IARMJ report

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

Volume 1, No 2 **www.iarmj.org** **February 2021**

THE EXECUTIVE OF THE IARMJ
SAN JOSÉ, COSTA RICA - FEBRUARY 2020

Back: Esteban Lemus Laporte (Costa Rica), Dunstan Mlambo (South Africa), Martin Treadwell (New Zealand)
Front: Katelijne Declerck (Belgium), Isaac lenaola (Kenya), Catherine Koutsopoulou (Greece)
Also: Bostjan Zalar (Slovenia), John Bouwmann (Netherlands)

From the Editors,

Dear friends and colleagues,

Well, the first anniversary of the wonderful global conference in San Jose last February has come around, and we are all still fighting the pandemic and nobody is travelling. Sad times: we hope you are all keeping safe and well, and 'following the science' as the British Prime Minister keeps telling us to do here. There are many new vaccines, giving hope that we may be able to reduce the spread of Covid-19 and all its offshoots, so that eventually we can meet again in person. We miss our international friends, but remote meetings do give at least some opportunity to keep in touch.

On that note, the editors would remind you of all of the fascinating working parties which the IARMJ has (details at the end of this newsletter). Now that we have all learned how to Skype, Zoom, and so on, international meetings are much easier than they used to be and collaborative working is no problem!

Please contact the Rapporteur of any working party which interests you, copying in James Simeon, the working party Coordinator. All the working parties welcome new members, but in particular, a number urgently need more members. There will be time for some useful and serious reflection on the working party topics before our next Global Conference and it is really important that the perspective of these working parties is a global one. So do, please, volunteer.

We are grateful to everyone who has provided contributions for this newsletter, both as Chapter President or working party Rapporteurs, or in the case law summaries. Please keep them coming, it is surprising how often the same issues come up around the globe.

We hope you enjoy reading the newsletter, and please do help if you can. Your first point of contact, as always, is your Chapter President.

With warmest wishes for your continued health and safety, until we meet again…

Judith Gleeson

Co-Editor

HABARI KUTOKA NAIROBI

Update from the President…

Justice Isaac Lenaola
President
IARMJ

Leviticus 19:15
(New King James Version)

"You shall do no injustice in Judgment.
You shall not be partial to the poor, nor honour the person of the mighty. In righteousness you shall judge your neighbour".

The pandemic continues to ravage the world. Our members have been affected in various ways. Yet we soldier on. Our judicial work continues and the new normal is almost becoming completely bearable. We have adapted well.

The World Conference and AGM, which are the highlights of our membership to IARMJ will not be held in 2022 but we are focused on 2023. We must remain hopeful. I encourage Chapters to continue planning for their Chapter Conferences and to embrace technology in training. Let us share links so that we can benefit and interact virtually.

I am happy to note that Working Groups have been very active and have, in this Newsletter, given us a brief about their work. This is most encouraging.

Lastly, let us resolve to remain safe and keep in touch with each other, by whatever means.

Isaac Lenaola

President, IARMJ

THE COUNCIL OF THE IARMJ

Clara Santa Pimenta Alves, Russel Zinn, Michael Hoppe, Johan Berg, Hugo Storey, Judith Gleeson, Rolf Driver, Sylvie Cossey, Dominique Kimmerlin, John Mativo, Zouheir Ben Tanfous

Also: Jody Kollapen, Rigobert Zeba, Maria J G Torres

NEWS FROM THE CHAPTERS

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

AFRICA CHAPTER

1. Migration and Refugee developments amid COVID – 19

Justice Mlambo
President, Africa Chapter

As the COVID -19 Pandemic rages on affecting various spheres of life, the management of migratory movements and needs of migrants has been particularly adversely affected by the Pandemic containment measures. This has been especially felt in Africa where large numbers of refugees and asylum seekers are hosted.

Countries in the Horn, East and Central Africa for instance started closing their borders as far back as March 2020 to contain the Pandemic. Closure of borders meant locking out asylum seekers, hence denying them the right to seek asylum as well as violating the principle of non-refoulement which prohibits turning away or returning asylum seekers to a territory where they are likely to face persecution.

It is also reported that food rations in refugee camps have been reduced due to underfunding. For instance, in Uganda's Bidibidi camp, food rations were reduced by 30% in April. Marked underfunding has also threatened or led to food ration cuts in the Democratic Republic of Congo, Malawi and Zambia. Further, the rise in food prices has forced refugees to skip meals, in effect compromising their health. For instance, in the Republic of Congo it is reported that, in July 2020, the price of a food basket had soared by 15%. Evidently, more funding is required to fund refugees globally but more so in Africa where the situation is dire due to the large refugee numbers.

In Ethiopia, the outbreak of the war in the Tigray region between the Federal government of Ethiopia and the Tigray People's Liberation Front (TPLF) has led to widespread displacement of people. It is estimated that 50,000 people have fled to Sudan since the war began on 4th November 2020. Eritrean soldiers have also reportedly been involved in the conflict raising fears that the conflict could escalate to a regional crisis.

On the other hand, the African Union has held various webinars to advance the refugee and migration discourse in the face of the COVID – 19 Pandemic. One such webinar, capturing the compounded human rights implication of the situation, was on the topic "Migration and Health: Addressing the Health Challenges of Migrants & Refugees in Africa", facilitated by the Department for Social Affairs of the African Union Commission, in July 2020. The virtual meeting was aimed at advancing policy and principles for ensuring access to health for refugees and migrants.

