

SCL International refugee law course

Part 2

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SCL International refugee law course

Introduction

Unlike most other people who leave their countries, refugees seek admission to another country not out of their choice but necessity to escape threats to their most fundamental human rights. At the core of the concept of a “refugee” is the notion of persecution underlining the need for international protection – this is what most clearly distinguishes refugees from other immigrants.

“Large scale movements of refugees and other forced migrants have become a defining characteristic of the contemporary world. Few times in recent history have such large numbers of people in so many parts of the globe been obliged to leave their own countries and communities to seek safety else where. Never before has the issue of mass population displacement gained such a prominent position in the agenda of the United Nations and its member States.”¹

¹ From *The State of the World's Refugee: In search of Solutions*, UNHCR, 1995 at page 11.

Part 2 provides an overview of the international legal process and framework for the protection of refugees' rights. It appraises major international laws established to address the plight of refugees². The basic legal framework that accord rights to refugees is the foundation upon which refugees are able to integrate into their host society.

After completing part two, you will receive part three, "International refugee law: integration".

² These include the 1951 Convention Relating to the Status of Refugees as amended by the 1967 Protocol.

SCL International refugee law course

Part 2

How to work your way through part two

1. Before attempting to answer any of the questions, read through the whole material.
2. Then answer each question as directed on the answer sheet.
3. When you have finished, send only the answer sheets back to us.

International Refugee Law

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“Today refugees are a major global problem of our time often inseparable from the range of problems affecting the political, social, cultural and economic development of the world.” United Nations High Commissioner for Refugees (UNHCR)³

There are two sources that provide universal rights to refugees,

- 1951 UN Convention Relating to the Status of Refugees; and
- general standards of international human rights law.

1. The 1951 UN Convention Relating to the Status of Refugees

Part 1 outlined some of the basic principles of the 1951 UN Convention Relating to the Status of Refugees (Refugee Convention) and the 1967 Protocol. This section will give more detailed explanation of the rights of refugees under the Refugee Convention.

The Refugee Convention is the standard international legislation that provides protection to refugees. All other international legislation that focuses on refugee rights and protection compliment the Refugee Convention. These will be discussed later in this chapter.

Not all refugees are equally entitled to the same rights under the Refugee Convention. While there are some core rights, additional rights are granted depending on the individual’s relationship to the host State. As Hathaway notes,

“Before any given right can be claimed by a particular refugee, the nature of his or her attachment to the host State must therefore be defined. The structure of the attachment system is incremental: because the levels build on one another [...], rights once acquired are retained for the duration of refugee status.”⁴

Thus, basic rights usually apply once a refugee is under a State’s jurisdiction while a refugee who has met residency requirements is often granted more rights.

Also note that States are able to suspend rights for refugees on the grounds of national security.

1.1. Fundamental rights

Fundamental rights are those granted to all refugees automatically when they are physically present in the asylum state and thus are under the jurisdiction of the host State. Thus, these are rights that do not contain requirements of legal residence. These rights include:

1.1.2. Non-refoulement

Information withheld

1.1.3. Basic needs

³ The United Nations High Commissioner for Refugees’ opening statement at the U.N.C.H.R executive committee 37th session on 6th October 1986.

⁴ James Hathaway: *The Rights of refugees under international law*. Cambridge University Press. Cambridge, 2005, p155.

1.1.4. Freedom of movement

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1.1.5. Public education

Information withheld

1.1.6. Freedom of religion

Information withheld

1.1.7. Family life

Information withheld

1.1.8. Judicial and administrative assistance

The UNHCR is not sanctioned with enforcing the Refugee Convention and the rights of refugees in a host country. Instead, States that signed the Refugee Convention are responsible for protecting the refugees in their territory.

Refugees are not able to seek diplomatic protection or assistance from their country of origin or the UNHCR if their rights were ignored or abused by the host State. Refugees therefore must rely on the court system of the host country to secure their rights. The drafters of the Refugee Convention understood that this may be a problem so they included Article 16 which states that, “A refugee shall have free access to the courts of law on the territory of all Contracting States.”

Please note that ‘free access’ is intended to read, ‘no obstacles’ preventing access, instead of exemption from paying any court fees.

