates a child may not possess the capacity to reason its objection until 11 or 12 years old (5P.3/2007 /bnm, Bundesgericht, II. Zivilabteilung; 93 F 178/98 HK, Familengericht Flensburg (Family Court), 18 September 1998). International courts have differed on a case-by-case basis, finding sufficient maturity for an objection to be considered in children as young as six, and failing to find sufficient maturity in children as old as nine (INCADAT Comment, Requisite Age and Degree of Maturity).

While there is no clear pattern that courts follow in determining requisite maturity, other than to look vaguely to age, one factor that international courts universally find important in deciding whether a child's objection shall be upheld is the presence of parental influence in the child's objection. Many international courts, Canada, the UK, and the US among them, will limit the weight given to a child's objection where great parental influence has been exercised, or may even dismiss child's objection all together (See, e.g., *J.E.A. v. C.L.M.* [2002], 220 D.L.R. 4th 577 (N.S.C.A.);

Spousal rights, children and resettlement: a continuing discussion

Child custody rights and UNHCR resettlement *continued from previous page*

Re S. (A Minor) (Abduction: Custody Rights) [1993] Fam 242, [1993] 2 WLR 775, [1992] 2 FLR 492, [1993] FCR 12, [1993] Fam Law 212; *Robinson v. Robinson*, 983 F. Supp. 1339 (D. Colo. 1997)). Note that, as with all Article 13 and Article 20 exceptions, a finding that a child has reached the requisite level of maturity for its objection to be considered under this Article does not necessitate that its objection will be upheld.

Requested states may refuse returns that violate human rights principles

According to Article 20, the requested State may refuse the return of a child 'if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms'.

'Fundamental principles … of human rights'

The Pérez-Vera report emphasises Article 20 'is not directed at developments which have occurred on the international level, but is concerned only with the principles accepted by the law of the requested State,' and elaborates,

> to be able to refuse to return a child on the basis of this article, it will be necessary to show that the fundamental principles of the requested State concerning the subject matter of the Convention do not permit it; it will not be sufficient to show merely that its return would be incompatible, even if manifestly incompatible, with these principles (§ 118).

The Shetty-Edleson article notes that American courts have universally refused to find Article 20 human rights violations, perhaps because the Article 20 defence is usually tied to and eclipsed by a simultaneous 13(b) defence assertion (pp. 129–30). While American courts have never applied Article 20 to deny a return request on the basis of violating human rights, an a Spanish court has, and two Australian courts have endorsed its usage (The Hague Convention on International Child Abduction: A Child's Return and the Presence of Domestic Violence, September 2005, p. 20).

External constraints on UNHCR use of the convention: Best Interests Determination applicability to the resettlement of a child with separated parents

The Convention on the Rights of the Child states '[t]he best interests of the child shall be a primary consideration in all actions affecting children' (Art. 3). A Best Interests Determination (BID) is a formal process by which UNHCR determines whether an action affecting a child is in his/her best interests. A BID is only employed under limited circumstances. The UNHCR Guidelines on Determining Best Interests of the Child (May 2008, hereinafter Guidelines) state that a BID by UNHCR is necessary in cases of separation of the parents when there is a 'need to determine with which parent the child should stay', but 'BID by UNHCR should be limited to those situations in which the competent authorities are unwilling or unable to take action' (p. 40).

Written consent by the left-behind parent and alternatives

The Guidelines recognise, in accordance with Article 3 of The Convention, that the removal of a child would not constitute abduction where custody rights were not being exercised by the left-behind parent (p. 43). However, where both parents are exercising custody rights, UNHCR 'must take all reasonable measures to clarify custody rights before facilitating the resettlement of a refugee child without one of his or her parents,' including obtaining informed written consent from the left-behind parent for the child's settlement. In the alternative, the Guidelines suggest the following measures:

- 'If the parent is absent or if he/she refuses [to provide written consent], verify whether previous custody decisions have already been made and, if so, obtain them, unless contacting the authorities of the country of origin would jeopardise the child's safety or that of the parents.
- If no previous custody decisions exist — or if they are clearly not based on international standards relating to the best interests of the child — the competent authorities in the asylum country should be asked to determine custody prior to departure. UNHCR may, where necessary, support building the capacity of the competent authorities in the asylum country, possibly including the introduction of a special procedure for urgent cases.
- If the competent national authorities will not clarify custody rights, including cases where one parent is being resettled and custody disputes remain unresolved (due to the unavailability or inaccessibility of competent authorities, or to the impossibility of obtaining official documents from the country of origin), UNHCR should undertake a BID to determine if resettlement together with one parent is in the best interests of the child. All reasonable efforts should be made to include representatives of the asylum country in the BID procedure in order to give it the strongest possible legitimacy.
- Where custody issues remain undecided, the parent with whom the child is resettled should be advised to initiate procedures to acquire full custody rights upon arrival in the resettlement country. In addition, a formal request should be made to the resettlement country to take a decision on custody rights as soon as possible after the resettlement of the child, based on Art. 25 of the 1951 Convention Relating to the Status of Refugees (administrative assistance). This decision should also specify rights of access'.

Spousal rights, children and resettlement: a continuing discussion

Child custody rights and UNHCR resettlement *continued from previous page*

Domestic violence

The Guidelines state that a 'BID is essential in all cases in which the resettlement of one parent is based on a protection risk emanating from within the family (e.g. domestic violence cases)'. The Guidelines emphasise the urgency of a BID under such circumstances: 'a BID must be undertaken immediately once a protection risk has been identified, and if the risk cannot be resolved through other interventions, such as an agreement with the parents', and must be concluded and implemented 'as promptly as possible' (p. 41).

The Guidelines recognise that, as part of UNHCR's international protection mandate, the UNHCR Executive Committee has requested for it 'to take actions for the resettlement of women and children at risk and to facilitate a speedy departure of women at risk and their dependants' (p. 43).