2. Statelessness - The Case of the Stateless Shona and Rwandese communities in Kenya

In December 2020, the Kenya government granted citizenship to 1,670 stateless persons of Shona descent and 1,300 stateless Rwandese. President Uhuru Kenyatta announced this decision during

Kenya's 57th Jamhuri day Celebrations. The process leading up to the recognition of the Shona was agitated by a Kenyan Non-governmental Organisation, the Kenya Human Rights Commission (KHRC). Following recognition of the Makonde community from Mozambique in 2017 through the KHRC's advocacy, the Shona approached the KHRC seeking their help to get Kenyan citizenship. After having several meetings with the Shona, the KHRC launched various activities to give visibility to the Shona cause, like launching a story titled, "Missionaries in Limbo", as well as engaging the Kenyan government. Eventually the KHRC was asked to submit names of the stateless Shona to the Immigration department for registration.

The recognition of these two (2) stateless communities as Kenyan citizens in effect means that they can now access socio-economic rights such as the rights to: education, healthcare, employment, property ownership and financial services, among other rights.

The Shona Community from Zimbabwe came to Kenya as Christian missionaries in the 1960s. After Kenya's independence in 1963, they were required to register as Kenyans within 2 years. However, most of them missed the registration deadline, and since they were no longer residents of their countries and could not go back to their countries, they became stateless.

Similarly, most of the stateless Rwandese came to Kenya in 1930s to work on tea farms in Kericho County and several years later they could not go back to their country. Just like the Shona, based on a number of factors they became stateless.

3. Conclusion

Despite the unfortunate effects of the COVID – 19 Pandemic, it is commendable to see governments and courts issuing policy decisions and generating landmark jurisprudence concerning migration issues such as statelessness. It is hoped that this momentum shall be maintained and that 2021 will be a year when the Africa Chapter members will engage more meaningfully in enhancing their capacity in refugee law decision making.

Mlambo JP

African Chapter President

Athens, 2017: A rest stop on the way up the Acropolis – Dunstan Mlambo and Tjerk Damstra

AMERICAS CHAPTER

Dear Colleagues:

Judge Esteban Laporte
President,
Americas Chapter

This year, 2021, we are relaunching our chapter. After the positive experience of having people from different parts of the continent at the Regional Conference in Washington in 2018 and the World Conference in San José 2020, we want to add the largest number of members representing the diversity of the Americas.

In the next few days, members will receive a message with the objectives and projects of the year, which we will inaugurate with a first virtual conference from Canada on the impact of the pandemic on our tasks and responsibilities.

Due to the restrictions of the pandemic this year 2021 we will not be able to have the Regional Conference of the Chapter, we hope to achieve it by 2022, however, thanks to the strong support of UNHCR we will be able to have bimonthly webinars on different topics of interest to the members of the Chapter and the rest of the association.

We want to add more members from Latin America and the Caribbean, so we will continue to send our emails in Spanish and English, as we do in this newsletter. We invite you to strengthen our chapter with your contributions and new members!

Respetables colegas:

Este año 2021 estamos relanzando nuestro capítulo. Luego de la positiva experiencia de contar con personas de distintas partes del continente en la Coferencia Regional en Washington en 2018 y la Conferencia Mundial en San José 2020, queremos sumar a la mayor cantidad de miembros representando la diversidad de las Américas.

En los próximos días, los miembros recibirán un mensaje con los objetivos y proyectos del año, que inauguraremos con una primera conferencia virtual desde Canadá sobre el impacto de la pandemia en nuestras tareas y responsabilidades.

Debido a las restricciones de la pandemia este año 2021 no podremos tener la Conferencia Regional del Capítulo, esperamos lograrlo para el 2022, sin embargo gracias al decidido apoyo del ACNUR podremos tener webinars bimensuales de distintos temas de interés de los miembros del capítulo y del resto de la asociación.

Queremos sumar más miembros de América Latina y del Caribe, por lo que continuaremos remitiendo nuestros correos en español e inglés, como lo hacemos en esta carta. Les invitamos a reforzar el capítulo con sus aportes y nuevos miembros!

Important Information For Members

The Costa Rican Administrative Court has an agreement with the Inter-American Institute of Human Rights that may be used by members of the Association who require specific information for their investigations from this important study center.

The agreement cover academic activities, research and technical assistance and has, as its purpose, the strengthening of the guarantees to the effective access to justice with respect to migrants and refugees.

If you are interested in learning more about this agreement, you can send an email to: tam@mgp.go.cr

Esteban Lemus Laporte
President, Americas Chapter

ASIA PACIFIC CHAPTER

Martin Treadwell
President,
Asia Pacific Chapter

If it seems a long time since the Wellington conference in November 2018, it's because it is. But there is really no ability to hold another Regional Conference as long as international travel is all but impossible. Our plans for the next conference in November 2020 were well under way when Covid struck and the difficult decision had to be made, in May 2020, to postpone it.

Why did we make that decision so early? Because a good Regional Conference requires a commitment to a lead-in time of at least nine months. We have to be confident, even that early, that the conference will be able to go ahead. The reason is simple logistics. A venue has to be booked, catering has to be committed to, and quality speakers and trainers will always have to be given enough notice to have the dates free in their calendars. Perhaps most important to a successful conference, a worthwhile and challenging programme has to be developed.

A programme's development generally takes much more time than is realised. A two-day conference, for example, will likely have five plenary sessions and two break-out sessions of at least two workshops each, per day. That is 18 separate sessions which each need to work with the others, form part of a coherent theme and offer something new to most of the delegates. Add in the need to identify two or three appropriate speakers for each session, have a Plan B for emergencies, provide for the relevant dignitaries and *then* start thinking about the ancillary things such as the conference dinner and a tour or some form of entertainment, and a picture emerges which explains why *at least* nine months' commitment is necessary. For a World Conference, with all of the travel involved, it is more realistic to look at a year.

All of this is me leading up to explaining why the Asia Pacific Chapter council has made the decision to delay the already-postponed Regional Conference for a further 12 months, to November 2022. It is as much a disappointment to the Council as it will be to you, but there is really no alternative. We cannot, today (when the decision has to be made), say with any confidence that, by November 2021, the Asia Pacific region will have returned to a state of normality such that our members will be able to travel internationally. Vaccines are starting to roll out, it is true, but the pace is slow as yet and the efficacy and durability are still untested in the field. We are not even sure of the extent to which the vaccinated will be protected against being infectious to others.

