Providing protection

Article 3 ECHR and UNCAT and humanitarian protection in selected countries

Based on research for the asylum project conducted by JUSTICE, ILPA and ARC

Supplementary report 1

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JUSTICE
Immigration Law Practioners' Association (ILPA)
Asylum Rights Campaign (ARC)

London, August 1997

ARTICLE 3 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE UNITED NATIONS CONVENTION AGAINST TORTURE AND HUMANITARIAN PROTECTION IN SELECTED COUNTRIES

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Introduction

This research report discusses the need for broader forms of protection, extending beyond the 1951 Convention Relating to the Status of Refugees, and examines the alternative forms of status available in a number of countries. It addresses, in particular, protection which may be offered to people who fall outside the 1951 Convention refugee definition, but who face the risk of violation of fundamental rights in a country to which they may be removed. It considers the international obligations under Article 3 of the European Convention on Human Rights (ECHR) and the United Nations Convention Against Torture (UNCAT), which prohibit the return of people to torture and inhuman or degrading treatment or punishment, and the responses to these obligations in domestic law.

Background to the report

The research was based on sources available in the UK, and on information collected by researchers during visits in 1996 to the Netherlands, Germany, Austria and Canada. Additional material from Sweden and Denmark was provided by refugee agencies and lawyers working in those countries. The report was re-edited in May 1997.

This supplementary report forms part of the research for the asylum law project conducted in 1996-97 by JUSTICE and ILPA (Immigration Law Practitioners' Association) and supported by the Asylum Rights Campaign. The main report from that project, *Providing protection: towards fair and effective asylum procedures*, critically assesses asylum determination procedures used in over ten countries, and identifies the principles which should underlie a fair and effective process. Other supplementary reports which were produced as part of the research include:

- *Asylum determination in Canada*, supplementary report 2
- *Asylum determination in the Netherlands*, supplementary report 3
- *Asylum determination in selected European countries: Germany, Austria, Hungary, Poland and Switzerland*, supplementary report 4
- *Asylum determination in Australia*, supplementary report 5

Copies of *Providing protection* and of the supplementary reports are available from JUSTICE (tel: +44 171 329 5100; fax: +44 171 329 5055; email: justice@gn.apc.org) and ILPA (tel: +44 171 251 8383; fax: +44 171 251 8384; email: ilpa@mcr1.poptel.org.uk).

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International Framework

1. With the exception of the Convention relating to the Status of Refugees 1951, none of the International Human Rights instruments to which the United Kingdom (or any of the other countries studied by this project) is a party provides for an express right to political asylum[1].

2. However, the European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention on Human Rights" or "ECHR"), the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 ("UNCAT") and the International Covenant on Civil and Political Rights 1966 provide some measure of protection from removal, deportation and/or *refoulement* where there is a risk that the individual in question would be subject to torture or inhuman or degrading treatment or punishment. As the European Court of Human Rights has held, in certain respects, the protection afforded by Article 3 of the ECHR is wider than that provided by Art. 33 of the Geneva Convention[2] This paper concentrates on the ECHR and the UNCAT and the mechanisms available in some of the countries studied for securing the rights available..

3. Article 3 of the European Convention on Human Rights provides:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

4. Though Article 3 does not provide for a right to political asylum[3]:

> "... it is well established in the case-law of the Court that expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, **where substantial grounds have been shown for believing that the person in question, if expelled, would face a real risk of being subjected to treatment contrary to Article 3 in the receiving country.** In these circumstances, Article 3 implies the

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[1] Article 14 of the Universal Declaration of Human Rights of 1948 provides for a "right to seek and to enjoy in other countries asylum from persecution". This, however, is not strictly speaking binding as it takes the form of a UN General Assembly Resolution and only proclaims "a common standard of achievement for all peoples and all nations" (Preamble).

[2] See Ahmed v. Austria, judgment of 17 December 1996, para. 41

[3] see *inter alia* Vilvarajah et al v. United Kingdom, judgment of 30 October 1991, Series A No. 215, (1992) 14 EHRR 248 at para. 102, and Ahmed v. Austria, judgment 17 December 1996.

obligation not to expel the person in question to that country ...".[4]

5. The protection offered by Article 3 is absolute and does not permit of any derogation nor even of a balancing exercise between the risk of ill-treatment to the individual and the reasons for his or her expulsion in determining whether a State's responsibility under Article 3 is engaged. As the Court put it in Chahal:

> "Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation [...]
>
> The prohibition provided by Article 3 against ill-treatment is equally absolute in expulsion cases. Thus, whenever substantial grounds have been shown for believing that an individual would face a real risk of being subjected to treatment contrary to Article 3 if removed to another State, the responsibility of the Contracting State to safeguard him or her against such treatment is engaged in the event of expulsion [...]. In these circumstances, the activities of the individual in question, however undesirable or dangerous, cannot be a material consideration. **The protection afforded by Article 3 is thus wider than that provided by Articles 32 and 33 of the United Nations 1951 Convention on the Status of Refugees** [...]"[5]