Conclusion

In refugee cases where the Hague Convention might apply, refugee applicants and their advocates should consider the following:

- Whether custody was being exercised by the child's potential left-behind parent. If custody was not being exercised for some time, and there is no valid reason for this lapse, the Hague Convention is not applicable (Guidelines, p. 43). If custody was being exercised, the Hague Convention is applicable, but Article 12, 13 and 20 defences may apply, providing the removal country with the discretion to reject a request for return.
- The interaction between the Hague Convention and the UNHCR Guidelines on Determining Best Interests of the Child. The Guidelines require written consent by the child's potential left-behind parent, but provide for alternatives in absence of this, including consulting custody documents from the country of origin, or even UNHCR conducting a BID to determine whether resettlement of the child with one parent is in his/her best interests (Guidelines, p. 41). In cases where the resettlement risk is based on domestic violence, UNHCR may be asked to conduct a BID immediately, even before the Guidelines' preferred alternatives are exhausted (Guidelines, p. 42).

As a preliminary matter, we must assess whether custody was being exercised by the child's potential left-behind parent to assess the Convention's applicability. If it was not, the Convention, by its own terms, does not apply, and UNHCR recognises there would be no abduction. A showing that custody was not being exercised by the left-behind parent would be the easiest way to dispense with the Convention's requirements. Similarly, the Convention does not apply to children aged 16 and above.

If custody is being exercised by the left-behind parent prior to the child's removal, the child is under 16 years old and the countries concerned are both Contracting States to the Convention, the Convention applies, and will likely be adhered to with similar force regardless of whether one party is a Non-Contracting State.

The Convention allows for limited defences, which provide the removal country with discretion to reject a request for return, but do not necessitate that it must reject the request. The defences apply where (i) the child objects and is mature enough for his/her objection to be relevant; (ii) the left-behind parent consented or acquiesced to the child's removal; (iii) the child would face a grave risk or intolerable situation if returned; and (iv) returning the child would be a violation of human rights. These defences are met with mixed responses; whereas a child's objection can be very persuasive, and the older the child the more powerful the defence, the violation of human rights defence is less favored. However, these defences are all strictly construed, and even where their conditions are fulfilled the removal country may return the child.

The UNHCR Guidelines indicate that the left-behind parent's written consent is required in order to resettle a child with only one parent. However, the failure to obtain such consent is not fatal, as the Guidelines provide alternatives, listed in preferred order: (i) obtaining previous custody decisions from the country of origin; (ii) asking the asylum country to determine custody prior to departure; (iii) conducting a UNHCR BID; (iv) resolving custody disputes by the resettlement country after departure. Thus, it seems possible to proceed with UNHCR resettlement of a mother and her child in the absence of the left-behind parent's written consent. Any custody documents that the mother possesses may be highly relevant at this stage.

Furthermore, the Guidelines seem to suggest that it is possible to skip straight to the UNHCR BID alternative in cases of domestic violence, and emphasise that the process should be concluded as quickly as possible. This would seem to be the best approach to take if a mother and child are victims of domestic violence but the father exercised custody and there are no past custody decisions in the mother's favor. A BID request could be supplemented with any defences under the Convention that may apply for extra force. ●

Spousal rights, children and resettlement: a continuing discussion

Resettlement, divorce and visitation rights *continued from page 7*

security forces. The judge issued orders that they be released immediately on bail. That night security forces came looking for him. He says,

> Fortunately I was with some friend outside my home. They smashed the door and entered the house. One of my friends warned me by phone about the matter. I left the city, going by foot throughout the night to another place where I was able to hire a camel to reach a town where I spent a night. The next day I headed to another town where I spent two nights. I resumed my move to the Sudanese border, accompanied by a friend. We arrived at a village in Sudan in May 2007.

Due to the unstable security scenario in Sudan, he moved on to Ethiopia with some friends on in December 2007. He continued exercising his visitation rights with his children through clandestine visits to them in Sudan. The judge possesses a Sudanese passport and an Ethiopian multiple entry visa valid until 2012.

To his surprise, on one of his visits to Sudan, he discovered his former wife and children had been resettled to Norway through the refugee resettlement program in 2010, without his knowledge or consent. He asks, 'Does the mother have the right legally to travel with them without my knowledge, although she agreed before the court that the custody will be my right after the children are eight years old?'

In January 2011, the judge contacted the SRLAN website. His first message:

> I am an Eritrean refugee aged 44, living now in Ethiopia, I was a presiding judge of the high court in the southern region of Eritrea . I fled my homeland on the first of 2007 to Sudan. But my two kids with their mom (my ex-wife) fled in 2006 also to Sudan. The security situation was not suitable for me and due to that I was not able to stay in Sudan more than a few months, so I headed to Ethiopia. Twenty days ago my kids get opportunity of resettlement to Norway. How can I meet, contact or visit them? Do I have a right to family reunification? Please help me as soon as possible, indeed I am in agony.

In another email, he explained,

> I used to visit them in the Sudan from time to time, in disguise and at the risk of my life, now they left to Norway without my consent or my knowledge with their mother. ...how can I meet my kids, communicate or visit them and whether I am entitled according to the laws of Norway for family reunification.

It was not until May that the Fahamu Refugee Programme made contact through its network with a professor at the University of Oslo. He wrote the judge:

> A long time ago I worked as an advisor to the Norwegian Immigration Service, which is probably why your request has ended up with me. I am willing to see if I can locate your family in Norway through contacts in the Immigration Service. What I need is a power of attorney, preferably signed, scanned and sent electronically, and the names, dates of birth and birthplace of the persons you are trying to locate. A short explanation of the background for the persons' settlement in Norway would, I suppose, also be of help. I should say that I have no previous experience with this kind of work, so I do not know what kind of difficulties I will meet. All I can say is that I will try my best.

The professor asked for more details about the family; the judge gave him power of attorney. He then contacted the deputy director of the Directorate of Integration and Diversity (IMDI), the government organisation responsible for settling refugees in Norway. The deputy director denied any knowledge of the judge's family being in Norway.

