

Assessing the Refugee Appeals Tribunal: The Case for the Publication of Decisions

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Introduction

These reflections on the Refugee Appeals Tribunal have been germinating since the appointment of the writer as one of the original members of the Refugee Appeals Tribunal (established November, 2000). They have been committed to paper as a contribution to the ongoing debate concerning the asylum process in this jurisdiction. They are written partly in response to a critique made of the Tribunal by the Master of the High Court (reported in the Irish Times, 20th November 2004). The processes of the Tribunal are subject to judicial review and in that context, the Master was reported as having made some general assertions.

The Master was quoted as criticising the Tribunal in the manner in which it dealt with asylum cases. He claimed that many decisions of the Refugee Appeals Tribunal were judicially reviewed on the grounds of unreasonableness involving unsupported findings without a factual basis, clear factual inaccuracies and inconsistencies and omissions. He indicated that a significant number of cases are settled, meaning that the claim for judicial review was well founded.

While any contribution to the debate is to be welcomed, I know I am not alone among Members of the Tribunal in feeling that a blanket criticism of the Tribunal is unwarranted. It is possible to have been a member of the Refugee Tribunal since its inception and to have heard over 600 cases and never to have been successfully judicially reviewed, nor to have had any case settled prior to trial. That is not to say that there does not appear to be something unsatisfactory about the fact that over 400 asylum judicial review cases have been taken, most of which are against the Refugee Appeals Tribunal (according to the article).

One major obstacle in relation to assessing the performance of the Tribunal is the absence of published decisions. This article seeks to argue that the publication of decisions of the Tribunal would greatly assist the dialogue among those practising in the area of asylum law. The publication of decisions would help remove any mystery surrounding the operation of the Tribunal and would lead to greater transparency and consistency of decisions. It would also help to alert practitioners to the necessary, but sometimes difficult, task entrusted to Members of the Tribunal. While the statutory provisions concerning publication are somewhat ambiguous, it is clear that a formal decision to publish is not one which can be taken by an ordinary Member of the Tribunal.

Use of Judicial Review to examine workings of Tribunal

The only decisions which are currently available for scrutiny are those the subject matter of judicial review. However, judicial review is not a satisfactory mechanism for providing an overview into the workings of the Tribunal for the following reasons:-

- i. Judicial review is an instrument of review rather than a full appeal. Whilst a valuable remedy, it is directed at the decision-making process rather than the result. This means that a *prima facie* case is only made out when the Tribunal has acted otherwise than in accordance with the principle of reasonableness and/or fair procedures. It therefore presents an incomplete picture of the Tribunal due to the fact that the majority of decisions are not judicially reviewed.
- ii. A practice has arisen whereby the Refugee Appeals Commissioner does not review decisions of the Tribunal. Of course, it may be that the RAC is fully satisfied with the deliberations of the Tribunal in all of the cases in which decisions of the RAC have been set aside. Alternatively, there may be some policy reason why the RAC does not judicially review the Tribunal, as it is hard to believe that the RAC has been entirely in agreement with every one of thousands of decisions. This means that the only decisions which are reviewed are decisions where applicants are unsuccessful in their asylum application. Judicial review therefore provides no insight whatever into the Tribunal's reasoning behind successful applications for refugee status. It must be unhelpful to those wishing to examine the workings of the Tribunal that the Tribunal has proceeded on the basis that its decisions will not be challenged by the RAC. Successful applications, which are nonetheless flawed, also deserve scrutiny.

Arguments for Publication

There must be a presumption in favour of publishing decisions as this would provide greater transparency. There does not appear to be any overriding principle which would militate against such publication. (Such publication would retain the anonymity of the applicant through the use of initials.)

The only apparent reason advanced in principle as to why decisions should not be published arises from the fact that most asylum applicants are not successful: Many, if not most, asylum applicants are found not to have established their credibility. The argument goes that if the decisions of the Tribunal were published, some potential asylum seekers would be encouraged to fabricate claims on the basis of the factual matrices of published decisions.

However this consideration does not outweigh the factors in favour of publication. Such publication, even if not of all decisions (as this might prove administratively burdensome), should be representative of the decisions in general. To ensure a representative cross section of decisions are published, an independent specialist might oversee the process.