Elsewhere in this issue, the President has written of the same decision being made by the Executive of the global Association, in relation to the next World Conference. It, too, is being deferred – to May 2023. At

least there is one small benefit in the deferral of the Asia Pacific Regional Conference, in that it will keep it in the alternate year to the World Conference. It is a small consolation.

As an alternative to a Regional Conference this year, the Asia Pacific Chapter is embarking on a series of free, online workshops for members throughout this year. The first is being held on Wednesday 24 March. Details are to be found later in this issue. The workshops are intended to be interactive and challenging and will be well worth your time. I hope to see you then.

Martin Treadwell

EUROPEAN CHAPTER

Judge Bostjan Zalar
President,
European Chapter

Apart from the events mentioned in the global Newsletter from December 2020, in the period from November 2020 until March 2021 IARMJ-Europe has been actively involved in projects and in conception of training event, such as:

- EASO WebEx online meeting: "*Religious Persecution*" Asylum Processes Network, 12-13 November 2020, "*Credibility assessment of religion-based claims*" (Hugo Storey).
- Transnational Training Workshop for judges on Asylum & Migration: "*Effective Justice, International Protection and Fundamental Rights in Asylum and Migration*" (FriCore Judicial Training Project, 4-5 March 2021, Université de Versailles, Saint-Quentin-en-Yvelines):
- Personal interview/report under Articles 14 and 17(1) of the Asylum Procedures Directive in the light of the right to an effective remedy from Article 46 (3) of the Asylum Procedures Directive and Article 47 of the EU Charter of Fundamental Rights (Katelijne Declerck),
- Judgments of the CJEU cases of LM, C-402/19 and TQ, C441/19 (rights of a child) and its relations with Article 47 EU Charter (Michael Hoppe).
- Judicial Dialogue (2006-2021) between CJEU and ECtHR on Fundamental Rights in Asylum and Return Related Cases: A View of a Judge of a Member State **(**Boštjan Zalar)
- Training event for administrative judges and prosecutors from Czech Republic: "*Selected discourses of asylum and migration law from the international and national perspective*" (22-23 March 2021), funded by International Commission for Jurists and EU:
  - Access to Asylum Procedure at the Border: A Polish Experience (Jacek Chlebny);
  - Vulnerable groups and children's rights: Irish courts perspective (John Stanley);
  - Judicial review of asylum decisions ex nunc: International and EU law standards *(*Hugo Storey);
  - Basic Conditions for the Rule of Law in Detention Cases: From Magna Carta to European Law Institute's Checklists for Judges (Boštjan Zalar).

- A new module in the Professional Development Series, "*Vulnerability in the context of application for international protection: judicial analysis*" has been published by IARMJ-Europe under the contract with EASO. It is available for free download on the EASO website of the EASO under "Latest Publications".

Plans and projects

We have many plans for future work. Katelijne Declerk is working on a project in Georgia. Too early for details… watch this space!

In collaboration with UNHCR, preparations are continuing for training event for judges from Croatia, Slovakia, Czech Republic, Romania and Slovenia on practical resources and different subjects related to questions for preliminary rulings of the Court of Justice of the EU in the field of international protection. The date for the on-line event is not set yet, but recording of speeches will start in March 2021.

The Drafting Committee chaired by Katelijne Declerck reached the final phase in preparing a proposal to amend the European Chapter Constitution to bring it fully in line with the of the global IARMJ Constitution, which will be submitted shortly for discussion by the Council.

Under the EASO contract, IARMJ-Europe is reviewing its Professional Development Series: "*Qualification for International Protection: A Judicial Analysis*" (Dec. 2016) and "*Article 15(c) Qualification Directive: A Judicial Analysis*" (Dec. 2014).

Boštjan Zalar

Russel Zinn and Robert Barnes – part of the Canadian delegation in Athens, 2017

IN THE LIBRARY

2020 CORRUPTION PERCEPTIONS INDEX

Transparency International, 28 January 2021

The CPI ranks 180 countries and territories by their perceived levels of public sector corruption. The 2020 CPI "reveals that persistent corruption is undermining health care systems and contributing to democratic backsliding amid the COVID-19 pandemic".

ASIA-PACIFIC MIGRATION REPORT 2020

United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP), 18 December 2020

This report presents an overview of migration in Asia and the Pacific. It also discusses short- and long-term impacts of the COVID-19 pandemic on migrants and their families, and recommends future collaborative action by governments and stakeholders in order to achieve safe, orderly and regular migration in Asia and the Pacific.

DFAT COUNTRY INFORMATION REPORT: INDIA

Australia. Department of Foreign Affairs and Trade (DFAT), 10 December 2020

Covers topics related to protection status determination, including: an economic overview, health and mental health, the security situation, religion including anti-conversion laws, political opinion and critics of the government, women, inter-faith and inter-caste marriage, loan sharks/moneylenders, state protection, police, internal relocation, treatment of returnees, and documentation.

EMERGENCY WATCHLIST 2021

International Rescue Committee, 15 December 2020

A global list of the top twenty humanitarian crises that are expected to deteriorate the most over the coming year. The triple threat of conflict, climate change and COVID-19 is driving the crises in nearly all Emergency Watchlist countries, threatening famine in several in 2021.

MIGRATION MOMENTS: EXTREMIST ADOPTION OF TEXT-BASED INSTANT MESSAGING APPLICATIONS

Global Network on Extremism and Technology (GNET), 9 November 2020

Examines online text-based instant messaging applications used by jihadist and far-right extremist groups. It analyses six online messaging services (BCM, Gab Chat, Hoop Messenger, Riot.im, Rocket.Chat and TamTam) that have been or may be used in conjunction with Telegram by extremist groups.