6. There is therefore no necessity for any judicial body faced with an allegation of a breach of Article 3 to even consider any allegation made by the Respondent authorities as to the conduct of the individual, as there is no balance to be struck. The only relevant consideration is:

> "... whether it has been substantiated that there is a real risk that [the individual], if expelled, would be subjected to treatment prohibited by that Article. Since he has not yet been deported, the material point in time must be that of the Court's consideration of the case. It follows that, although the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, **it is the present conditions which are decisive.**"

7. Article 3 of UNCAT is even more specific in the protection it offers to the individual:

> "1. No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

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[4] Chahal v. United Kingdom, judgment of 15 November 1996 (not yet reported in *EHRRs* or *Reports of Judgments and Decisions*) at para. 74; at the Commission stage the UK government sought to contend that Article 3 did not have extraterritorial effect and that it only prevented the Contracting States from exposing a person to torture or inhuman or degrading treatment "within its own jurisdiction". This argument, however, was strongly rejected by the Commission ((1995) 20 EHRR CD19 at para. 102 and not renewed before the Court (see para. 74 of the judgment). See also judgment Ahmed v. Austria.

[5] *Ibid.* At paras. 79 to 80.

2. For the purposes of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

8. "Torture" is defined in Article 1 as:

> "... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

9. In a relatively recent decision upon an individual complaint against Switzerland, the Committee against Torture established under UNCAT set out the principles to be applied when considering whether the expulsion of an asylum seeker would violate Article 3:

> "The aim of the determination, however, is to establish whether the individual concerned would be *personally* at risk of being subjected to torture in the country to which he would return. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a person would be in danger of being subjected to torture upon his return to that country; additional grounds must exist that indicate that the individual concerned would be personally at risk. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his specific circumstances."[6]

10. In finding that there were substantial grounds for believing that the author would be in danger of being subjected to torture, the Committee had regard *inter alia* to reports on the human rights situation in the applicant's home country (Zaire) prepared by the UN Secretary General and the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, the UN Special Rapporteur on Torture and the UN Working Group on Enforced or Involuntary Disappearances.

> "Moreover, the Committee considers that, in view of the fact that Zaire is not a party to the Convention, the author would be in

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[6] Communication No. 13/1993 ***Balabou Mutombo v. Switzerland***, decision of 27 April 1994, @ para. 9.3; Communication 15/1994 Khan v. Canada, views adopted 15 November 1994, para. 12.2; Communication 36/1995 X v. Netherlands, views adopted 8 May 1996, paras. 7.1 and 7.2; and Communication 41/1996 Kisoki v. Sweden, views adopted 8 May 1996, para. 9.2.

danger, in the event of expulsion to Zaire, not only of being subjected to torture but **of no longer having the legal possibility of applying to the Committee for protection**"[7]

11. The Committee against Torture, in its recent Conclusions and Recommendations on the UK's second periodic report[8] to the General Assembly states:

"The Committee is concerned about the following:

(a) ...

(b) The method adopted in forcibly returning persons under deportation orders;

(c) ...

(d) ...

(e) The practice of the *refoulement* of asylum-seekers in circumstances that may breach article 3 of the Convention;

(f) ...

(g) The failure of the United Kingdom to declare in favour of article 22 both for itself and its overseas dependencies[9];

...

The Committee recommends that the Government of the United Kingdom take the following measures:

(a) ...

(b) Reviewing of practices related to deportation or *refoulement* where such practices may conflict with the State party's obligations under article 3 of the Convention;

(c) ...

(d) ...

(e) ...

(f) Declaring in favour of article 22 of the Convention and specifically on behalf of Hong Kong and the other United Kingdom dependent Territories.

..."[10]

12. It appears from the foregoing that the UK practice of granting Exceptional Leave to Remain outside the Immigration Rules to those who are refused asylum, where the situation in the country to which the individual is to be returned or the individual's circumstances make it "unsafe" for them to return, fails to fully

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[7] *ibid.* @ para. 9.6, emphasis added; see also Communication 15/1994 Khan v. Canada, Views adopted 15 November 1994

[8] Reported in Annual/Sessioinal Report of Committee against Torture to the General Assembkly of 7 September 1996 at paras. 59 ff

[9] right to individual petition

[10] *ibid.* paras. 64 and 65

satisfy the requirements under either of these instruments[11].