Benefits of Publication

Publication would also bring many specific benefits for those interested in scrutinising the Tribunal's decisions. It would provide greater openness about the operations, practices and procedures of the Tribunal. It would enable a consensus to emerge in relation to best practice and allow wider comment and analysis. It would also bring to a broader public a greater awareness of the difficult issues which need to be confronted. In this article, I would like to focus on particular issues that emerge on a continuous basis that would benefit from analysis and scrutiny by those practising in the area.

(1) Interpretation of Legal Concepts

Certain key legal concepts arise in the application of asylum law. The legal advisors of applicants must be in a position to advise their clients. In the absence of the publication of any positive asylum decisions, advisors are ignorant as to the basis of successful decisions. What constitutes "*membership of a particular social group*"? How should the "*internal relocation*" principle be applied? Is the Tribunal examining the case *de novo* or conducting a more limited form of appeal (as the Regulations might envisage)? What constitutes persecution on cumulative grounds?

One particular example illustrates the importance for practitioners of knowing how legal interpretations are approached. Sometimes a "*change of circumstance*" takes place in the country of origin after the applicant leaves. A number of possible approaches can be found in the textbooks to this issue. If there has been a civil war, a return to democracy, or a U.S. led invasion since the applicant left, does that affect his application? If he would have qualified for refugee status in this jurisdiction had his case been determined immediately on his arrival here some years ago, should he still gain recognition now? Does the burden of proof shift to the RAC to justify returning somebody to a country of origin where there has been a significant change of circumstance? The UNHCR has refocused this writer's attention on Article 41 of the UNHCR Handbook. This provides that fear must be reasonable. However "*exaggerated fear*" may be justified in certain circumstances. This would appear to suggest that somebody who has suffered torture at the hands of the state in his or her country of origin may nonetheless be justified in having a well founded fear of persecution if returned, notwithstanding that the source of persecution is no longer in power.

In recent times the concept of "*exaggerated fear*" would appear to have particular relevance to some asylum seekers from Iraq. In some cases, the source of persecution may no longer officially exist. However the ongoing effects of previous torture, imprisonment or the deaths of loved ones at the hands of the State, may result in such a person having an "*exaggerated fear*" which is nonetheless reasonable. Since positive decisions are never published, legal advisors may be unaware of how asylum law is applied in this jurisdiction.

(2) Promoting Consistency of Approach

It is desirable that the approach of Members to issues before them be consistent insofar as this is possible. In certain cases, the lack of consistency as between Members can lead to certain anomalies. The consequences of lack of consistency in approach can be considered by taking as an example the concept of "*adequate state protection*". One Member might accept the credibility of an applicant but conclude that there was adequate state protection available to the applicant from the police or the Ombudsman in his country of origin. Another Member might accept the applicant's credibility in relation to an identical set of facts but take the view that there was no adequate state protection. The country of origin information relied on by this Member might indicate that the Ombudsman was an ineffective protection against corrupt and powerful mafia agents in relation to whom the police turn a blind eye. It is submitted that consistency in relation to whether adequate state protection is available in an applicant's country of origin is imperative. It is not acceptable that an applicant's chance of being successful should be determined by a subjective view of what should be capable of being assessed objectively, namely, whether the state can give meaningful protection. Publication should ensure greater consistency of approach to such matters.

(3) Examining Credibility

One of the most difficult tasks facing the Tribunal is to listen to heartrending stories and yet still embark on a critical assessment of their credibility. Practically every asylum seeker tells a story which, if believed, is one of suffering and hardship.

Even without the publication of decisions, practitioners appear to be aware that most applicants who are not successful fail by reason of the fact that their credibility has not been accepted. It does no service to the asylum process to shirk from assessing credibility. An assessment of credibility requires a careful analysis of the applicant's circumstances. For example, if he states that he suffered religious persecution in a particular city, one would examine as to how he came to be in the city in the first place, his knowledge of the city, his knowledge of his claimed religion, his knowledge of the precise riots complained of and his location in relation to same. It also requires the consideration of relevant and specific country of origin information in some detail. It happens not infrequently that on such an examination, it is demonstrable that the person has no knowledge of the city which he claims to have lived in for a number of years or of the name and location of the church, his membership of which gave rise to his being targeted.