GNET has also recently published a report on the data protection and research ethics challenges and opportunities of researching extremist content on social media platforms.

STATE-SPONSORED HOMOPHOBIA: GLOBAL LEGISLATION OVERVIEW UPDATE 2020

International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), 15 December 2020

ILGA's annual world survey of sexual orientation laws.

WORLD REPORT 2021

Human Rights Watch, January 2021

HRW's 31st Annual World Report summarises human rights conditions in nearly 100 countries worldwide in 2020.

Amnesty International recently launched a free online course on the **BASICS OF OPEN SOURCE INVESTIGATIONS FOR HUMAN RIGHTS**, including video verification, geolocation, remote sensing, weapon recognition, and more.

IOM TRAVEL RESTRICTIONS MATRIX
An interactive tool to visualize COVID travel restrictions imposed (and imposed upon) countries.

UPCOMING BOOK RELEASE

The second edition of James Hathaway's *The Rights of Refugees under International Law* will be published this year by Cambridge University Press (joint authors are James Hathaway and Sarah E Degan, also a Professor of Law at the University of Michigan). The book has been completely rewritten, addressing all of the cutting-edge protection questions — including for example how the duty of *non-refoulement* has evolved, access to basic civil and socioeconomic rights, and how solutions to refugeehood should be conceived. As in the case of the first edition, it's "one-stop shopping" — merging refugee law with international human rights law, drawing on leading national and international jurisprudence, and mapping the law onto the facts of literally thousands of practical protection challenges.

A discount will be available for members of the IARMJ. Please contact Valarie Guagnini on VGuagnini@cambridge.org if you wish to take advantage of the IARMJ discount.

UPCOMING EVENTS

ASIA PACIFIC

Online Workshop – 24 March 2021

"The Child in Protection and Migration Law"

The Asia Pacific Chapter of the IARMJ will hold a series of online workshops this year, beginning with a workshop on The Child in Protection and Migration Law, hosted by Bruce Burson (NZ), Sean Baker (Au) and Judge Torres (Phil). The workshop will focus on, among other things, the application of the 'best interests' principle, the vulnerability of stateless children and child-specific forms of harm in the protection context.

The workshop will be held at 7pm NZ time on Wednesday 24 March 2021, by way of MS Teams and is free of charge to IARMJ members. Register by email to Bruce.Burson@justice.govt.nz so that you can be sent an email with an invitation and the link in it. You do not have to install any particular software, just make sure that your computer has a camera and microphone. Your computer should adjust the time of the workshop to your time zone.

EUROPE

"Ageing Gracefully? The 1951 Refugee Convention at 70"

5th Annual Conference, Refugee Law Initiative, London, UK
9 - 11 June 2021

See here for the call for conference papers

Run this year as a virtual event over three half-days, the 5th RLI Annual Conference builds on the success of previous RLI conferences in uniting refugee law academics, practitioners, policy-makers and students. Registration is free.

AMERICAS

IARMJ Americas Chapter Online Conference Series

25 March 2021

The American Chapter of the IARMJ will hold a series of online workshops this year, beginning with a conference on the theme of the application of justice in times of pandemic hosted by Judge Russel Zinn, on Thursday, 25 March 2021, at 2:00 p.m. (Ottawa time).

People interested in participating should write to the Chapter President, at elemus@mgp.go.cr, to ensure they are registered.

Justice for our Times? The Bangalore Principles and Judicial Integrity

An International Presentation and McLaughlin College Lecture by Judge Judith Gleeson

March 16, 2021, from 12:30 – 1:30 pm (Toronto time) via Zoom

Judge Gleeson will look at how the judge-made principles in the Bangalore Principles have influenced the global assessment of judicial integrity, and how they seek to protect judicial integrity in these challenging times. Click here for more details and the link to join.

The 2020 Judgment Awards

Judges from Mexico, Ecuador and Costa Rica were honored with the "2020 Judgment Award", created to encourage the development of jurisprudence that takes a human rights approach and defense of the rights of migrants who are under international protection in the Americas.

First place was awarded to the Constitutional Court of Ecuador, based on two judgments: "The first develops minimum guarantees for migrants held at the airport, stating that none should be held for more than 24 hours to avoid creating cases of illegal, arbitrary detention (335- 13-JP/20)" and "The right to due process through guarantees for assistance by a qualified interpreter and the right to present a verbal or written explanation of the grounds or arguments to request asylum, the principle

of non-refoulement and the right to receive effective judicial protection (897-11 JP)".

The Costa Rican Administrative Court was granted second place for a decision based on access to justice for migrants or persons subject to international protection.

Third place went to the Eighth District Court of the state of San Luis Potosí, Mexico (Case file: 54/2019) for protecting a migrant with irregular status who was suffering from HIV and tuberculosis, was not a member of the social security program, and applied to join the Public Social Health Protection System.

The award ceremony took place during the Sixth Regional Forum on *Migration and International Protection: State Responsibility and Obligations under COVID19*, an event that examined the main challenges facing migrants who seek access to their rights in times of pandemic. The convening organizations and agencies grant these awards as a way to consolidate their working agenda with judicial bodies in the countries of the Americas and thus help guarantee access to justice for migrants, refugees and persons subject to international protection. The convening organizations will continue their work over the next few months on a plan of action to give continuity to this regional recognition of judicial decisions, further encouraging good practices for access to justice by persons who are migrants or subject to international protection.