In his desperate efforts to locate his children, the judge has contacted the Norwegian Embassy in Addis Ababa; they referred him to their embassy in Khartoum. The Norwegian Embassy in Khartoum referred him to the Norwegian Directorate of Immigration (UDI). After a lot of correspondence and questions, the UDI informed him through a staff member of the Consular Affairs Office in Khartoum, '. . . that they can do nothing but invite me to apply for family re-unification in order to reunite with my children. I have done as they have advised and paid a fee equivalent to USD500'. Does this mean they have found his children? In the meantime, he waits. ●

ANNOUNCEMENTS

Towards better information about refugee policy

This month the Fahamu Refugee Legal Aid Newsletter received a document that detailed UNHCR's so-called 'incentive salary policy' in Ethiopia, which discriminates refugees and violates national and international law (for more on this, read 'UNHCR's Incentive Salary Policy Violates International Human Rights Laws and Local Labour Laws' in this issue). If you would like to share or bring attention to a policy document currently under implementation in different countries, whether or not it is online already, please email us.

New academic centre on refugee law

The Refugee Law Initiative is a new academic centre based at the Human Rights Consortium of the University of London's School of Advanced Study. It hosts events, undertakes research and 'works to integrate the shared interests of refugee law scholars and practitioners'.

Call for applications for Human Rights Education Associates (HREA) e-learning courses, February–April 2012

The HREA is calling for applications for forthcoming specialised training courses and short certificate courses. For more information, and a list of all the available courses, please visit the application website.

REFUGEE LEGAL AID PROFILE: Iraqi Refugee Assistance Project

Contributed by Becca Heller, director of the Iraqi Refugee Assistance Project, with writer Janet McGiffen.

The Iraqi Refugee Assistance Project (IRAP) is a US-based non-profit organisation that provides legal representation to Iraqis and other refugees in Jordan, Egypt, Syria, Iraq and Lebanon who are going through the resettlement process. IRAP focuses on refugees who are in life or death situations for whom resettlement in a safe country is the only option — children with medical emergencies, Iraqis who risked their lives as interpreters with allied forces, and victims of human trafficking, domestic violence and sexual assault.

Becca Heller, a Yale Law School graduate, is the co-founder and director. IRAP operates as a programme of the Urban Justice Center in New York City where its main offices are located. IRAP also has staff attorneys in Cairo and Amman. They carry out outreach and intake, matching clients to lawyers and law students at 18 law schools and 25 law firms in the US and the Middle East who provide *pro bono* legal assistance. The majority of the legal representation is done remotely, using Skype and email to communicate with clients.

While legal advisory groups for refugees do exist in Egypt and Jordan, IRAP expands on these models by providing comprehensive, individual legal representation to refugees navigating the resettlement process. IRAP's goal is to achieve resettlement for its clients, while avoiding re-victimisation, arbitrary decisions, and faulty rejections. The need for case-by-case representation is great because no clear area of US law exists that defines and protects the rights of refugees (as opposed to asylum seekers) in life and death situations who are seeking resettlement in safe third countries. Millions of stateless people are left to the mercy of host governments whose primary aim is to ensure the security of their populations and borders.

IRAP Organisational History, Mission and Goals

Founded by law students at Yale Law School in 2008, IRAP began as a volunteer student-run organisation. By September 2011, IRAP had grown to 18 law school chapters and 25 law firms — more than 300 law students and attorneys worldwide. IRAP began by focusing on Iraqi refugees because the founders of IRAP believe that the US has a unique responsibility towards this population. However, because the legal process is the same for all refugees, any changes that IRAP effects regarding Iraqi resettlement should establish precedent for refugees worldwide.

IRAP combines individual case work with systemic policy advocacy, seeking not only to establish a clear area of law defining and protecting the rights of refugees seeking resettlement, but also to transform the refugee resettlement process at national, regional and international levels. IRAP's advocacy team litigates major cases regarding refugees' right to due process; meets with top officials at the White House, Department of Homeland Security and National Security Council to urge expansion of refugee entitlements; writes public policy papers; and partners with domestic and international NGOs including the UN to push for enforcement of refugee human rights.

In fiscal year 2010, on a donated budget of USD76,000, IRAP provided over USD2.4 million in *pro bono* legal services to refugees in urgent situations seeking resettlement. IRAP has won more than 90 percent of its adjudicated cases.

IRAP activity since 2009

1. **Individual legal assistance**: IRAP lawyers have achieved resettlement status for more than 500 refugees, including non-Iraqis, in urgent situations, proving the model to be deployable in other contexts. Intake for 2011 will include refugees from Somalia, Sudan, Ecuador, Kuwait, Syria and Libya.

2. **International training in refugee and human rights law**: Since 2009, IRAP's legal representatives from US law schools have traveled to Jordan to train law students at the University of Jordan, thus facilitating creation of Jordan's first clinical legal-education program while also providing *pro bono* legal representation to more than 200 Iraqi families there. IRAP hopes to replicate this model in additional Middle Eastern countries during the 2011–2012 school year — a transnational model that can be applied around the world.

3. **US policy advocacy and Freedom of Information Act litigation**: IRAP's two lawsuits brought under the Freedom of Information Act resulted in 5,000 pages of declassified documents being released to IRAP, related to US refugee processing systems, visas for Iraqis who worked for or on behalf of the US military in Iraq, and treatment of migrant employees on US military bases in Iraq. IRAP utilised these documents to advocate for more procedural guarantees in refugee processing and better application of US labor law on military bases abroad. A number of IRAP's suggested reforms have been implemented.

4. **International field research:** Through their information network, IRAP is conducting fact-finding for advocacy and information campaigns regarding sexual trafficking of Iraqi women and girls into Syria and northern Iraq and the unique protection situation facing LGBT refugees. IRAP hopes to organise a hearing in conjunction with the Reauthorisation of the Trafficking Victims' Protection Act in November 2011.

5. Public information: The work of IRAP has generated a NY Times front-page feature and Sunday editorial, plus stories in the BBC, Associated Press, Philadelphia Inquirer, Miami Herald, Washington Times, New Yorker blog, Newsday and several NPR state affiliates. To view our press list, click here.