The experience in other jurisdictions suggests that some decision-makers find it easier to decide a case, not on credibility, but on some other factor such as the possibility of so-called "*internal relocation*" in the country of origin. Relying on this ground means the decision maker

does not have to conclude that someone is not telling the truth. It is also easier to write such a decision as it does not demand a radical consideration of the facts. For example, if somebody claims to have escaped religious persecution in the northern part of a large African country, it requires little consideration to accept this at face value, but to state that there are over 100 million people in that country and that relocation to a large city in the south would not cause the applicant problems. If such a decision is then judicially reviewed, the decision of the Tribunal might appear very harsh: the credibility of somebody who fears for his life having been accepted, but it being callously suggested that he or she should simply relocate to another city. The truth may be that the decision maker formed a view that the story was not credible, but refrained from expressing this view.

In assessing credibility, one must also have regard to the danger of imputing one's own cultural preconceptions to people from very different cultures and levels of educational attainment. In this regard, I recall an applicant who alleged that he had been a child soldier in Sierra Leone during the civil war. His credibility at first instance had not been accepted partly due to the fact that he could not recall the different colours of the various bank notes in his country. On appeal, the Presenting Officer on behalf of the RAC fairly stated he was not relying on this ground as a general inquiry among his colleagues had elicited that many of them could not name the colours of the Irish bank notes.

(4) Application of Credibility Assessments

How credibility is examined has further implications in relation to comparative recognition rates. Recognition rates are relevant in two ways:

(a) Recognition Rates: Specific Countries

Criticism has been made of the Tribunal because of its failure to recognise refugees from places such as Somalia and Sierra Leone at times when these countries were internationally recognised as refugee producing countries. It has been alleged that the Irish recognition rates are lower than those of other countries. However, perhaps what is not fully appreciated is that sometimes persons from third countries claim to be from Somalia or Sierra Leone. If it is held by the Tribunal that these persons have not established that they are from Somalia or Sierra Leone, then it is unfair to criticise the recognition rate for those claiming to come from such countries. The only true statistic is to take the number of asylum seekers whom it is accepted come from these countries and then to analyse recognition rates for those applicants. Publication would allow for this differentiation to be made.

(b) Recognition Rates of Individual Members

Publication would also bring some transparency in relation to the recognition rates of individual members. Few generalisations can be made in relation to recognition rates as the range of cases presented is very varied. However, disquiet has been voiced concerning a perceived wide discrepancy between Members in relation to recognition rates.

It has been a matter of comment, and indeed alleged in the High Court, that some Members appear to have exceptionally low

recognition rates, bordering on zero. If some Members have never had the experience of hearing meritorious cases, there is a danger that there would be a perception that this could be accounted for by the temperament of such Members. Publication would allow for analysis as to whether any such discrepancies (if such are found to exist) are accounted for by the different mix of cases allocated to Members or are due to other factors such as the application of differing standards concerning the assessment of credibility. If it emerges that differing recognition rates are due to the case mix allocated to Members, one would have to question any mechanisms which would seem to have deprived some Members of dealing with any, or all but a couple of meritorious appeals.

(5) Treatment of Separated Children in the Asylum Process

I have been involved in hearing the cases of minors since distinct procedures were adopted to hear these cases in 2002. I found it initially surprising that my recognition rates in relation to the hearings involving minors was lower than that relating to adults. The fact that many of these cases, despite a liberal application of the benefit of the doubt in relation to credibility, are simply not credible is a matter of particular concern. An unsuccessful adult asylum seeker may in reality be an economic migrant. Can the same generally hold true for a child who arrives alone in this country?

This is of particular concern because of the manner in which a certain category of minors have been dealt with. The only statutory provision dealing with minors is Section 8(5) of the Refugee Act 1996. This provides that where an immigration officer or the RAC becomes aware that a minor is not in the custody of any person, they will inform the Health Board and thereupon the provisions of the Childcare Act 1991 will apply. The Health Board has established a special unit entitled "*The Separated Children's Unit*" to look after such children. However the RAC and the Health Board have divided these children into two categories, namely those they refer to as "*unaccompanied minors*" and those whom they refer to as "*accompanied minors*". "*Accompanied minors*" include minors who are claimed by a person alleged to be a relative or family member on or subsequent to arrival in this jurisdiction. Full responsibility for the pursuing of an asylum claim then falls to such person (and indeed whether to pursue the claim in the first place). However, there does not appear to me to be any statutory provision allowing the Health Board to discharge these children to the care of such guardians without any further State involvement.

According to UNHCR "Separated Children" are:

"Children under 18 years of age who are outside their country of origin and separated from both parents, or their previous legal/customary primary caregiver." (par. 2.1 "Separated Children in Europe Programme: Statement of Good Practice", published jointly by UNHCR and Save the Children in 2000.)