(Information courtesy of the Press Office of the Inter-American Court of Human Rights)

The Right to International Protection: A Pendulum between Globalization and Nativization

A Research Project

This project explores the impacts of the United Nations (UN) 2018 Global Compacts (on migration and refugees) on local-level responses to migration and how different national and local actors address and reduce migrants and refugees' vulnerabilities. The project's objectives are to:

- Map key actors' conflicting/converging understanding of migrants' vulnerabilities and specific needs (i.e. who is vulnerable, what makes someone vulnerable and what should this designation entail).
- Investigate how understandings of vulnerabilities and specific needs, as well as governance networks, are shaped on the ground through mechanisms such as funding opportunities, capacity training, production, and dissemination of knowledge.

The comparative research is being conducted by five universities across Europe, Canada, and South Africa. The project is funded by the European Union Commission (Horizon 2020 Program) and the Social Sciences Humanities Research Council of Canada (SSHRC). Watch this space!

THE WORKING PARTIES

DEPORTATION WORKING PARTY

Most states reserve the right to eject a non-citizen from their sovereign territory for breaches of its laws or immigration requirements. The language can vary ("removal" or "expulsion" are sometimes used, for example), but the principle is usually the same, whether the person is a resident or a temporary visa holder or is unlawfully within the territory. For a resident, it is usually necessary for the person to have committed immigration fraud or a criminal offence (often needing to be of increasing gravity, the longer the person has been a resident). For a temporary visa holder, their lesser degree of attachment to the state can mean that even minor transgressions can lead to deportation. For those unlawfully in the country, the mere fact of their unlawfully status is likely to suffice to warrant deportation.

Domestic laws governing deportation are generally a matter for the state and so fall outside the scope of the Deportation Working Party and the IARMJ generally. What is of concern to us, however, is the application of international human rights law to the determination of deportation cases.

The extent to which international human rights law intersects with deportation will depend, to a large extent, on the nature of the enquiry permitted by the state's domestic law. Perhaps the state permits no enquiry into circumstances to be made. Commit the crime and be deported, one might say.

But the majority of states which respect the rule of law do require an enquiry to be made – both at the executive level and on appeal to an independent body. Jurisdiction arises by statute and it is often the jurisdictional boundaries which have come to require consideration of international law principles.

As an example, New Zealand's deportation enquiry includes the right of appeal to an independent tribunal whose jurisdiction includes, through section 207 of the Immigration Act 2009:

> "**Grounds for determining humanitarian appeal**
>
> (1) The Tribunal must allow an appeal against liability for deportation on humanitarian grounds only where it is satisfied that—
>
> (a) there are exceptional circumstances of a humanitarian nature that would make it unjust or unduly harsh for the appellant to be deported from New Zealand; and
>
> (b) it would not in all the circumstances be contrary to the public interest to allow the appellant to remain in New Zealand."

38 years ago, the New Zealand Court of Appeal made it clear that, unless expressly signalled otherwise, Parliament's laws were to be read consistent with the treaties New Zealand had signed. This dipping of the toe in the waters of international law came about in a 1993 deportation case (*Tavita v Minister of Immigration*), in which the state asserted that it was entitled to ignore international Conventions. The President of the Court of Appeal, Justice Cooke, found this to be an "unattractive argument" and stated:

> "A failure to give practical effect to international instruments to which New Zealand is a party may attract criticism. Legitimate criticism could extend to New Zealand Courts if they were to accept the argument that, because a domestic statute giving discretionary powers in general terms does not mention international human rights norms or obligations, the executive is necessarily free to ignore them."

From this, it quickly became established that "the public interest" in deportation cases includes the public interest in New Zealand observing its international obligations. So, for example, to separate a parent from a spouse and children requires an enquiry into whether deportation would breach the rights to protection from arbitrary interference with the family and to family unity (Arts 17 and 23 of the ICCPR). As stated in *Garate v Minister of Immigration* (HC, CIV 2004-485-102, 30 November 2004):

> "… it must be in the public interest that a family with established roots in this country should be permitted to stay, and to stay together, and that international conventions directed to those ends are respected."

Of course, other human rights obligations also come into play – the right of a refugee *to non-refoulement*, for example, and the right of all persons not to be returned to torture. And, of course, children are a special case, requiring consideration of their rights under the 1989 *Convention on the Rights of the Child*. In particular, Article 3(1) of that Convention states that all actions involving children require their best interests to be taken into account as a primary consideration.

It is the intention of the Deportation Working Party to explore these challenging issues involving the relevance of international law principles to the field of deportation. Where it takes us will depend entirely on the input of the Working Party's members. If you are interested in this sphere of migration work, please do contact me. It is only through as wide as possible a membership that the experience of a broad range of jurisdictions can be brought together and conclusions and consensus be reached.

Martin Treadwell
Martin.Treadwell@justice.govt.nz

JUDICIAL RESILIENCE AND WELL-BEING WORKING PARTY

Some of us have developed a concern about the mental health effects of our work and the lack, in some jurisdictions, of adequate training and support around these issues. There is also a lack of knowledge around the extent of the problem. Refugee and migration judges spend their working days listening to claimants recounting their experiences of fear, trauma, violence, and persecution. We are required to solicit these sensitive accounts from potentially vulnerable claimants, while dispassionately and objectively assessing their veracity.

The phenomena described variously as trauma exposure, vicarious trauma, and secondary traumatic stress reflect the effects of exposure to the trauma and the suffering of others. Professionals can develop their own trauma symptoms as the experiences of others become incorporated in their own memory system. As a result, we can find ourselves experiencing trauma symptoms such as intrusive thoughts or images, and painful emotional reactions. For judges, this might be described as the cases, images and interactions that stick in your mind and the negative impact they can have on your world view and day-to-day functioning.

Psychotherapists and social workers are trained in the occupational hazards of their work and how to prepare and respond to them. They are taught to expect to be affected by trauma exposure. Lawyers are not. Until recently, there has been scant regard to mental health management in law schools and little professional guidance provided to lawyers and judges on how to address trauma exposure and its impact.