We are currently looking to expand our model to other refugee populations in the Middle East, in the hopes that legal representation for refugees can become a norm in *pro bono* legal services. ●

Israeli court orders government to grant asylum *continued from page 1*

presented by the House of Lords' decision in *Islam & Shah* and by UNHCR in its guidelines on membership in a particular social group. The Court concludes that whatever approach is adopted, persecution on account of family membership is one of the typical examples of persecution on account of membership in a particular social group (citing the American case *Sanchez-Trujillo*).

Finally, the Court rules that persecution by a non-state actor comes within the purview of the Refugee Convention in cases where the State is unable or unwilling to protect a person, and rules out the possibility of an internal protection option in the individual case.

Based on this analysis the Court finds the applicant to be a refugee. The Court goes further and mentions in *obiter dictum* that even if the persecution of the applicant were not based on a Convention ground, the *non-refoulement* principle, being wider than the stipulation in Article 33 of the Refugee Convention, may nevertheless apply to him.

For lawyers in common law countries, the description above may seem unexciting, as courts across the globe determine such cases on an almost daily basis. For us, Israeli asylum lawyers and activists, this judgment is nothing short of historic. The asylum system is Israel is notorious for lacking a fair procedure and for its officials' ill-intended practices in determining refugee claims. The recognition rate of refugees in Israel is less than 0.2 percent. At the same time, courts in Israel give considerable deference to the decisions of the Government on asylum issues and are unwilling to intervene in its decisions. Judges tend to be reluctant to rely on international law or resort to comparative law. This, in combination with the fact that no significant judgments on the definition of refugees have been handed down so far in Israel, means that courts have no guidance in refugee law and lack the most basic knowledge. In this atmosphere, the current decision is a beacon of light in the darkness, and gives hope for future interventions of the Court in Israel's broken asylum system. •

Resettlement in exchange for local asyum? *continued from page 2*

integrity and political support through the instigation of wide-spread fraud by non-refugee claimants. This fraud not only compromises the purpose of international protection but also has the effect of dissipating the motivation of host country governments and civil society and even refugees themselves to implement, advocate for, or even exercise refugee rights.

An alternative strategy (more below) would be to advocate that international donors fund integrative, community hosting alternatives in Egypt along much the same lines as they fund resettlement in their own countries — a winning formula that has built strong domestic constituencies for refugee rights. Advocates should simultaneously mobilise Egyptian civil society actors that could play analogous roles to resettlement agencies in the west in lobbying their own government to accept such a plan.

'Strategic use of resettlement' and the protection dividend

As a response to its limited availability, enormous expense, and political complications, advocates of mass resettlement frequently allege that it may have *strategic* benefits in general and a 'protection dividend' in particular. Specifically, they argue or imply that wealthy countries accepting refugees for resettlement from a poorer host country may induce the host country to improve protection for refugees who remain (UNHCR, 'Protracted Refugee Situations', 20 November 2008). Unfortunately, there is little evidence for this proposition. In fact, most host countries view resettlement not as a benefit for which they are willing to sacrifice other objectives but as a draw to other asylum seekers, many of whom — particularly those that resettlement countries deem undesirable or inadmissible — will remain indefinitely as a residual caseload that the host country is neither able to repatriate nor willing to integrate. Aggravating this phenomenon is the fact that donor nations are so far unwilling to make credible commitments to shift their funding from subsidizing the human 'warehousing' of refugees in camps or rights-deprived urban areas to sustained support for more integrative, rights-friendly modes of assistance.

(It is also true that not all refugees even want to resettle in far-away industrialized countries, as many prefer to remain close to their home countries, even in bad conditions, in hopes of eventual return. For example, agencies had to commission production of promotional videos to advertise US resettlement to refugees from Myanmar in Thai border camps. New arrivals to the camp quickly replaced those that did depart but this appeared to be more a function of camp capacity rather than the draw of resettlement.)

The pull-factor thesis

Kagan makes three arguments against the 'pull-factor thesis' that resettlement from Egypt does more harm than good by attracting greater numbers of asylum seekers. In essence, Kagan's thesis:

- over-simplifies migration patterns;
- is incoherent on its own terms as an argument against resettlement from Egypt, even if true; and,
- ultimately encourages more general anti-refugee policies (p. 31).

Slippery slopes

Taking these points in reverse order, the last is essentially a slippery slope argument that Kagan fleshes out as follows:

> anything offered to refugees that is relatively better than what is available in another country can be labeled a pull factor, no matter how modest. Put bluntly, the pull factor thesis could be applied to anything that makes refugee life in Cairo relatively better than conditions in a refugee camp in Eastern Sudan. Under this way of thinking,

> governments should not only avoid giving refugees the right to work, but should actually seek out ways to make refugee lives more untenable in order to deter their arrival. The pull factor thesis supports a general orientation aimed at lowering refugee expectations, rather than legitimising refugees' legitimate aspirations for a durable solution (p. 35).

There are three problems with this analysis.

First, the qualitative difference between allowing refugees to work freely and equal access to public education and other benefits, on the one hand, and resettlement (and naturalisation), on the other, is that the former are rights of refugees under international law whereas the latter are not. Egyptian authorities may well have their motives for denying refugees their rights but this argument is essentially akin to saying that because giving you something to which you are not otherwise entitled, say, my money, may induce you to do something, it logically follows that I might also do something to you to which I am not entitled, like hit you over the head.

Second, there is also an enormous quantitative difference between the right to work and national treatment with regard to public benefits in Egypt, on the one hand, and full legal admission to the most advanced economies and welfare states in the world as pull-factors of migration. In fact, resettlement is already, i.e., even with its present limited availability, as Kagan puts it, 'the elephant in the room when almost any refugee protection question is discussed in Egypt' (p. 26). Many asylum seekers in Egypt quite bluntly reject 'local integration', not only as something Egypt does not offer but also as something undesirable in itself even though it would provide all the rights of refugees under the Convention and more. Many, for example, refuse albeit rare opportunities to put their children in Egyptian schools because they would prefer them to learn in English rather than Arabic in preparation for resettlement.