Alternative processes in use in various European and/or North American countries

Germany

13. Alternative (ie. non-Convention) protection in Germany is provided for by section 53 of the Aliens Act (*Ausländergesetz*). This is in principal designed to comply with the obligations of the Federal Republic under international law (in particular UNCAT (see s. 53(1) and ECHR (see s. 53(4)):

> "(1) An alien may not be removed to a state, where there is a real risk that this alien would be subjected to torture.
> (2) An alien may not be removed to a state, where he is sought by that state for having committed a criminal offence and there is a risk that he may be subject to the death penalty. In such cases the provisions concerning extradition will be applied.
> (3) ...
> (4) An alien may not be removed, where such a removal would be in breach of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (Federal Gazette 1952 II p. 686).
> (5) ...
> (6) The removal of an alien to another state may be suspended if the alien would there be subject to a substantial danger for his limb, life or liberty. Dangers in this state which apply generally to the population or the group to which the alien belongs are considered in the context of a decision under section 54."[12]

14. The officer of the Federal Office for the Recognition of Foreign Refugees (*Bundesamt für die Anerkennung Ausländischer Flüchtlinge*, hereafter "BAFl") examines whether there are any s. 53 obstacles to removal at the same time s/he considers the application for asylum[13]. This applies to all applications considered by the BAFl irrespective of their assessment of the main application[14]. The only three exceptions to this rule, where the s. 53 examination is not compulsory are:
    a. where the applicant was recognised as entitled to asylum under Article 16 of the Basic Law;

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[11] It should be noted, however, that the UK government in its submissions (in relation to Article 13 (right to an effective remedy) in Vilvarajah v. United Kingdom, expressly stated that:

> "... court would have jurisdiction to quash a challenged decision to send a fugitive to a country where it was established that there was a serious risk of inhuman and degrading treatment, on the ground that in all the circumstances of the case the decision was one that no reasonable Secretary of State could take." (emphasis added)

[12] author's own - provisional - translation

[13] s. 24(2) of the Asylum Procedure Act ("AsylVfG")

[14] s. 31(3) first sentence AsylVfG

b. where the applicant was recognised as a Convention refugee under s. 51(1) Aliens Act; or

c. where the application is found to be irrelevant under section 29(3) AsylVfG (ie. where on the basis of an international agreement, another party to that agreement is responsible for or has accepted responsibility for conducting the asylum determination process (Safe Third country)).

15. This examination is automatic and cannot be applied for. Any finding by the BAFl is binding on the local Aliens Office (*Ausländerbehörde*). Even where s. 53 obstacles to removal arise after a final decision refusing asylum, the BAFl has sole responsibility for conducting the s. 53 examination.

16. Where the BAFl concludes that there is a s. 53 obstacle to removal s. 41(1) first sentence AsylVfG provides for the applicant to be granted toleration (*Duldung*) for 3 months (though there is some discretion under s. 53(6) first sentence Aliens Act - however, a *Duldung* should not exceed 1 year). At the expiry of the *Duldung*, it is for the Aliens Office to decide about an extension of the *Duldung*, though where there has been no change of circumstances, this is no more than a formality. Is the *Duldung* not extended, the Aliens Office has to execute the removal directions.

17. A *Duldung* is merely a temporary suspension of removal (though it does in no other way affect the applicant's obligation to leave the country[15]) and does not constitute a residence authorisation and does not entail a right to reside. The applicant subject to a *Duldung* is restricted to the particular *Land* where he resides and may be subject to further limitations and conditions, in particular a prohibition or restriction on the applicant taking up (self-) employment[16].

18. Once the grounds for finding s. 53 obstacles have ceased to exist the *Duldung* will be revoked and the applicant will be removed without further warning. Only once an individual has been subject to a *Duldung* for more than 1 year is there an obligation to give three months notice of removal, unless the agreement of the receiving state expires before that time[17].

19. S. 30 of the Aliens Act further provides the authorities with a discretion to issue an individual recognised under s. 53 with a residence authorisation (*Aufenthaltsbefugnis*); in contrast to the *Duldung* this constitutes a real right to reside. This is, however, only a discretionary power[18].

20. Once the asylum application has been finally refused, the individual may be granted residence authorisation if

(a) the s/he fulfils the requirements for *Duldung* (ie. the removal is impossible for legal or practical reasons, or the removal has been

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[15] s. 56(1) Aliens Act

[16] s. 56 Aliens Act

[17] s. 56(6) Aliens Act

[18] Only Convention refugees recognised under s. 51 Aliens Act have a legal right to such a residence authorisation.

stayed under ss. 53(6) or 54) for reasons for which he cannot be held responsible[19]; or

(b) the individual has been subject to unappealable removal directions for two years and has held a *Duldung*, unless the individual refuses to comply with reasonable requirements for the elimination of the obstacles to their removal[20].

21. In practice, those subject to s. 53 obstacles will, even over long periods, only be granted *Duldung*. There may, however, be substantial discrepancies between the practices of the different *Länder*.

22. A residence authorisation may not be issued or renewed for periods exceeding 2 years[21], though in practice they are often only issued for one year. After holding a residence authorisation for 8 years the individual may apply for an unlimited residence permission and after another 3 years for an unlimited residence entitlement.

23. The spouse and single, underage children of an individual who holds a residence authorisation may also be granted a residence authorisation "for the formation or maintenance of family life"[22]. Where a child is born in Germany a residence authorisation is automatically granted if the mother holds such a residence authorisation. This, however, only applies to those who have been issued with a residence authorisation and not to those merely granted *Duldung*.