Studies concerning the mental wellbeing of judges generally have reported that psychological distress, burnout and secondary trauma syndrome are occupational hazards of judicial office and that most judges experience at least one symptom of work-related vicarious trauma including anger, anxiety, flashbacks, loss of empathy, sleep disturbances, intolerance, depression and a sense of isolation.

The one study that looked specifically at vicarious trauma and burnout amongst American immigration judges found that the immigration judges' burnout scores were higher than among all other professionals similarly assessed, including physicians in busy hospitals and prison wardens. While the symptoms of secondary traumatic stress appeared less pronounced than burnout, about a quarter of the sample reported difficulty sleeping and approximately half the sample had wondered how they would be able to continue working with asylum seekers.[1]

Burnout and trauma may affect our ability to conduct cases. It has been variously suggested that burnout and exhaustion might make us too tired to find fault with an applicant's case when fault, in fact, lies. Alternatively, it has been suggested that stress and burnout, including cynicism and detachment, could adversely affect our perception of an asylum seeker's credibility. Another line of articles criticised asylum judges for not allowing asylum seekers to fully describe their experiences in hearings and suggested that we may do this to protect ourselves from exposure to trauma and that this can give rise to unfairness.

Even if trauma exposure is not shown to affect outcomes in immigration cases, the impact on immigration judges themselves personally and professionally is worthy of attention. Many of us work in difficult conditions and under high amounts of stress.

The issue of trauma exposure for immigration judges was raised for the first time at the IARMJ conference in Costa Rica in February 2020. This led to the formation of an IARMJ Working Party on Judicial Resilience and Well-Being. One of its purposes is to investigate what is done in various jurisdictions to assist judges with the mental health challenges of our work. Another is to investigate and collate the personal strategies that IARMJ members employ that help with wellbeing at work. I hope that enough members across a variety of jurisdictions will join the Working Party to assist with this.

If you are interested in joining our working party, please contact me.

Martha Roche

Rapporteur, Judicial Resilience and Well Being Working Party
Martha.Roche@justice.govt.nz

Working Party Quick Updates

Please contact the Rapporteur of any working party which interests you, copying in James Simeon, the Working Parties Coordinator. As well as the working parties discussed above, all working parties welcome new members, but in particular:

(1) The Asylum Procedures and Extra-Territorial Processing working parties are urgently seeking additional members;

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[1] S Lustig and others "Inside the Judges' Chambers: Narrative Responses From the National Association of Immigration Judges Stress and Burnout Survey" (2008) 23 *Georgetown Immigration Law Journal* 57.

(2) The Membership of a Particular Social Group working party is working towards a paper on membership of a particular social group as a basis for refugee protection.

(3) The Artificial Intelligence, Information Technology and Judicial Decision-Making working party is focusing on the current use of technology by governments, claimants and the courts/tribunals - not just AI, but wider technology such as video-hearings, digitalisation and sharing of information, including the electronic application "SISCONARE," and the use of video hearings; the digitalisation of tribunal processes; and increased sharing of migrant data within the European Union. Future work will consider the likely development of technology in the medium term and will work towards practical guidance on how it can affect the quality of evidence, access and participation in judicial decision-making, and wider concerns over fairness of proceedings.

RECENT CASE-LAW OF INTEREST FROM AROUND THE WORLD

(all decisions can be accessed by clicking on the name, as a link)

AFRICA

Minister of Home Affairs and Others v Jose and Another
(169/2020) [2020] ZASCA 152 (25 November 2020)

Background

This case was an appeal to the Supreme Court of Appeal of South Africa, arising from the refusal of the South Africa Department of Home Affairs (DHA) to grant the respondents South African Citizenship in accordance with Section 4(3) of the South African Citizenship Act 88 of 1995 (The Citizenship Act). Section 4(3) provides that:

> "A child born in the Republic of parents who are not South African citizens or who have not been admitted into the Republic for permanent residence, qualifies to apply for South African citizenship upon becoming a major if –
>
> a. he or she has lived in the Republic from the date of his or her birth to the date of becoming a major;
>
> b. his or her birth has been registered in accordance with the provisions of the Births and Deaths Registration Act, 1992 (Act No. 51 of 1992)."

Respondents' case

The parents of the respondents fled their country, Angola, in 1995 to seek asylum in South Africa. The respondents were born in South Africa and had lived in South Africa their entire lives. Together with their parents, they were registered as refugees in South Africa in 1997 till 2014 when they were informed by the South African authorities that pursuant to the repatriation process launched by the South Africa government, their refugee status had been withdrawn. The respondents were advised to consult the Angolan Embassy for further information regarding their status. The Angolan Embassy on its part advised the respondents that, in order for them to legally remain in South Africa, they had to obtain Angolan passports. The respondents obtained Angolan passports through the Angolan Embassy, even though they

had never been to Angola. Thereafter, the respondents tried getting South African identification documents with no success.

The respondents successfully approached the Gauteng Division of the High Court, Pretoria for orders *inter alia* that the DHA be ordered to grant them South African Citizenship in accordance with Section 4(3) of the Citizenship Act.

Appellant's case

The DHA appealed against the decision of the High Court, seeking the Court of Appeal's determination whether it was right for the High Court to order the DHA to grant the respondents citizenship as opposed to requiring the DHA to reconsider their application for Citizenship.

Analysis and conclusions of the court

The Supreme Court of Appeal observed that, although at times the court may refer back a case for the decision maker to review it or make a fresh decision, occasionally the court will make that decision itself, as in the instant case. In arriving at this finding, the court cited the Constitutional Court in *Chisuse and Others v Director-General, Department of Home Affairs and Another* [2020] ZACC 20, where the court, while acknowledging the doctrine of separation of powers, was emphatic that there may be cases where the court may need to direct the Executive, and that "Citizenship does not depend on a discretionary decision; rather it constitutes a question of law".