Hathaway also notes the important requirement that States must “conceive an administrative mechanism by which to facilitate the exercise of Convention rights by all refugees living in its territory.”⁵

1.1.9. Property rights

While some of the more basic needs such as food are not mentioned in the Refugee Convention, there is a mention of property rights. Article 13 notes that States cannot discriminate in relation to the right to acquire property. Rosa da Costa quotes the list of properties incorporated under this article:

- “acquisition of moveable and immovable property, include other rights deriving from these such as mortgaging, revenues, sale, administration of the property etc., as well as leases and other contracts relating to that property. [...]
- tangible property as well as “property rights” such as bank accounts, securities and moneys”⁶.

⁵ This is under Article 25

And Article 7(1) – which states “except where this Convention contains more favourable provisions, a Contracting State shall accord to refugees the same treatment as is accorded to aliens generally” – can be interpreted to say that refugees are protected from property confiscation without compensation⁷.

1.1.10. Documentation of identity and status

The drafters of the Refugee Convention were aware that it would be importance for refugees to be able to prove they are refugees and thus entitled to certain basic rights. Thus, Article 27 adds,

“The Contracting States shall issue identity papers to any refugee in their territory who does not possess a valid travel document.”

This article is applicable to those waiting a decision on their claim for protection under the Refugee Convention. The format of the identity document depends upon the relevant needs of the State.

It is important to bear in mind, as da Costa noted, that “the issuance of such an identity paper does not obligate the State to keep the refugee within its borders, and does not confer any rights on the bearer”⁸.

1.2. Rights for asylum seekers who are “present in their host country lawfully.”

The fundamental rights listed above in section 1.1 apply throughout a refugee’s time in the host country. Additional rights are granted to those who apply for asylum under the Refugee Convention as they are then lawfully present in their host country while their claim is being examined.

1.2.2. Protection from expulsion

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1.2.3. Freedom of residence and internal movement

Information withheld

1.2.4. Economic activity

The right to be economically active in some cases is essential for survival. Other times, being economically active can help the refugee cope with their losses and begin integration. According to Professor Hathaway, “the 1951 Refugee Convention was the first international instrument to speak to the right of refugees to undertake independent economic activity...”⁹ Article 18 states that:

⁶ da Costa, Rosa. *Rights of Refugees in the Context of Integration: Legal Standards and Recommendations*, Legal And Protection Policy Research Series, UNHCR 2006, p 150.

⁷ Ibid, p 517-527

⁸ Ibid, p 126

⁹ Ibid, page 723.

“The Contracting States shall accord to a refugee lawfully in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies.”

Asylum seekers and others lawfully present in a host country are not given an automatic right to wage-earning employment in the Refugee Convention. This is because many States did not want refugees to enter into full employment immediately upon arrival for fear of it affecting their labour market. Thus, the right to work is often only granted to those with full refugee status under the Convention. However, the drafters of the Convention recognised that asylum seekers and other lawfully present in a host society need to be able to provide for themselves and thus made engaging in independent economic activities as listed in Article 18 a right.

1.3. Rights for refugees

Refugees legally and officially sanctioned to stay in a host country, either because they were granted refugee status after applying for asylum or they were admitted under a temporary protection system, are granted further rights than those listed in 1.1 and 1.2. Thus, these rights do not normally extend to those who are waiting for a decision on a formal claim for asylum.

1.3.2. Right to integration assistance

Article 34 states that

The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.

The drafters of the Refugee Convention used the term “assimilation”, however they did not intend it to denote forced or coerced joining of a society by rejecting their culture and way of life so as to be indistinguishable from the host society. Today, we would use the term ‘integration’ – the joining of the economic, social and cultural life of the country without losing one’s identity. (*Part 3 of this course focuses more on integration*)

Article 34 recognises the vulnerability of refugees; their need for protection that goes beyond *non-refoulement*, that many lack the initial social networks essential for integration, as well as the financial resources to facilitate integration. Therefore, the Refugee Convention charges States with assisting refugees to establish themselves at the beginning. Thus, Contracting States may need to make it a policy to grant refugees rights beyond those normally granted to other immigrants¹⁰.

1.3.3. Right to work and social security

Article 17 grants refugees the right to engage in wage-earning employment.

¹⁰ da Costa, Rosa. *Rights of Refugees in the Context of Integration: Legal Standards and Recommendations*, p 25.

“The Contracting State shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.”