24. S. 53(6) provides that removal can be stayed where the individual would there be subject to a substantial danger for his limb, life or liberty. "Substantial danger" has been held to include such matters as: vendettas in Albania, rape by members of the security forces (Turkey and Zaire) and prosecution of deserters in "illegal" wars.

25. The list of obstacles to removal applicable in individual circumstances set out in s. 53 is not exhaustive. The individual may also be able to rely directly on provisions of the Basic Law such as:

a. Arts. 1(1) (protection of human dignity), 2(2) (right to life and physical integrity) and 104(1) (right to liberty)[23]. In order to be able to rely on these there has to be real and serious indications of a danger for life and limb. Usually, however, these only provide temporary and short term obstacles to removal and do not prevent the authorities from issuing removal directions. As soon as these obstacles have disappeared the individual may be removed.

b. Art. 6(1) which entrusts marriage and the family to the special protection

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[19] s. 30(3)

[20] s. 30(4)

[21] s. 34 Aliens Act

[22] s. 31(1) Aliens Act

[23] This includes cases where the risk to life and limb emanates from the removal process itself (ie. where the individual is ill and unfit to travel; in the advanced stages or pregnancy; serious risk of suicide)

of the State;

c. Art. 4(3) which prevents the removal of conscientious objectors where their removal would lead to them being drafted to do military service or being punished for their objection[24].

26. S. 54 of the Aliens Act further provides a power for the Supreme *Land* authority (usually the Interior Ministry of a *Land*) to order that the removal of individuals from certain states or population groups is to be stayed generally or in relation to removal to certain states. Such an order may be made on humanitarian grounds, on grounds of international law obligations or in order to preserve the political interests of Germany. As it is made by the authorities of the *Land*, they only apply in that *Land* and are not binding on the other *Länder*.

27. A s. 54 order may not exceed six months in validity. If they are to last more than six months they are subject to the approval by the Federal Minister of the Interior. In practice, the powers under s. 54 are rarely used, and the Federal Ministry of the Interior uses its power under the second sentence of s. 54 in a way that it will only approve orders where all *Länder* agree with the order. If one *Land* objects, the Federal Ministry will automatically refuse its consent.

28. A similar power is contained in s. 32 of the Aliens Act which allows the Interior Ministries of the *Länder* to issue a residence authorisation to groups of aliens, where it is clear that removal will not be possible[25]. Again these orders are subject to approval by the Federal Ministry of the Interior and if issued are only binding on the aliens authorities of the *Land* in question. Generally, it is a condition precedent to the issue of a residence authorisation under such an order that any outstanding application for asylum be withdrawn and that the individual be in possession of a passport issued by the state of origin. If these conditions are not fulfilled the individual will only be eligible for a *Duldung*.

29. S. 33 provides the Federal Minister of the Interior with a power to grant a right of residence to an individual on the same grounds as in s. 32. Anybody eligible for protection under s. 32 will be issued with a residence authorisation.

Austria

30. S. 37(1) of the Aliens Act (*Fremdengesetz*) provides that an alien may not be expelled to another State if there are solid reasons to believe that s/he would be in danger of being subjected to inhuman treatment or punishment or to capital punishment in that State[26]. Furthermore, under s. 37(6) an alien may not be

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[24] This was held to be the case by the Federal Supreme Court (a civil court); the administrative courts have not so far accepted or even adopted this jurisprudence. They have, however, generally held that threatened punishment for conscientious objection qualified for protection under s. 53(5).

[25] usually referred to as *Altfallregelung*, this applied for example to Afghans and Ethiopians who entered Germany prior to 1 January 1989 and their family members who entered prior to 1 January 1991.

In the case of Ahmed v. Austria, judgment of the ECtHR of 17 December 1996, the applicant's domestic appeal had been rejected *inter alia* on the ground that s. 37(1) only contemplated dangers and threats emanating from a State and that in the civil war in Somalia all State authority had disappeared. In that case, the ECtHR held that there would be a breach of Art. 3 if the applicant was removed; unlike the Commission, it did not however expressly deal with the issue of threats emanating from actors who do not command "State authority". The Commission had held that it was sufficient that "... those who hold substantial power within the State, even though they are not the Government, threaten the life and security of the applicant."

expelled as long as this would be contrary to an interim measure taken by the European Commission on Human Rights or the European Court of Human Rights.

31. The decision as to whether there exists an obstacle to removal under s. 37(1) is taken not by the Federal Asylum Office (*Bundesasylamt*), who are responsible for asylum applications), but by the Aliens Police Authority to whom the case is referred once the asylum application has been rejected.

32. Though an appeal against refusal of entry or expulsion may only be made after removal, s. 54(1) requires that the police authority, at the alien's request, render a declaratory decision on whether or not there are firm reasons to believe that the alien is endangered within the meaning of s. 37(1). The alien has to be informed that he has a right to make such a request, which may be made during proceedings for a residence ban. S. 54(4) provides that an appeal against a decision that an expulsion is admissible must be brought within 1 week but that the expulsion may not be carried out unless and until the s. 54 decision has become final.