Court's order

Disallowing the appeal, the Court held that, as the respondents had met all the requirements of section 4(3) of the Citizenship Act, they were entitled to South African citizenship as held by the High Court.

ASIA PACIFIC

XAD (by her litigation guardian XAE) v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs

[2021] FCAFC 12 (16 February 2021)

The appellant was a three-year-old child, born in Australia to parents who were unauthorised maritime arrivals within the meaning of s 5AA(1) of the Migration Act 1958. This meant that the appellant was also an "unauthorised maritime arrival" and that an application lodged on her behalf on 12 September 2019 for a Safe Haven Enterprise Visa was invalid unless the Minister of Immigration "lifted the bar" to her application under s46A(2) of the Act, as he had the power to do.

The proceedings before the Federal Court on appeal were complex but, in essence, the issue was whether the Minister had made a decision to consider lifting the bar (in which case, rules of procedural fairness would apply) or whether he had not.

Uddin v Kantha

[2020] PGNC 83; N8267 (16 April 2020)

"Love and humanity will prevail"

Mr Uddin was a Bangladeshi national, previously a detainee on Manus Island. After release, he married a PNG woman and they had a child. He was deported to Bangladesh but made his way back to PNG, to be with his family, where he was again detained pending deportation.

The PNG National Court of Justice rejected a number of arguments but did accept that the appellant's right to freedom from harsh or oppressive treatment under section 41 of the Constitution would be breached by his continued detention and deportation. In ordering the grant of a three-year visa, the Court was critical of the state's failure to investigate the family's circumstances and noted the following:

> [68] Before determining whether that burden has been discharged I return to the point made when making the findings of fact for this case. The evidence on both sides is not detailed. Presumptions and inferences have had to be made and drawn. There are still gaps. Why was the applicant's refugee application refused? Was he considered not to be a genuine refugee? Was he labelled as an economic refugee? Was his security status suspect?
>
> [69] I decline to speculate on those issues. The respondents had the opportunity to present evidence to show that the applicant is not the sort of man he says he is: a man who has fallen in love with a Papua New Guinean. That opportunity has not been taken. So I am going to treat the applicant as a genuine person. I will determine this case on the basis of the principles of love and humanity that underpin the Constitution. Love and humanity will prevail."

EUROPE

M and Others (Transfert vers un Etat membre)

(Asylum and immigration - Refugee staying illegally in the territory of a Member State - Judgment)

[2021] EUECJ C-673/19 (24 February 2021)

The appellants were third-country nationals present in the Netherlands, who already had refugee status in another EU Member State: the Republic of Bulgaria, the Kingdom of Spain and the Federal Republic of Germany respectively. Their applications for international protection in the Netherlands were rejected, as they already had protection, and under Article 62a(3) of the Vreemdelingenwet 2000 (2000 Law on Foreign Nationals) of 23 November 2000, they were ordered to return to Bulgaria, Spain, and Germany respectively. The appellants did not leave the Netherlands as ordered, and the State Secretary detained them pursuant to Article 59(2) of the Vreemdelingenwet for the purpose of forced transfer. The receiving countries agreed to receive them, and the appellants were removed.

The Fifth Chamber of the Court of Justice ruled that:

> "Articles 3, 4, 6 and 15 of Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals must be interpreted as not precluding a Member State from placing in administrative detention a third-country national residing illegally on its territory, in order to carry out the forced transfer of that national to another Member State in which that national has refugee status, where that national has refused to comply with the order to go to that other Member State and it is not possible to issue a return decision to him or her."

Mtchedlishvili v Georgia - 894/12 (Judgment : Right to a fair trial : Fifth Section)

[2021] ECHR 160 (25 February 2021)

The European Court of Human Rights examined the implications for Article 6(1) ECHR (the right to a fair trial) in circumstances where an appellate criminal court in Georgia decided to dispense with an oral hearing, without giving reasons. The appellant had been convicted at first instance, with oral evidence, of illicitly transporting narcotic and psychotropic medication from Turkey into Georgia with the aim of selling it. The Kutaisi Court of Appeal decided to dispense with an oral hearing and the Georgia Supreme Court declared an appeal on points of law to be inadmissible as the case was 'not important for the development of the law and coherent judicial practice, and the appellate court had not examined the case with major procedural flaws which could have significantly affected the outcome of that examination'.

The European Court of Human Rights held that "as the questions to be decided by the appellate court involved the assessment of issues such as the personality and character of the appellant and her co-accused, the applicant should have been heard directly" and concluded:

> 39. Thus, the Court considers that, in the first place, the questions to be decided by the appellate court in relation to the second set of events could not, as a matter of fair trial, have been properly determined without a direct assessment of the evidence given in person by the individuals concerned. Yet when confirming the lower court's findings by means of a written procedure, the appellate court did not respond to the applicant's request to be heard in person and adjudicated the matter on the basis of the available material in the case file. Furthermore, the requirements of fair trial under Article 6 mandated that clear reasons be provided by the appellate court for refusing the applicant's request for a hearing, not least because the applicable provisions of the CCP appeared to require one, as a rule, in the circumstances of a case such as hers. Given the fact that no explanation was given by the Kutaisi Court of Appeal for dispensing with an oral hearing, the Court is not in a position to discern any exceptional circumstances that may have justified the lack of an oral hearing (see paragraph 33 above).

Begum, R (on the application of) v Special Immigration Appeals Commission & Anor

[2021] UKSC 7 (26 February 2021)

In February 2019, the Secretary of State for the Home Department notified the appellant, Shamima Begum, that he intended to deprive her of her British citizenship ("the deprivation decision"), because he considered her to be risk to the national security of the UK as "a British/Bangladeshi dual national who it is assessed has previously travelled to Syria and aligned with ISIL". Ms Begum has been held at a camp in Syria by the Syrian Democratic Forces throughout. The Secretary of State certified that his decision had been taken partly in reliance on information which, in his opinion, should not be made public in the interests of national security and in the public interest.