However, the drafters understood that most States feared the universal allowance of refugees to work would damage their domestic job market for its citizens. Thus they added in 17 (2) a concession which states that there may be times when the host country chooses to limit this right, but this right should be granted to those who meet the following criteria:

- “a) He has completed three years’ residence in the country;
- b) He has a spouse possessing the nationality of the country of residence. A refugee may not invoke this benefit if he has abandoned his spouse;
- c) He has one or more children possessing the nationality of the country of residence.”

Refugees also have the right to fair working conditions and, for those unable to work or support themselves, the right to social security based on employment contributions (such as support granted to those who are unemployed, disabled, or elderly as well as maternity support)¹¹. This contrasts with Article 23 (see 1.3.4) in that this is not ‘needs based’ support but often reflects ‘contribution based’ support.

Article 19 gives the right for those refugees who gained professional diplomas or training in their home country the right to “as favourable treatment as possible” the right to access professional opportunities and utilise their skills to support themselves.

1.3.4. Housing and public assistance

Information withheld

1.3.5. Intellectual property rights

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1.3.6. International travel

The drafters of the Refugee Convention understood that refugees are often unable to travel with a passport from their country of origin. This means that refugees often enter a host country without a valid passport, preventing them from any further international travel. So Article 28 was included to ensure that legally staying refugees are issued with travel documentation:

1. The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other

¹¹ This is under Article 24

refugee in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel document from the country of their lawful residence.

2. Travel documents issued to refugees under previous international agreements by Parties thereto shall be recognized and treated by the Contracting States in the same way as if they had been issued pursuant to this article.

NOTE: See also, Schedule to the Convention relating to the Status of Refugees of 1951 that details essential requirements for Convention Travel Documents.

1.3.7. Freedom of association

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1.3.8. Assistance to access the courts

Refugees who are 'habitually resident' receive additional rights to asylum seekers under Article 16:

"2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatum solvi*.

3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence."

According to da Costa, this provision "is intended to relieve refugees of the requirement ordinarily made of foreigners for a deposit intended to cover the court expenses of the other party in the event that the foreigner loses the case." Article 16 also states that refugees should be entitled to any national or State-sponsored legal aid assistance¹².

2. The international human rights regime for the protection of refugees' rights

The Refugee Convention is the foundation for refugee rights. International concern over human rights and the right to humane treatment in all situations has led to the adoption of a number of treaties and protocols. These speak in broad terms of the minimum treatment of all people. They therefore extend to refugees seeking asylum, who do not forfeit their fundamental human rights when they leave their countries of origin. Note, however, that these other human rights laws do not provide new standards, but instead compliment the Refugee Convention¹³.

A close link between refugee law and the broader context of human rights is confirmed in the preamble to the 1951 Convention, which makes reference to the

¹² da Costa, Rosa. *Rights of Refugees in the Context of Integration: Legal Standards and Recommendations*, p135.

¹³ *Ibid*, p 10

principle that all human beings shall enjoy fundamental rights and freedoms with out discrimination.

International human rights law sets a minimum standard for the treatment of “aliens”, International Courts of Justice in the Inter-handel case codified this minimum standard when it declared that States should treat an alien (including refugees) in the same way it treats its nationals, i.e. the ordinary standards of civilisation. States are held responsible for breaching international obligations on not complying with the minimum international standard.¹⁴

Significantly, the most definitive of the human rights that the international community organised itself to protect pro actively for refugees included the right to seek and enjoy asylum, the right to life, and freedom from torture or other cruel, inhuman and degrading treatment or punishment.¹⁵

The international human rights regime that have in the past been used to protect refugees include

- The Universal Declaration of Human Rights
- The International Convention on Economic, Social and Cultural Rights
- The International Convention on Civil and Political Rights
- The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa
- The European Convention on Human Rights

2.1 The Universal Declaration of Human Rights 1948 (UDHR)

Information withheld

2.2 The International Covenant on Economic, Social and Cultural Rights 1966

Information withheld

2.3 The International Covenant on Civil and Political Rights (1966)

Information withheld

2.4 Organisation of African Unity's (OAU) 1969 Convention governing the Specific Aspects of Refugee Problems in Africa

The definition of a ‘refugee’ as stated in the Refugee Convention was deemed too narrow for the unique refugee situation in Africa. Thus the Organisation of African Unity’s Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention) expands the definition of refugee to include in Article 1 (2) states

“The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.”