33. Though s. 37(1) prohibits deportation, forcible return **and** refusal of entry at the border where the criteria are satisfied, the individual does not receive any legal status or entitlements - s/he is merely tolerated. This means that s/he has no access to any benefits no access to the labour market and no automatic or enforceable right to family reunion; this leaves many dependent on charities and/or working illegally.

34. S. 8 of the Asylum Act (*Asylgesetz*) provides a further option where the Federal Asylum Office may grant a limited right of residence "in cases particularly deserving of consideration ... if expulsion is not possible in fact or in law or could not, for cogent reasons, be reasonably expected owing to the situation in his home country". This "status" is wholly discretionary, may not be applied for and those who satisfy the criteria have no means of legally enforcing their entitlement. A refusal to grant such a "status" is not justiciable.

35. In theory, an individual may be granted a renewable right of residence for no more than one year. Renewal will only occur if the individual cannot be removed at the end of the one year period. S. 8 has been criticised as a "dead letter" by UNHCR as it appears to have been granted in only very few cases. There is, however, anecdotal evidence that during 1996 the s. 8 protection has been awarded more widely.

36. Those not given any status, who cannot be removed on practical or physical grounds, such as lack of flight connections to home country or impossibility of obtaining documentation are simply tolerated (*Duldung*). This means they can stay in Austria without access to any benefits or the labour market only for as long as the practical obstacle remains; once the obstacle has been overcome they are liable to immediate deportation without notice.

(Commission opinion of 5 July 1995, para.68).

Netherlands

37. Under Dutch law there are two forms of humanitarian status that may be awarded: "C Status" which is applicant- (rather than country-) oriented and can be applied for by the individual; and "VVTV" humanitarian protection in respect of those coming from particular countries identified as not safe. Eligibility for any of these two alternative forms of protection is examined at the same time as an applicant's application for A-Status (ie. asylum). Throughout the process it is possible for an applicant to be granted any one of these forms of protection.

38. C Status is designed to implement the criteria for protection under Art. 3 ECHR laid down by the European Court of Human Rights in the case of Vilvarajah v. United Kingdom but in fact appears to also cover those who face a substantial likelihood of future ill-treatment and those who have suffered traumatic experiences such as rape or the death of a relative.

39. C Status provides the individual with a right of residence for one year which will be renewed automatically so long as the individual does not have a criminal record. C Status provides all the rights in relation to social security, work and/or family reunion that are attached to permanent residence[27].

40. It is possible to apply for C Status independently of an application for A Status, or for it to be granted by the authorities as an alternative to A status. The refusal to grant such status is subject to administrative review and subsequently a right of appeal to one of the five District Courts charged with hearing immigration appeals.

41. By contrast, VVTV may be granted only "if in the judgment of the Minister, forced expulsion to the country of origin would be of extreme hardship to the alien in relation to the general situation in the country". Countries triggering VVTV are kept on a list maintained by the Minister of Justice (with the advice of the Minister of Foreign Affairs) which is subject to (possible) debate in Parliament.

42. Those granted VVTV status will be issued with a renewable right of residence for one year. This will be renewed unless the individual's country is now safe. VVTV status cannot be renewed to last more than three years. If the individual's country remains unsafe after three years the individual will be granted C Status. Those awarded VVTV status have access to a limited number of social security benefits and are allowed to work after two years. There is, however, no right to family reunion during the three year duration of VVTV.

43. Normally, an individual will not apply for VVTV status, which may be awarded at the discretion of the authorities, if A or C status is refused. Though the grant of VVTV to an individual is not subject to appeal, the criteria applied in the addition or removal of a certain country from the VVTV list may be challenged on appeal to the courts. A decision to end VVTV status for a particular group or country on the basis that it is now safe may be overturned even if it has been

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[27] This leaves those granted C Status in a more secure position than those recognised as Convention Refugees (A Status) which may technically be withdrawn.

approved by Parliament.

44. Despite the new Dutch system there remains a sub-class of persons who are in practice not returned and where no status has been given even though no final decision to refuse of remove has been made - these are left without any status and therefore any enforceable rights[28].

Switzerland

45. Under Swiss law there are generally two categories of humanitarian status:
    a. Provisional admission where removal is "not possible, permissible or cannot reasonably be expected"; and
    b. Permission to reside temporarily on humanitarian grounds;

46. Where an asylum applicant has been refused refugee status, the Federal Refugee Office (*Office fédéral des réfugiés*) has the power to grant the applicant provisional admission, where either
    a. Removal is not possible due to technical or practical obstacles, such as no flight connections, no travel document or refusal of state of origin to accept returnee;
    b. Removal would violate Swiss obligations under international obligations such as Article 3 of the ECHR or Article 3 of the UNCAT; or
    c. Return may not "reasonably be expected" : under Swiss law and practice this applies where the individual would face clear and certain risks as for example in the case of returnees to civil war countries, eg. Somalia and Bosnia.