Finally, the focus of any analysis of the pull-factor thesis should not be on the behavior of genuine refugees, who deserve international protection in any event, but upon that of *non-refugees* attempting to game the system, especially by fraud. In this regard, resettlement likely does more to undermine the integrity of refugee protection and political support for it in Egypt as well as in resettlement countries than it does to support it through any putative 'protection dividend' from host countries for the benefit of remaining refugees.

Corrosive fraud

Perhaps millions of non-refugee migrants are demonstrably willing to pay tens of thousands of dollars, to risk their lives in dangerous passage, and certainly to break laws in order to reach advanced industrial economies. It would strain credulity to doubt that thousands more invent claims in order to accomplish the same objective safely, at much less cost and danger, and with apparent legality, through refugee resettlement programs. Some non-refugees may use fraud to gain resettlement as refugees so for purely economic or personal reasons and/or even for humanitarian reasons the Refugee Convention does not cover. Others may include persons whose resettlement would be far more corrosive to the purposes of refugee protection and human rights generally, such as persecutors of others, war criminals, or common criminals evading prosecution.

There are no DNA tests to verify most particularised factual claims of persecution or insecurity that asylum seekers proffer, not even to corroborate genuine ones. Where such tests are applicable, however, i.e., in claims of family relationships in reunification applications, they have revealed fraud of massive proportions. In 2009, after undertaking hundreds of such tests, the US State Department reported that it was 'only able to confirm all claimed biological relationships in fewer than 20% of cases (family units). In the remaining cases, at least one negative result (fraudulent relationship) was identified, or the individuals refused to be tested.' (Notably this sample excluded claims based on spousal relationships, i.e., where there was no claimed biological relationship. It also only addressed claims of biological relationships *between members of families applying for the program from outside the country* and did not attempt to verify biological relationships applicants claimed with anchor relatives in the United States). This shut down the entire family reunification program for any claims lodged after March 2008.

US Department of State, Bureau of Population, Refugees, and Migration, 'Fraud in the Refugee Family Reunification (Priority Three) Program', 3rd February 2009. [1]

Sasha Chanoff, then with the International Organization of Migration, has reported:

> Going to America is the holy grail of refugee life. People will cajole, bribe, threaten and kill for the opportunity. Dadaab's other desperate refugees are angry that they have been neglected in this [Somali Bantu] resettlement process. People have been devising schemes and strategies to access the program. When the resettlement interviews began, urban refugees from Nairobi arrived in droves, looking for opportunities to buy ration cards from people scheduled for an interview… In Nairobi, urban refugees pay for coaching lessons before resettlement interviews. They often present stock stories and rehearsed responses, and there is never an empty slot in a family. If a real family member has passed away or is not present at the time of interview, that slot can be sold for as much as $5,000. (US Committee for Refugees and Immigrants, 'After Three Years: Somali Bantus Prepare to Come to America', *Refugee Reports*, 22nd November 2002.[2].)

One of the few methods for reducing fraud, what some call the 'stealth approach', i.e., completing camp registrations or population verifications as soon as possible and well before mention of resettlement to fix or record key individual characteristics or histories, is not generally available in urban areas. Since family reunification has now been suspended, at least to the United States, one can only imagine that non-refugees will increasingly try other ruses, including false claims of insecurity in host countries. These will undoubtedly further strain already frosty relations between asylum seekers and host country governments. Even ordinary citizens of

host nations might resent false allegations of insecurity or xenophobia, undermining the popular solidarity essential to refugee protection and enjoyment of rights.

Incoherence?

The incoherence argument against the pull-factor thesis is as follows:

> *Smuggling of asylum-seekers to Israel exploded only after UNHCR in Egypt began limiting its use of resettlement in 2004*. … Logically, if the availability of resettlement can act as an attraction to asylum-seekers, it is equally plausible that withholding resettlement may be a push factor that encourages asylum-seekers to move on from Egypt. The pull factor thesis would suggest that by reducing its use of resettlement, UNHCR removed an incentive for asylum-seekers who arrive in Egypt to stay in Egypt, which would conceivably have saved lives. Even if today many asylum-seekers reaching Israel do not intend to spend any lengthy period in Egypt, to the degree the pull factor thesis is true it stands to reason that they might be more attracted to stopping in Egypt if resettlement prospects were better. … [T]o the degree there is truth to the pull factor thesis, it may actually be a reason to expand the use of resettlement strategically in Egypt, so as to provide asylum-seekers an incentive to not engage smugglers en route to other countries (pp. 34-35).

I do not know the motives some asylum seekers may have for choosing to go from Egypt to Israel. The border passage alone is difficult and dangerous, even deadly. Israel only rarely grants asylum and few current prospects for onward resettlement. Perhaps the security environment and/or humanitarian aid are better there. Perhaps the refugees reason that, as a generally liberal democratic state, Israel will not have Egypt's resolve in maintaining a hardline position (indeed, some cracks are beginning to appear [3]). As Kagan himself offers:

> When I met with Sudanese arriving in Israel from Egypt in 2006, they cited limitations on resettlement in Egypt as a motivation for taking the journey across the Sinai (p. 30).

This line of reasoning suggests an implicit other half of the refugees' motivation, i.e., that they *do perceive* better prospects for either asylum in or resettlement from Israel. If that is the case, then the pull-factor thesis is not at all incoherent but even further validated. But even if it is not, then this makes a stronger argument for decreasing the protection differential between the two countries by granting refugee their Convention rights in Egypt.

Oversimplification/overdetermination

As to his first point about the pull-factor thesis oversimplifying migration patterns, Kagan is undoubtedly correct but it is a straw-man argument. The motivations for people to uproot themselves from their countries of nationality and undertake difficult, dangerous, and traumatic journeys to foreign lands with no certainty of welcome or even legality are nothing if not complex. Kagan's impressive statistical analysis shows that, while the migration patterns of Sudanese asylum applicants to Egypt do ebb and flow in the correlation with resettlement that the pull-factor thesis would predict, they also do so in correlation with human rights conditions in their country of origin. Moreover the migration patterns of Somali and Eritrean asylum seekers to Egypt do not fit correlations the pull-factor thesis would predict. Neither this thesis nor any other single thesis can fully explain migration patterns but that would be an unreasonable criterion for validity in the first place.