¹⁴ The Inter-handel (1959) ICJ

¹⁵ William Clarence: An analysis of Human Rights Incorporation in to Refugee Law, 1997. UNHCR Publications at page 22.

The OAU provisions of *non-refoulement* also provides more protection for refugees than the Refugee Convention. For example, Article 2 of the OAU Convention provides that:

“(1) Member States of the OAU shall use their best endeavors consistent with their respective legislation to receive refugees and to secure the settlement of those refugees who for well-founded reasons are unable or unwilling to return to their country of origin or nationality.

(2) No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion which would compel him to return to or to remain in a territory where his life, physical integrity or liberty would be threatened.”

This is further strengthened by Article 2 (5) which provides that:

“Where a refugee has not received the right to reside in any country of asylum, he may be granted temporary residence in any country of asylum in which he first presented himself as a refugee pending arrangement for his resettlement.”

The OAU Convention also provides for the right to voluntary repatriation by stating that no refugee shall be repatriated against his will under Article 5. This puts the obligation on the country of origin on receiving back refugees to facilitate their settlement and grants them full rights and obligations. It further provides that refugees who voluntarily return to their country shall in no way be penalised for having left it for any of the reasons giving rise to refugee status.

2.5 The African Charter on Human and People Rights 1986

The OAU also drafted the African Charter on Human and People Rights (African Charter) because they wanted to ground human rights within African values and create a human rights instrument for the African continent in a similar manner to that created in Europe (see 2.6).

Refugee protection here is highlighted in Article 3 which provides that every individual shall be equal before the law and entitled to equal protection of the law.

The African Charter professes this idea by providing that all people shall have the right to their economic, social and cultural development. It further obliges each assenting State to individually and collectively ensure the exercise of this right to development under Article 22.

2.6 The European Convention on Human Rights 1950

Information withheld

3. Relationship between international law and domestic law for refugee provisions

All the above-mentioned international instruments impose an obligation on any signatory State to provide protection to refugees' rights. Under international law, when States become party to international treaties and instruments, they assume obligations and rights there in. A country that ratifies a treaty has to ensure that the obligations it imposes are reflected in its domestic setting. This should be reflected not only in their domestic laws but also in their practice.

The Vienna Convention on the Law of Treaties requires that State parties to treaties progressively change their domestic legislation to conform to the obligations they have assumed.¹⁶

A State as such cannot rely on a provision in its domestic legislation in answer to a breach of an international obligation undertaken by ratifying a treaty.¹⁷ The same Convention requires that State's party to a treaty must perform their obligation there under in good faith under the principle of "pacta sunt servanda."¹⁸

3.1 Case study - USA

Most countries have adopted international and domestic legislation for the protection of refugees' rights.

A case in point is the United States of America. Through the Organisation of American States, it has adopted two treaties dealing with refugees and asylum.¹⁹

They also have human rights instruments, which cater for the protection of refugee's rights.²⁰ These guarantee the protection of most rights set out in the Bill of Rights like the right to life, liberty and security, freedom of movement and progressive realisation of social, economic and cultural rights.

In addition, the American Convention on Human Rights prohibits deportation of aliens (read refugees) under certain circumstances thus,

"Every person has a right to seek asylum and be granted asylum in a foreign territory in accordance with the legislation of the State and international conventions, in event of his being pursued for political offences or related common crimes."²¹

The principle of *non-refoulement* is also embedded herein. The American Convention states that in no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status or political opinions.²²

¹⁶ This is under Article 25

¹⁷ This was the holding in the UN Headquarters opinion case 1987 by Oda .j. The same principle was re- stated in the case of Polish Nationals in Danzing (1931) PCIJ series A/B44

¹⁸ This is under Article 26

¹⁹ The Organisation of American States encompasses most American and Caribbean states and the refugee treaties it has adopted are the Convention on Diplomatic Asylum (1954) and the Convention on Territorial Asylum (1954)

²⁰ These are the American Convention on Human Rights (1954 and 1959) and the American Declaration of the rights and Duties of Man (1948)

²¹ The American Convention on Human Rights is also referred to as the Pact of San Jose, Costa Rica 1969. The right to seek and be granted asylum is under Section 22(7)

²² This is in Section 22(8)

Most of these provisions and those of the 1967 Protocol to the Refugee Convention are reflected in America's Refugee Act of 1980, which assented to, ratified and consolidated these provisions in to its domestic legislation.²³

4. A closer look at case law - ECHR

The European Convention of Human Rights 1950 (ECHR)

4.1. Who is protected under the ECHR

The ECHR begins in Article 1 by articulating that everyone in a State's jurisdiction is entitled to all the rights and freedoms listed in the Convention. Therefore, refugees and those waiting for a decision on their asylum claim are also protected by the ECHR.