47. Though there is no statistical evidence it appears that the largest group of individuals granted provisional admission are granted this status under the third heading. The other two groups are said to be much smaller, which appears to be mainly because applicants seeking provisional admission on the basis of the first two criteria have to overcome a substantial burden of proof[29]

48. Where the Federal Office for Refugees refuses to grant provisional admission there is a right of appeal to the Swiss Commission of Appeal in Refugee Matters (*Commission suisse de recours en matière d'asile*)[30].

49. Once an individual has been granted provisional admission, they are entitled to the same benefits as those whose asylum decision is pending. This means that they may be entitled to support under special support schemes for assistance in kind and small cash allowance (subject to satisfying the means test) and have a

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[28] The example given is that of Algerians whose appeals against refusal have been deferred with no enforcement action taken.

[29] UNCAT Communication 13/1993 Mutombo v. Switzerland, adopted 27 April 1994.

[30] It appears that there may be a further possibility for "appeal" by way of a request for a review of the decision on the grounds that essential evidence had not been taken into account by the authorities; see UNCAT Views in Communication 13/1993 Mutombo v. Switzerland at para. 2.5

right to work[31], though the canton of the individual's residence may restrict this right to certain types of employment. If the individual found work the authorities may demand a reimbursement for any assistance previously provided. Those granted provisional admission do not have a right to any form of travel document or to family reunion, thereby making it impossible for such individuals to see their family either in Switzerland or outside Switzerland, unless members of the family have also acquired some form of status in Switzerland.

50. Provisional admission may be granted subject to certain defined conditions and is therefore liable to revocation where these conditions cease to be met. It may also be revoked where the reason for granting it has disappeared. In practice, however, there appear to be relatively few revocations of provisional admission. Where a decision is made to revoke provisional admission there is a right of appeal to the Federal Department of Justice and Police.

51. By contrast, permission to reside temporarily on humanitarian grounds is awarded at the discretion of the canton in which the individual is resident and may only be awarded after an application has been pending for a minimum of four years without a decision being made. Any decision by a canton to award this status is subject to the consent of the Federal Aliens Office[32]. If an individual's asylum application was refused, there is no right to award this status. The criteria applied by cantons when exercising their discretion include matters such as the length of an individual's stay in Switzerland, the strength of their attachment to the country and the local community and family considerations such as attendance of children in local schools etc.

52. Those granted temporary residence will be issued with a "B" status residence document by their canton. These residence documents are valid for one year and can be renewed; they are further valid only for the canton which issued them. Individuals who hold a "B" status residence document may travel to other cantons for no more than 3 months and only on condition that they do not seek to work there. It is possible to apply for such a residence document from another canton where the individual is seeking to move in order to work in the other canton. The decision is, however, again at the discretion of the canton. Work permits may be granted upon application to the local Aliens police who may restrict the permit to certain sectors of employment or self-employment.

53. The rights granted to those granted temporary residence are more extensive than those for individuals granted provisional admission: eg. they have a right to family reunion, provided
    a. The Federal Office for Refugees is satisfied that there is a long term obstacle to the return of the individual; and
    b. The Federal Office for Aliens has no objections.

    Family members allowed to come to Switzerland are given the same status as the resident.

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31 **Asylum applicants are entitled to seek work three months after their application for asylum has been lodged.**

32 **Not the Federal Office for Refugees; para. 13f., Decree Limiting the Number of Aliens (6 October 1986)**

54. After 10 years of continuous residence in Switzerland[33] individuals of either category may apply for a Permanent Residence Permit ("C" permit) which entitles the holder to work without a work permit and without restrictions[34]. Such a permanent residence permit will be awarded unless the individual's "behaviour has given rise to serious complaint".

Sweden

55. Following the latest amendments to the Swedish Aliens Act[35] persons who do not qualify for Convention refugee status may be entitled to general humanitarian protection if it would be "inhumane" to remove them; this criterion is intended to be applied flexibly. Humanitarian reasons for non-removal include:
    a. Length of presence in Sweden (pre-decision);
    b. Integration into Swedish society to an extent that it would be unreasonable to remove;
    c. Establishment of a family which is effectively integrated into the community;
    d. Need for medical treatment not available in individual's home country.

56. Protection is also available for those who are at risk because of a situation of general violence in their country of origin. None of the categories of humanitarian protection available under Swedish law have any express connection with Sweden's obligations under Article 3 ECHR and/or Art. 3 UNCAT, though as a matter of practice any person subject to a threat of torture or inhuman or degrading treatment or punishment would not be expelled. Those who benefit from this *de facto* protection will usually be awarded the same residence rights as those under the recognised humanitarian categories.