The word "*separated*" is used rather than "*unaccompanied*" because it better defines the essential problem that such children face, namely, that they are without the care and protection of their parents or previous legal guardian. The careful use of "*previous*" in relation to primary care givers should also be noted.

Paragraph 2.2 of the Statement of Good Practice provides:

"While some separated children appear to be 'accompanied' when they arrive in Europe, the accompanying adults are not necessarily able or suitable to assume responsibility for their care."

UNHCR recommend that each separated child is provided with an independent guardian to safeguard his or her interests. It is noteworthy that best practice requires that even if the child is allowed live with persons who claim to be relatives, such child remains a separated child for the purposes of the asylum process with all necessary safeguards afforded to such children.

I believe all "*Separated Children*" should continue to have an independent person to safeguard their interests in the asylum process. The practice of treating some of these separated children as so-called "*accompanied minors*" is fraught with child protection difficulties.

This member has come across cases where "*accompanied minors*" have been placed with most unsatisfactory persons as guardians. While the Health Board might have had no initial concerns in placing these children with such persons, it has become clear during the determination of the asylum claims of these minors that these persons were not suitable. The following examples illustrate the point, although they are not an exhaustive list of cases giving rise to concern.

1. A 17 year old girl who was "*reunited*" with a relative claiming to be her half-sister and discharged to her care. This person put pressure on the girl to withdraw her asylum claim and put her out of her house, leaving her homeless. She was brought to her embassy by this person to obtain an emergency travelling certificate to send her home. The girl told her legal advisors that she wished to pursue the claim. The Tribunal felt that not only was the guardian not a suitable guardian, but was acting to the detriment of the minor's asylum claim. The Tribunal also felt that by reason of the fact that the girl was homeless, that the Health Board had an ongoing obligation under the Childcare Act in relation to the welfare of the child. The Health Board disagreed.
2. A 4 year old boy arrived in this jurisdiction. He was subsequently "*reunited*" with a man claiming to be his father. The asylum claim presented on behalf of this 4 year old boy was presented by this man. This man was himself a failed asylum seeker who had been found not to be credible. He did not claim to have been married to the boy's mother, had never lived with her or indeed lived in the same part of the country as she had. He presented school reports which could not have been completed by the boy in his country of origin as the boy was manifestly unable to speak English, let alone undertake written exams two years previously, at the age of two. In addition, he presented a birth certificate which was demonstrably false as he stated it had been obtained as an earlier one had been lost. However, the birth certificate presented gave the date of *registration* of the birth as the date of the new birth certificate. The father stated he was unable to contact the boy's mother as he did not have her mobile phone number. In addition, the boy was brought to this country by a "*pastor*" whom the father could neither identify nor contact.
3. A fifteen year old boy was made to work full time and prevented from attending school by the person into whose care he was placed by the Health Board.
4. A minor placed with her eighteen year old sister as "*guardian*". This sister was also an asylum seeker and herself fleeing alleged sexual abuse.
5. An educated girl in secondary school in this jurisdiction whose "*uncle*" produced a birth certificate which contradicted the age the girl had given. The girl broke down and said she didn't in fact know how old she was.
6. A girl placed with her half sister, who claimed to share a common father with the girl. However, the application revealed that if the relationship was as stated, the father would have become a father at the age of three.
7. A girl whose guardian was her "*aunt*". Her aunt failed to appear on one occasion and the case was adjourned. On the next occasion, the "*aunt*" was not present either. However, a lady was there representing the interests of the girl. When asked for her identity, she revealed that she was the girl's natural mother: she alleged that she had been separated from her daughter shortly after the girl's birth in her country of origin. She herself had come to Ireland to seek asylum some few years previously. Completely unknown to her, her daughter for unrelated reasons came later to Ireland. The applicant had not known her natural mother. Coincidentally her "*aunt*" had bumped into her natural mother in Moore Street and reunited the pair. The mother then wished to act as guardian.

Serious issues are raised in relation to the treatment of so called "*accompanied*" minors which deserve further debate. I am not alone among Members in declining to hear such cases in the absence of satisfactory safeguards for these vulnerable children.