4.2. The Right to Life

Article 2 of the ECHR sets out the premise of the right to life:

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a court following his conviction of a crime for which penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

- (1) in defence of any person from unlawful violence;
- (2) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (3) in action lawfully taken for the purpose of quelling a riot or insurrection."

The standard of proof to which a person must show that their life is at risk is generally considered to be a high one.

4.3. The Prohibition upon the Death Penalty

Article 1 of Protocol 6 contains an absolute prohibition upon the death penalty. Thus, where there are "substantial grounds for believing" that following a removal from a European country a person will be condemned to death or executed, such removal would be to breach their human rights. The Article reads:

"The death penalty shall be abolished. No one shall be condemned to such penalty or executed."

On the wording of Article 1 of Protocol 6, not only execution, but condemnation to execution, is forbidden and is absolute.

4.4. Freedom from torture or inhuman or degrading treatment or punishment

²³ Adele Brown: Asylum Practice and Procedure. Country-by- country Handbook. Trenton Publishing 1999.

Information withheld

4.4.2. Article 3 in Comparison to the Refugee Convention

In relation to the ambit of the protection bestowed by Article 3, note that this Article is subject to no limitation, unlike the Refugee Convention.

According to the European Court of Human Rights, as noted in *Chalal v UK* (1996) 23 EHRR 413, in expulsion cases in which a violation of Article 3 is asserted, the standard of proof to which it must be established that there is indeed a prospect of such breach is whether there are “substantial grounds for believing” that such will occur²⁴. These words echo those used by the House of Lords in *Sivakumaran* [1988] Imm AR 147: “A reasonable chance”, “substantial grounds for thinking”, “a serious possibility”, all of which were summarised by Lord Keith as representing “a reasonable degree of likelihood.”

Under the European Convention on Human Rights, there is no reference to an independent concept of “protection” within the Convention itself, and the only question appears to be whether the system in place does indeed alleviate the risk of harm to below the standard of “substantial grounds for thinking,” as suggested in cases as *HLR v France* (1997) 26 EHRR 29.

In *Horvath v UK* (6 July 2000), the court noted that the definition of ‘persecution’ is based on an absence of state protection from non-state agents. They went further to state that this absence is based on a failure of the state to provide protection (ie, unwilling to protect its own nationals).

However in the *Kacaj v SSHD* July 2001 (IAT), it was found that it would be wrong to apply a different approach to *Horvath* when assessing whether there is ‘sufficiency of protection’ afforded by the State. In *Kacaj* the Tribunal did go on to comment:

“We do not read *Horvath* as deciding that there will be a sufficiency of protection whenever the authorities in the receiving State are doing their best. If this best can be shown to be ineffective, it may be that the applicant will have established that there is an inability to provide the necessary protection.”

Ahmed v Austria (1996) 24 EHRR 278 demonstrated that Article 3 could apply in civil war context.

It is clear from cases such as *D v UK* 1997 (see 4.1.5 above) that inhuman treatment, at least, may be established where there is no *intention* behind the harm in question (contrast the approach to “persecution” within the meaning of the Refugee Convention).

There is no requirement under the ECHR to establish that the harm feared be linked to a ‘Convention reason’ (ie, the individual’s race, religion, nationality, membership of a particular social group or political opinion).

²⁴ *Chalal v UK* (supra, para 45)

The standard of proof for establishing whether an individual is likely to face a breach of their rights under Article 3 is whether substantial grounds have been shown for believing that the person concerned faced a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the country to which he or she was returned.²⁵

Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum depends on all the circumstances of the case, such as the nature and context of the treatment, the manner and method of its execution, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim.²⁶ A case in point is that of *Muwanguzi v SSHD* 30 November 2003 (IAT) where the tribunal found that it would be a breach of Articles 3 to remove a Ugandan woman who had been diagnosed as HIV positive and was suffering from AIDS. The European Court of Human Rights also held in *D v UK* (1997) that D's removal from the UK despite his advanced state of Aids would hasten his death and expose him to risk of dying under inhumane and degrading circumstances constituting a violation of Article 3 of the ECHR.