57. Applications for humanitarian protection are made, just like any other immigration application, to the Swedish Immigration Board (SIB) who will assess any application on the basis of all the material before it and any information arising from their own inquiries. Any decision by the SIB, whether on humanitarian grounds or Art. 3 protection, is subject to appeal to the Aliens Appeal Board (AAB) and, if unsuccessful, a request for review to the Supreme Court on the basis of procedural irregularities either at primary decision level and/or appeal. If such a request for review is successful, the decision in question is quashed and remitted for reconsideration. If either the application or the appeal is unsuccessful, the individual has a right to submit a fresh application[36]. Any such renewed application should be made to the AAB which

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33 **This includes any time spent on travels outside Switzerland unless it exceeds 6 months, provided all other restrictions on movement are complied with.**

34 **By contrast those granted asylum may apply for "C" status after 5 years of continuous residence in Switzerland.**

35 **1 January 1997**

36 **There appears to be no limit in law as to the number of such renewed applications that can be made.**

will consider any new grounds not previously considered. Both the SIB and the AAB have the power, under certain conditions, to submit individual cases to the government for a "special decision"[37].

58. Applicants whose application has been refused by the SIB are removed from Sweden. Expulsion orders are generally suspended while an appeal is pending. This does not, however, apply to fresh application made following an unsuccessful first application or appeal. In such cases there is no automatic right to remain in the country while any subsequent application is dealt with. A request for suspension or the expulsion order may be made to the AAB but such applications are rarely successful.

59. Once an application is successful, the individual will generally be granted a permanent residence permit which confers relatively extensive rights, such as family reunion (including spouses, minor children and, in some cases, relatives who are economically, physically or "socially" dependent on the applicant) and a right to work. Furthermore, those granted permanent residence on this basis are entitled to receive social assistance on a similar basis as Swedish nationals and they are entitled to vote in local elections. On the other hand, there is no right to a passport or travel document in the same way as there is for refugees.

60. Following an amendment of the Aliens Act in 1994, section 4a provides the possibility for granting only temporary residence permits to those people "where the underlying causes of the flight, with some degree of certainty, were expected to last only for a short period[38]. Those awarded temporary residence permits are generally accommodated in asylum seekers' reception centres but retain a right to work. They are further entitled to social security (though only if they have no resources), health care (emergency treatment only, except for children) and family reunion (spouses and dependent children to remain on the same temporary basis).

61. Swedish law, in theory, makes provision for the revocation of permanent residence permits granted on a humanitarian basis; in practice these seem to be very rarely used.

Denmark

62. Under Danish law, there are two categories of "humanitarian" protection. Section 7(2) of the Danish Aliens Act provides for so-called *de facto* refugees, ie. those individuals where it is considered that "for reasons similar to those listed in the Convention or for other weighty reasons, the alien should not be required to return to his or her home country"; this status is referred to as F-status. Those granted F-status have essentially the same rights as Convention refugees.

63. Applications for recognition are made to the Danish Immigration Service on a

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37 **This appears to be similar to applications in the United Kingdom to be considered outside the Immigration Rules.**

38 **This provision was applied primarily to some 6500 Bosnian Croats.**

written application form to be filled in in the applicant's native tongue. If the application is rejected by the Immigration Service this application will automatically be considered on appeal by the Refugee Board of Appeals. There is a general right to remain in Denmark until the application has been finally considered by the Refugee Board of Appeals. Applicants are represented by publicly funded lawyers before the Refugee Board of Appeals. Once a decision to reject an application is final, the applicant will be required to leave Denmark within 15 days from the date of the decision. Where there are factual circumstances which make it impossible to return an individual to his country of origin, the Danish Immigration Service may grant a temporary residence permit until the individual is able to return.

64. Section 9.2.2 of the Danish Aliens Act, further provides that any person whose application for asylum has been rejected either in the manifestly unfounded procedure or by the Refugee Appeals board can apply to the Ministry of the Interior for a residence permit on humanitarian grounds. These are granted on the basis of considerations such as the applicant's health and/or other personal circumstances. Only a limited number of such residence permits are granted.

65. IF an application for humanitarian status is made within ten days of notification of the rejection of the asylum application, the applicant has a right to remain in Denmark while the decision is being made. This does not, however apply to those who are treated under the manifestly unfounded procedure or who submit their applications late. As the former is required to leave "immediately" their right to remain in the country can only be preserved if their application is made promptly to the police upon rejection..

66. Those who have been granted either status will be entitled to participate in an integration programme offered by the Danish Refugee Council, which last approximately 18 months and includes language lessons and an introduction to Danish "cultural and social norms". Individuals granted F-status also have a right to family reunion, covering spouses (over the age of 18), children (under 18) and parents who are 60 years of age or older. In cases of family reunification with parents, their residence permit may be subject to the condition that their "sponsor" can and will provide for them. This condition is not usually imposed on permits issued for reunification with spouses unless they got married after the Danish residence permit had been granted.

Canada[39]

67. The Immigration Act in Canada provides for consideration of humanitarian status by way of a post-determination assessment of those refused Convention refugee status. Applicants who have been refused refugee status automatically fall to be considered under the 'post-determination refugee claimants in Canada class' ("PDRCC"). The grounds for granting PDRCC status are:

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39 For a recent decision concerning the compliance of an individual decision under the Canadian system with Art. 3 UNCAT see Views of the Committee against Torture in Communication No. 15/1994 Tahir Hussain Khan v. Canada adopted on 15 November 1994, where the Committee held that Canada was under an obligation under UNCAT not to forcibly return the applicant to Canada.