No system can prevent the tragic trafficking of children. However, releasing "*Separated Children*" to adults who claim them and allowing such adults to process their claims without any further involvement on the part of the State would appear to be a most unsafe procedure to adopt in relation to the protection of vulnerable children. UNHCR Guidelines exist in part to prevent child trafficking. There is no legal obligation on the State to follow these Guidelines but having regard to their purpose, it appears imperative that they should be followed. Furthermore the constitutional rights of such children to fair procedures in the determination of their case cannot be vindicated without having an unequivocally independent advocate to act on their behalf.

5. Procedures which disentitle an applicant to an oral hearing on appeal.

Publication would allow for an appraisal of the "*papers only*" appeal mechanism.

Certain amendments introduced by the Immigration Act, 2003, disentitle an applicant to an oral hearing in circumstances other than where an application is "*manifestly unfounded*". It is not unreasonable, if an application fails to disclose any grounds which could justify a determination of refugee status, that it be deemed manifestly unfounded, with an applicant not enjoying the benefit of an oral hearing. However, the 2003 Act is more far-reaching than this. Under the new Section 13(5) where the report of the RAC includes any of the findings specified in subsection 6 in its decision, any appeal which an applicant has will be without an oral hearing. Section 6 includes

grounds such as where the applicant, without reasonable cause, has failed to make an application as soon as reasonably practicable after arrival in the State, or that the applicant lodged a prior application for asylum in another State party to the Geneva Convention. The legislation envisages that the Tribunal on a "*papers only appeal*" will either confirm the decision of the RAC or declare the applicant a refugee.

These procedures present clear problems by virtue of the inclusion of criteria other than that the application is manifestly unfounded. This is because the Tribunal, under the manifestly unfounded procedures, can easily conclude that an application is not manifestly unfounded by reason of the fact, for example, that the credibility of an applicant was not accepted but the story (if accepted) would justify a finding of a well founded fear of persecution. The matter would then be referred back to RAC for further consideration.

However, under the new procedure, the Tribunal, without the benefit of an oral hearing, is attempting to determine whether or not an applicant is a refugee, rather than simply whether or not the case is manifestly unfounded. This is a crucial distinction. As already pointed out, the most important determination in this process is an assessment of credibility. If the RAC has found that an applicant is not credible, how can the Tribunal revisit that decision in any meaningful way without hearing oral evidence from the applicant? What if the applicant, in his or her notice of appeal, provides an explanation for a negative finding on credibility? For example, an applicant may fail to disclose initially that she has been sexually abused or the extent of such abuse. It is a well recognised psychological phenomenon that disclosure of abuse is gradual and therefore, the fact that the abuse was not disclosed at an early opportunity is not necessarily something which should be held against an applicant in relation to credibility. How can the Tribunal test this explanation? Was the failure to disclose the abuse due to psychological factors inhibiting disclosure or, has the issue of abuse been thought up for the purpose of the appeal?

What of an applicant who states that he has received multiple beatings from the police? Whether this constitutes harassment or amounts to persecution is a finely balanced decision. If the RAC decides that this is harassment only and not persecution on cumulative grounds, how can the Tribunal without further questioning of the applicant, revisit this decision?

The Executive Committee of the UNHCR (Conclusion No. 8, 1997) states that applicants not recognised as refugees should be given time to appeal for "a formal reconsideration of the decision either to the same or to a different authority, whether administrative or judicial, according to the prevailing system." Goodwin-Gill in "*The Refugee in International Law*" (2nd edition) at pages 331 to 332 comments on the appeal or review. He notes that some States have responded to the crisis in numbers in refugee procedures by abolishing appeals, or levels of appeals, or by confining review to legal issues. He concludes that "at both national and international levels, some sort of appeal, going both to facts and to legality, offers the best chance of correcting error and ensuring consistency".

The new procedure does not offer any meaningful appeal in relation to facts and is open to criticism for this reason. It is hard not to conclude that the lack of an oral hearing in cases other than those which are manifestly unfounded gives rise to a suspicion that the Tribunal is merely engaged in some form of rubber-stamping. It should be noted that not all members have agreed to hear these cases.

Conclusion

Feedback from practitioners would be welcome as a contribution to the ongoing debate about how the rights of asylum seekers can best be vindicated in the asylum process. ●

(The author is a member of the Refugee Appeals Tribunal. The views expressed in this article are the personal views of the writer.)

Joyce Reading



Pictured at the reading of a paper on "James Joyce's Legal Dublin" by Brian McMahon, were Mr Justice Adrian Hardiman and Brenden Kilty S.C. The reading took place in the James Joyce house of "The Dead" in Dublin 8.