Ms Begum applied for leave to enter in order to pursue her appeal against the deprivation decision. The Secretary of State refused, also partly in reliance on information which should not be made public, for the same national security/public interest reasons.

The appellant appealed unsuccessfully to the Special Immigration Appeals Commission (SIAC), and then to the Court of Appeal, which allowed the appeal against refusal of entry clearance, as 'the only way in which she can have a fair and effective appeal is to be permitted to come into the United Kingdom to pursue her appeal' and that fairness and justice outweighed the national security concerns. The Court

held that SIAC had erred in approaching the appeal as a judicial review, rather than as a full merits appeal. The appeal was remitted to SIAC for further findings on the Article 2 and 3 ECHR risks to the appellant of transfer to Bangladesh, or to Iraq, or remaining in the camp and being exposed to a real risk of serious harm there. Both parties appealed to the Supreme Court, which expedited its hearing of the appeals.

The Supreme Court, reversing the Court of Appeal, held that:

(1) No Article 6 ECHR challenge to the refusal of leave to enter had been raised, and the Court of Appeal had erred in engaging with and allowing the entry clearance appeal;

(2) It was not open to the Court of Appeal to make its own assessment of the requirements of national security. The Home Secretary was the person charged by Parliament with making such assessments and who was democratically accountable to Parliament for the discharge of that responsibility;

(3) The right to a fair hearing does not trump all other considerations, including the safety of the public. The appropriate, if unsatisfactory, response was to stay the deprivation appeal until the appellant was in a position to play an effective part in it without the safety of the public being compromised, although 'it is not known how long it may be before that is possible'. There was 'no perfect solution to a dilemma of the present kind'; and

(4) The Secretary of State's extraterritorial human rights policy was not a rule of law but was intended to guide the exercise of his statutory discretion, based on detailed assessments by his officials and the Security Services. The decision of SIAC was restored and the application for judicial review of SIAC's preliminary decision on the deprivation appeal was dismissed.

AMERICAS

Canadian Council for Refugees v Canada (Immigration, Refugees and Citizenship)

2020 FC 770 (CanLII)

A July 2020 decision of Canada's Federal Court struck down the provisions implementing the Canada-United States Safe Third Country Agreement (STCA), on the basis of a finding that, by returning refugee claimants to the US, Canada exposes those claimants to violations of their rights as a result of the immigration detention regime in the United States. Specifically, the Court found that the provisions of the STCA violate claimants' rights to liberty and security of the person guaranteed under the *Canadian Charter of Rights and Freedoms*. The STCA presently remains in effect, as the declaration of invalidity is suspended until an appeal is decided by the Federal Court of Appeal.

Background

The applicants, citizens of El Salvador, Ethiopia and Syria, entered Canada by land and sought refugee protection in Canada. The applicants were ineligible to make refugee claims in Canada due to the STCA, which, in 2004, designated the US a "safe third country". The STCA deems those who arrive in Canada from the US at an official land port of entry ineligible to make a refugee claim in Canada (and vice versa for those crossing into the US from Canada). Conversely, those that cross between the two countries by air, sea, or along the US-Canada land border between official ports of entry are not precluded from

making a refugee claim by the STCA. The applicants, along with three organizations, Amnesty International, the Canadian Council of Churches, and the case's namesake, the Canadian Council for Refugees, challenged the validity and constitutionality of the STCA before Canada's Federal Court.

Issues

The Court considered whether the provisions creating the STCA regime, as implemented, are contrary to rights guaranteed under the *Canadian Charter of Rights and Freedoms*, which forms part of Canada's constitution. The decision specifically focused on whether the provisions implementing the STCA are contrary to rights guaranteed under section 7 of the Charter which provides that "[e]veryone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".

The Court found that the applicants' s.7 rights were engaged due to their detention once they returned to the US, and the conditions they faced during detention, noting that "the imprisonment and the attendant consequences are inconsistent with the spirit and objective of the STCA and are a violation of the rights guaranteed by s.7 of the Charter". Canada's Federal Court concluded that "ineligible STCA claimants are returned to the US by Canadian officials where they are immediately and automatically imprisoned by US authorities", which constituted a limitation on liberty as guaranteed by the Charter. Additionally, the Federal Court concluded that the regime engaged the right to security of the person because "the accounts of the detainees [in the US asylum system] demonstrate both physical and psychological suffering because of detention, and a real risk that they will not be able to assert asylum claims".

The Court considered whether the relevant provisions of the STCA could be justified under s.1 of Canada's Charter, which provides that "the Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". The Court concluded that the provisions were not justified by this section of Canada's constitution, as the rights of refugee claimants are more than minimally impaired by the STCA and the deleterious effects (detention and threats to security of the person) were not proportional to the salutary effects (administrative efficiency).

Due to the infringement of Charter rights, the Court declared the relevant provisions implementing the STCA to be of no force or effect.

Conclusion

As noted above, the Canada-US STCA continues to operate, as the Court's declaration of invalidity is presently suspended pending the outcome of an appeal at Canada's Federal Court of Appeal. That appeal was heard in February 2021 and the decision is currently under reserve.

WHO WE ARE AND WHAT WE DO

THE INTERNATIONAL ASSOCIATION OF REFUGEE AND MIGRATION JUDGES

The IARMJ is an organisation for judges and decision-makers interested in refugee law and migration law. In particular, it fosters recognition that refugee status is an individual right established under international law, and that the determination of refugee status and its cessation should be subject to the rule of law.

THE EXECUTIVE

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

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THE ASSOCIATION'S WORKING PARTIES

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

	Rapporteurs	
Artificial Intelligence	John Keith	uppertribunaljudge.keith@ejudiciary.net
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