"... if removed to a country to which the immigrant could be removed would be subjected to an objectively identifiable risk, which would apply in every part of that country and would not be faced generally by other individuals in or from that country,

(i) to the immigrant's life, other than a risk to the immigrant's life that is caused by the inability of that country to provide adequate health or medical care,[40]

(ii) of extreme sanctions against the immigrant,

(iii) of inhumane treatment of the immigrant;"

Following a grant of PDRCC, applicants are given permanent residence status, unless there are reasons why they are inadmissible to Canada (eg criminal convictions or terrorist associations).

68. Initially, there was a post-claim review process, operated by a special review committee. It was a centralised, file-driven process which finally collapsed under its own weight three years later; but which did deliver a 16-17% acceptance rate. In 1993, the process was decentralised (and under-resourced), with the result that acceptances plummeted to 1%.

69. PDRCC was then created as a specific prescribed class, under the Immigration Act. Decisions are made by Post Claim Determination Officers in provincial immigration offices. PDRCC is not an appeal against refusal, even though it follows automatically on refusal and is justified as a 'safety net'. Nor is it a consideration of humanitarian and compassionate considerations against removal, which are dealt with under a separate category (H&C).

70. Furthermore, it does not cover those fearing return to generalised social, political or economic upheaval. As initially operated during its first year, it attracted a great deal of criticism. Only 13 applicants out of nearly 14,000 were successful (0.3%). It was described in a report commissioned by the Immigration Minister as 'a highly sophisticated, special class designed to apply to almost no one'. This was partly because of the low level and enforcement training of the decision-makers, and partly to the narrowness of the criteria (particularly in view of the broad criteria adopted in the refugee determination process itself). Following the report, new criteria and guidelines were introduced and decision-making was separated from the removals branch. It was also decided that the process should be able to review all the facts *de novo*.

71. However, this has failed to remedy the defects of the system. The new guidelines, which are widely held to be unworkable, result in an overall acceptance rate of 5-7% (with significant provincial variations from 3% to 11%). Refugee lawyers say that it is wholly unpredictable. Decisions are still made by low-level staff, with no human rights training, working in isolation, who make fewer decisions per person than the IRB. There is a one-year PDRCC backlog.

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[40] This would, for example, exclude such cases as that currently before the ECtHR D v. United Kingdom, Application No 30240/96, [1996] 22 EHRR CD45, where the Commission held that the applicant's proposed removal to St Kitts, placing him at a risk of *inter alia* inhuman and degrading treatment since he is suffering from AIDS and will be exposed to a lack of adequate medical treatment and living conditions, constituted a violation of Article 3 (11 votes to 7).

72. PDRCC is generally seen as unsatisfactory. It provides for a further layer of decision-making, on the same facts, by non-specialists, of matters which will already have been considered in detail by the specialist Immigration and Refugee Board. It is retained in its present form partly because non-refugee matters are seen to be the preserve of the government, not the IRB, and partly because, in the absence of an appeal, it provides the only opportunity to review the Board's decision.

73. Following a PDRCC refusal, claimants may apply for consideration under the H&C category. This is a general provision whereby the Minister may exempt persons from the normal rule that they should apply for entry to Canada from outside the territory, on grounds of compassionate and humanitarian grounds that they would face 'undue hardship' if returned. Theoretically, that hardship relates to ties formed in Canada, rather than conditions faced on return, though there are no clear guidelines for decision-making. There is a fee of $500 per applicant. It is estimated that there is perhaps a 3% acceptance rate for refused refugee applicants in H&C applications. However, refused applicants frequently re-apply: there is no limit to the number of applications which can be made on the same facts.

74. Decisions to refuse PDRCC or H&C attract the possibility of judicial review, by leave, to the Federal Court Trial Division. The court does not review the merits of the case, but only the reasonableness or lawfulness of the decision. The judicial review test is very high. In H&C cases, it is established in case law [41] that the content of the duty of fairness is minimal. There is no case to meet, since it is for the applicant to persuade the decision-maker that s/he should be given exceptional treatment; there is no requirement for a hearing, for reasons to be given, or for any conclusions or apparent contradictions to be put to the applicant. Decisions will only be overturned if the decision-maker erred in law, proceeded on wrong or improper principles, or acted in bad faith. Though there is no caselaw on the subject, the courts operate the same kind of test in PDRCC cases, as these also are seen as purely administrative decisions.

75. The multiplicity of process available to applicants is much-criticised. Each consecutive refusal (for refugee status, PDRCC and H&C) is reviewable. H&C attracts repeat applications, and judges report sitting on such cases at the third or fourth attempt, on the same facts. Given that decisions to deport, to set removal directions and to remove are also reviewable, the system provides almost unlimited opportunity for ineffectual challenge, while offering no opportunity for an effective review of fact and law.

TIM EICKE
May 1997

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[41] ***Shah* (FCA, 24 June 1994)**