In any event, the collateral damage that mass resettlement does to the integrity of and political support for refugee protection and the weak to non-existent inducement it offers host countries are the chief reasons we should not delude ourselves into thinking other refugees may reap protection dividends from it. Limiting resettlement to high-priority emergency needs might better serve rescue as a protection tool and the integrity of the general protection regime.

Alternatives

If 'strategic use of resettlement' promises little protection dividend, what is the alternative? The non-binding 1966 Bangkok Principles on the Status and Treatment of Refugees, which Egypt has endorsed, has a treatment of the international responsibility gap unique among refugee protection instruments. Article X recognises an explicit

> principle of international solidarity and burden sharing … applying to all aspects of the refugee situation, including the *development and strengthening of the standards of treatment of refugees*, support to States in protecting and assisting refugees ... through effective concrete measures where major share be borne by developed countries in support of States requiring assistance.

Can we get the developed countries to step up to the plate? The US Committee for Refugees and Immigrants presented some ideas on how this might work in 'Moving Forward: Identifying Specific Measures to End Refugee Warehousing' at UNHCR's 2004 Consultations with NGOs. The international 'Statement calling for Solutions to End the Warehousing of Refugees' also gathered hundreds of endorsements from businesses, labor organisations, faith groups and notable individuals throughout the Middle East, including Saad Eddin Ibrahim (Chairman of the Ibn Khaldun Center for Development Studies and author of *Islam and Democracy: Critical Essays*), Clovis Maksoud (Director of American University's Center for the Global South and Former Ambassador of the League of Arab States), and Oroub El-Abed (author of *Unprotected: Palestinians in Egypt Since 1948*) and the following Egyptian NGOs: Arab Program For Human Rights Activists, Committee to Defend Democracy, Egyptian Organization for Human Rights, Ibn Khaldun Center for Development Studies, Land Center for Human Rights, Refugee Center for Human Rights, South Center for Human Rights, and *Tadamon*/ Egyptian Refugee Multicultural Council.

Are rich countries only interested in subsidising their own domestic constituencies in the humanitarian aid industry than supporting local service providers in the communities that actually host the bulk of the world's refugees? Is the fact that this may lead to long-term refugee warehousing rather

ANNOUNCEMENTS cont'd

Postgraduate diploma on integral protection for human rights defenders and social activists
The Universidad Pablo de Olavide and Protection International are jointly organising an online postgraduate diploma course targeting human rights practitioners from all backgrounds. The course will run from January to July 2012 and will be conducted in both Spanish and English. For more information and details on how to apply, please visit the course website.

Forced migration summer school, Refugee Studies Centre, Oxford, United Kingdom, July 2012
Applications for the 2012 International Summer School in Forced Migration at the University of Oxford's Refugee Studies Centre are now being accepted. The summer school offers an intensive, interdisciplinary and participative approach to the study of forced migration. Applicants for the summer school, held from 2–20 July 2012, should have a first degree, experience in working in the field of forced migration, and proficiency in English. The fee, which includes 19 nights' accommodation, breakfasts, weekday lunches, tuition and course materials, is GBP3,220 — pay by 31 March to qualify for a reduced fee of GBP3,050. The closing date for applications is **1 March 2012** for applicants requesting a bursary through the RSC, **1 May 2012** for all other applicants; applicants are advised to apply early. For more information and to apply, click here.

Resettlement in exchange for local asyum? *continued from previous page*

than to the freedom, dignity and human autonomy the 1951 Convention proposes merely an incidental consideration? What is the missing ingredient in refugee protection advocacy?

Perhaps it is the advocacy of such local service providers as a constituency in themselves, much as refugee resettlement agencies act in rich countries. The major obstacle to such advocacy that public choice theory predicts is that the beneficiaries of the status quo, even if a numerical minority, are a concentrated interest fully aware of its stake whereas those who suffer from it are diffused and potential beneficiaries of change, such as local service providers in host countries, do not know who they are or the extent or certainty of their prospects under an as yet unrealised alternative.

Nevertheless, civil society agents have taken some small steps could take more. Over 1,000 Thai organisations, leaders and individuals submitted a little-publicised open letter in October 2009 to international donors calling on them 'to commit funding for more rights-friendly, community-based alternatives [for refugees] instead of forced encampment'. 'Thai community groups', they continued, 'are willing to "adopt" and host refugee families – much as similar groups resettle refugees in other countries. With the right policies, they can help refugees integrate and become productive and self-sufficient'.

Could advocates amplify such rights-friendly efforts and expand them to Egypt? Would it get results? There's only one way to find out. •

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[1] On use of fraud undermining resettlement generally, see also David Seminara, "Asylum Fraud Takes Center Stage," Center for Immigration Studies, July 18, 2011,

> *When I worked as a consular officer [in Skopje], I had an opportunity to interview the family members of successful asylum seekers who were applying for follow-to-join status, after a relative – almost always a husband – was granted asylum in the U.S. … in the years shortly after the Kosovo conflict and was struck by the high prevalence of fraud in asylum applications. When a family would arrive at the embassy for their interview, my task was to simply ensure that all of their documents were in order and then sign off on their visas…, but I still took the time to read the substance of each successful applicant's applications. … The applications almost always had vague claims of threats being made due to involvement with political parties, and many also claimed that the applicant's home had been burned to the ground during the conflict. Nearly every time I read this claim, it turned out to be false.*

[2] See also David A. Martin, "A New Era for U.S. Refugee Resettlement," University of Virginia Law School,
Public Law and Legal Theory Working Paper Series, No. 27, 2005, pp. 10-13:

> *Out of desperation or manipulation, or based on the coaching of an entrepreneur collecting a fee for such advice, applicants for resettlement may tailor their stories to fit what they understand to be the requirements of the program (often called the "camp story" problem)—as a great many persons interviewed for this study took pains to emphasize.[c] Importantly, these warnings about the likelihood of fraud in connection with a resettlement program were heard at least as much and as vehemently from humanitarian workers as they were from persons with enforcement roles. It is probably true that this problem has worsened in recent years. With the expanded reach of criminal enterprises, including human traffickers, and with improved global communications,[c] anecdotal evidence suggests that organized fraud crops up earlier and in more sophisticated forms in refugee situations. … The temptations in this field have also sometimes resulted in damaging corruption or manipulation on the part of certain UNHCR officials or others in a responsible role, who find they can extract large bribes or other personal favors for moving certain cases to the head of the resettlement line.[c] On occasion, as happened in Nairobi in 2000, resettlement was suspended.*

[3] Administrative Petition 3415-05-10 *Hernandez v. Ministry of Interior* (described in Yonatan Berman, Clinic for Migrant and Refugee Rights, Academic Center of Law and Business, "Court orders the Government of Israel to grant asylum for the first time," *Fahamu Refugee Legal Aid Newsletter*, Issue 20, November 2011: "On August 14th the Central District Court in Israel … issued the first judgment ever in Israel, cancelling the a Government's decision to reject an application for asylum and recognizing a person as a refugee. … Shortly afterwards the Government of Israel appealed the judgment to the Supreme Court (Administrative Appeal 7126/11), which will hear the case February 2012." Summarized in English at University of Michigan Law School's Refugee Caselaw Site.) Resettlement countries have so far admitted a handful of sub-Saharan African refugees in Israel under highly restrictive conditions.

PETITIONS

For the protection of immigrants, refugees, and asylum seekers from prison rape

A petition calling for the protection of immigrants, refugees and asylum seekers from prison rape is now open online. This petition is targeted at US President Barack Obama, US Attorney General Eric Holder, and Department of Homeland Security Secretary Janet Napolitano. For more details on the petition or to sign it, please visit the petition website.

Against the amendment of Israeli government's 'Anti-Infiltration Law'

Israeli NGO Hotline for Migrant Workers (HMW) is collecting signatures for a petition objecting to the new amendment of the Israeli goverment's 'Anti-Infiltration Law'. If the bill is passed and the law goes into effect, it will enable imprisonment of all refugees, together with their children, for three years, and imprisonment of refugees from 'enemy countries', such as genocide survivors from Darfur, for indefinite periods of time. HMW states:

> Israel is currently home to 36 thousand asylum seekers, the vast majority of whom have never had their asylum claims checked and are left with no social or medical rights, as well as no right to work....Many asylum seekers languish for years in prisons which were not built for long-term detainment, as the Israeli Ministry of the Interior insists they provide very high levels of proof for their asylum or nationality claims.... It is this detention system that Israel is proposing to enhance through the proposed 'Anti-Infiltration Law'.
>
> ...By signing the petition you will call on the Government of Israel to advance a refugee policy that befits the country's legal obligations, as it is a signatory to the United Nations Convention Relating to the Status of Refugees as well as several other conventions. You will call on Israel to remember the specific moral and historical lessons that this country of refugees must never forget.

To sign the petition, click here.

UNHCR's incentive salary policy *continued from page 3*

Violations of local and international law

The mandatory policy preventing UNHCR's implementing partners in Ethiopia from paying fair wages to refugees violates both local and international laws:

The right to equal pay for equal work & the right to just and favourable renumeration

Section 14(1)(f) of Ethiopia's Labour Proclamation contains a general provision of anti-discrimination on the basis of sex, religion, political outlook '*or any other condition*' (emphasis added). By requiring NGOs to pay refugees half the salary of a national in the same profession, UNHCR is requiring NGOs to discriminate on the basis of nationality in contravention of Ethiopia's Labour Proclamation.

With regard to international law, it should be noted that the Ethiopian Constitution makes all international human rights instruments ratified by Ethiopia an integral part of the law of the land and provides that the fundamental rights and freedoms specified in its Constitution shall be interpreted in a manner conforming to the principles of the UDHR, international covenants on human rights, and international instruments adopted by Ethiopia. Accordingly, the incentive scheme also violates international law. Article 23 of the UDHR and Article 15 of the African Charter each provide for 'the right to equal pay for equal work'. In addition, Article 7(a)(ii) of the ICESCR and Article 23 of the UDHR guarantee the right to an income that provides for a decent living for workers and their families. Yet UNHCR requires implementing partners in Ethiopia to violate the rights to equal pay for equal work and to just and favorable remuneration contained in these instruments by setting wages for refugees far below those of nationals.

The reasonable limitation of working hours and periodic holidays with pay

Article 42 of Ethiopia's Constitution provides that '[w]orkers shall have the right to appropriately defined working hours, breaks, leisure, periodic leave with pay, paid public holidays, and a safe and healthy working environment'. In addition, Article 24 of the UDHR provides that '[e]veryone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay'. UNHCR's guidelines provide for neither a reasonable limitation of working hours nor periodic holidays with pay. Furthermore, refugees are not only expected to work for unequal salaries with no provision for holiday pay, but are also expected to perform tasks outside of their usual job duties (such as construction and road paving) with no compensation.

Maternity leave policy

Article 35 of Ethiopia's Constitution grants the right to both maternity leave and prenatal leave with full pay. In addition, Article 10 of the ICESCR instructs that '[s]pecial protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits'. The incentive worker guidelines do not provide for maternity leave; thus nationals working alongside refugees in camps are entitled to maternity leave with full pay while mothers with refugee status are provided no protection and no maternity pay.

The right to free choice of employment & the prohibition of forced and compulsory labour

Article 18 of Ethiopia's Constitution provides that '[n]o one shall be required to perform forced or compulsory labour'. Similarly, Article 23 of the UDHR and Article 6 of the ICESCR provide the right to free choice of employment. By requiring refugees to perform

UNHCR's incentive salary policy
continued from previous page

tasks such as construction of schools, road paving, and cleaning without pay, the incentive worker guidelines violate the right to free choice of employment and the prohibition against forced labour codified in local and international law.