4.5. The Right to liberty and security of person

Information withheld

4.6. The right to a fair trial

Information withheld

4.7. The right to family and private life

Article 8 grants individuals the right to family life:

“(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except as is in accordance with the law and is necessary in a democratic society in interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

Four questions have to be answered in turn in order to determine whether there is a breach of the obligation it creates: There has to be a private or family life established, there has to be interference with the right to respect for such private or family life, the interference should not be in accordance to the law and should not be necessary in a democratic society in the interests of one of the legitimate aims set out in Article 8's 2nd paragraph.

4.7.2. Establishing family life

Information withheld

²⁵ (see *Vilvarajah and Others*)

²⁶ (see *Cruz Varas and Others, Nsoma v Belgium*)

4.7.3. Establishing interference with family life

Information withheld

4.7.4. Is there interference in accordance to the law?

Information withheld

4.7.5. The Practical Use of Article 8

Article 8 can be expected to be of interest chiefly in the following circumstances:

- Where an individual seeks to prevent their own removal from the country because such removal would interfere with their right to family life;
- Where an individual applies for entry clearance as a dependent family member under the immigration rules, or where an individual applies for leave to enter or remain as a dependant family member under immigration rules.
- In relation to family reunion applications made by refugees, where the family whose re-union is sought does not fit the definition of 'family' as contained in the asylum country's reunion policy.
- In relation to family reunion applications made by those given partial or full refugee status.
- Article 8 'Protection' claims based on sexuality;

Sexuality is an aspect of private life that can be a ground for State protection under the ECHR. Precedents including Courts of Appeal and House of Lords have upheld this assertion. The case of Jain (2000) Imm AR 76, decided before the ECHR laid foundation to this claim. The Court of Appeal held that there was a broad International consensus that every one has a right to respect to their private personal life, which includes their sexual life. And that criminalizing homosexuality between consenting adults in private was not regarded by the international community at large as being acceptable. The European Court, however, held in *Modinos v Cyprus* (1993) 16 EHRR 485 that each case had to be considered in context and that it would always be necessary to look beyond the law to see whether there was a risk of enforcement investigation and prosecution, and that all circumstances of the case, to see whether there was in fact an interference with one's private life. However, Lord Steyn in *Ullah* (2004) Imm AR 419 re-emphasized that a homosexual might succeed under Article 8 even though they could not win under the Refugee Convention.

4.8. Limited rights under the ECHR

Articles 9, 10 & 11 of the ECHR are all expressed as being subject to certain limitations, three of which are common (public safety, the protection of health or morals, and the protection of the rights and freedoms of others); the prevention of

disorder or crime and national security (just Articles 10 & 11); the protection of public order (Article 9 only) and the protection of territorial integrity (Article 10 only).

The issue therefore arises as to the ability of a State to remove a person whose fundamental right is infringed, where there none of the limitations set out above applies.

4.9. Right to freedom of thought, conscience and religion

Article 9 enshrines the right to freedom of thought, conscience and religion

“1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”

Newman J in Oru (CO1807/2000; 17th November 2000) accepted, in principle, that a breach of the right to freedom of religion could be a relevant consideration, at least, in militating against an immigrant’s return. Although Newman J found that the right to proselytise exists, he concluded that there is no right to do so in any particular way, unless the chosen method of proselytising was such a fundamental aspect of an individual’s faith, that with out it, the applicant would not be able to practice her religion at all.

4.10. The right to freedom of assembly and association:

Article 11 proclaims

“1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”

Article 11 is a ‘qualified’ right as some limitations on these rights may occur as stated in 11(2).

However, international law, including the ECHR, does not allow refugees to interfere in the political affairs of their countries of asylum (see Refugee Convention, article 15).

5. Conclusion

Human rights claims are outside the Refugee Convention reason but are internationally recognised as grounds for the grant of asylum or residency status in a country of application.

The international refugee law regime, as analysed in this part of the study, sets the foundation for refugee protection. These are the standards every national should aspire to and be judged upon regarding refugee protection. This is with consideration to the fact that every country has different resources, capabilities and individual perspective to immigration and refugee issues. However, when countries ratify the aforementioned treaties, they hold out to implement them in their domestic law and policy. Refugees and their advocates have the right to legally challenge any breach of their rights.