The right to collective bargaining

In its preamble, the Ethiopian Labour Proclamation states that one of its central objectives is to promote collective bargaining as a means of maintaining industrial peace and of working in the spirit of harmony and cooperation towards the all-round development of the country. As noted above, by fixing incentive salaries and forcing all NGOs to comply with the incentive policy, UNHCR prevents refugees from bargaining for fair wages and benefits.

UNHCR's incentive policy: faulty underlying logic

Aside from being illegal, UNCHR's incentive policy is contradictory. UNCHR attempts to justify incentive salaries by claiming that NGOs and UNHCR lack resources to pay refugees salaries on par with those paid to nationals; that refugees already receive food and other aid; and that refugees should be eager to help their own communities without the expectation of compensation. None of these arguments holds water.

First, while UNHCR admittedly runs programmes around the world on tight budgets, it is still able to hire national staff at salary levels that far exceed national scales. This has been the norm for UNHCR for decades. For example, in 1982 a part-time secretary employed by UNHCR in the Yei Office in southern Sudan received a higher monthly salary than did the Assistant Commissioner for Refugees working for the Government of Sudan (personal communication with Barbara Harrell-Bond). The salaries and additional benefits paid to 'international' staff warrant separate examination. UNHCR's decisions on how to allocate operating funds cannot be used to indemnify illegal labour practices.

Second, there is no basis for the notion that work benefiting one's community should not be compensated. Nor is there any evidence showing that refugees' work benefits solely members of their own community. As pointed out in the Kakuma News Reflector piece,

> in countries around the globe, nurses, teachers and social workers serve their compatriots and are paid for their services. It is unclear why refugees should not be entitled to salaries because they also serve 'their fellow citizens'. In fact, the refugee community is diverse and refugee staff serve persons from many different countries.

Individuals living in the camps may not feel any sense of community whatsoever; it is unfair to expect them to work for little or no salary on behalf of their so-called community.

Third, nationals in camps — who earn much higher salaries — often have access to the same social services offered to refugees. Withholding or lowering a refugee's salary so as to offset services received would not affect a just distribution of compensation. One agency responsible for a camp in Kitgum, Uganda in 1997 made this very point when it refused to conform to the incentive policy. Instead it calculated the value of the food and non-food aid refugees received and deducted it from the salaries paid to refugee employees. The deduction amounted to seventeen cents per day (personal communication).

Under international human rights law and local laws, refugees are entitled to equal pay for equal work, reasonable limitation of working hours and periodic holidays with pay, maternity leave, protection against compulsory labour and the right to collective bargaining. By forcing NGOs to violate these fundamental human rights, UNHCR illegally and shamefully violates the very economic and social rights that UNHCR and its implementing partners are charged with protecting. •

COUNTRY OF ORIGIN & LEGAL NEWS *continued*

EUROPE

CYPRUS: Detained Georgian man found dead, cells used for long-term detention 'totally unacceptable'
EU: European Court of Justice issues a non-binding opinion on Dublin transfer stating that asylum seeker should not be transferred to another Member State where s/he may be at risk of ill-treatment; European common asylum system in discussion
ITALY: Hundreds of Tunisian migrants detained on board ships in Palermo harbour
NETHERLANDS: Dutch asylum policy to become more selective and more restrictive; Debate on Immigration Minister's discretionary powers relaunched
NETHERLANDS: Nearly a dozen Uyghur rejected asylum seekers facing pressure to return to China
SPAIN: 'Detained immigrants are treated like criminals'
UK: Government does not support common asylum system, has grave concerns about provisions; 'Forced marriage' immigration restriction on non-EU spouses found to be discriminatory; Despite government's pledge to end child detention, 697 children detained between May and August 2011; 88-year-old Zimbabwean woman faces deportation

MIDDLE EAST

EGYPT: Hundreds of Eritrean refugees in Egyptian detention centres, many facing possible deportation; every month, around 650 people cross the border into Israel
ISRAEL: Eritrean asylum seekers rejected as Ethiopia issues documents claiming they have the right to Ethiopian citizenship and are therefore ineligible for asylum
LEBANON: Legal aid NGO slams Lebanese General Security for deporting Iraqi refugee who was arbitrarily detained for over three years; Syrian troops seen planting mines along Lebanese border, repeatedly cross into Lebanese territory

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RESOURCES

The documentary 'Brooks — The City of 100 Hellos' explores how immigrants, refugees and temporary foreign workers from the local meat packing plant are changing and challenging the city of Brooks, in Alberta, Canada. The producer Brandy Yanchyk of Brandy Y Productions Inc can be contacted by email for further inquiries or to place orders.

Funds for NGOs is an online initiative working for the sustainability of NGOs by increasing their access to donors, resources, and skills. It uses technology to spread knowledge and increase capacity. Their website features announcements regarding not only funding opportunities for NGOs, but also fellowships, scholarships, awards, trainings and conferences, and includes a section devoted to guides and tools, which covers topics such as proposal writing and training staff in fundraising. Organisations providing legal aid to asylum seekers and refugees may find interesting opportunities listed here.

The European Commission's intra-ACP academic mobility scheme offers scholarships for postgraduate students and staff from a selected list of countries in Africa, the Caribbean, and the Pacific in order to increase the availability of trained and qualified high-level professional manpower in the ACP countries. Refugee law clinics attached to universities in Africa or in the Caribbean may be able to send researchers or students to EU universities through this funding program. Please see the scholarship website for more details on criteria and application guidelines.

NEWS & INFORMATION LINKS

southern refugee legal aid network web, list-serv

statelessness in focus, alertnet

statelessness programme, tilburg law school, netherlands

european council on refugees and exiles weekly bulletin

kakuma refugee free press

pan african media portal

rsdwatch

international detention coalition news

shelter and legal aid for refugees in the US

forced migration current awareness blog

women's asylum news monthly newsletter

this newsletter: past issues, facebook, blog, style guidelines