

# Refugee status determination: three challenges

Martin Jones

**Refugee status determination (RSD), which is vital to the protection of so many asylum seekers worldwide, is at best an imperfect, haphazard and challenging process. It merits greater attention and appropriate reform.**

Asylum seekers are subject to a variety of procedures examining their individual reasons for being outside their country of origin, and thus determining their status as refugees. Even within states, procedures can vary based upon location, country of origin and personal history. Despite recent efforts to harmonise RSD procedures, notably in the European Union, there is still no single model for RSD and there remains a troubling variation in outcomes in similar cases. For example, the acceptance rates for Iraqi refugees in European states governed by the EU's RSD standards varied between 0% in Greece and 81% in Sweden.

Studies of outcomes in RSD processes have linked recognition rates to a variety of seemingly extraneous factors, including government ideology, country of asylum demographics and the number of refugees already in the country of asylum.<sup>1</sup> Recent studies in Canada and the US have shown that the identity of the decision maker in RSD is often the most significant influence on the outcome.<sup>2</sup> Recognition rates have also been linked to refugee movements, with higher recognition rates prompting future population movements. At best, RSD is an imperfect, haphazard and challenging process. Even factoring in successes upon appeals and grants of 'complementary protection'<sup>3</sup>, in 2007 a majority of (55%) of asylum seekers worldwide were refused protection.

The high rejection rates and consequent threat of forced removal from the country of asylum make

these issues of vital concern to asylum seekers and to the international community. Although there are many issues to debate relating to RSD, there are three broad, inter-related issues that cut across national jurisdictions. These are: access to counsel, the increasing transnationality of RSD and current governance of the international refugee regime.

## **Access to counsel**

In setting out a framework for RSD, the Executive Committee of UNHCR has recommended that "the applicant should be given the necessary facilities, including the services of a competent interpreter" and be allowed "to contact a representative of UNHCR." Both of these recommendations help to ensure an outcome that is based on a full understanding of the facts of the case and on international law. However, the Executive Committee's conclusions about international protection are conspicuously silent on one issue: the access of asylum seekers to legal advice.

Access to a representative of UNHCR cannot be a substitute for the provision of or access to independent legal counsel. This is especially true in the approximately 80 jurisdictions in which UNHCR serves as a decision maker. Statistics on RSD indicate that self-representation rarely, if ever, serves the interests of the individual.<sup>4</sup> Fortunately, the provision of independent legal advice to asylum seekers has recently spread beyond the 'global north' where such services are well established (though subject to budget cutbacks). The Southern Refugee Legal Aid Network (SRLAN)<sup>5</sup> was founded in 2007 in order to facilitate representation of asylum seekers in the 'global south'. A growing number of legal aid organisations now exist in the South, providing representation to a significant number of asylum seekers, though the overwhelming majority remain without access to counsel.

In the South, refugee legal aid has typically grown out of refugee advocacy organisations (unlike in the North where refugee legal aid is more commonly an outgrowth of well-established legal aid programmes for indigent criminal defendants). The different origins of legal aid in the South present a series of unique challenges, including the frequently expatriate nature of staff and the lack of formal legal qualifications and training of representatives. The SRLAN's first project was to develop standards for professional conduct (the Nairobi Code of February 2007); it is also in the process of developing common training materials for refugee legal aid organisations.

### Transnationality of RSD

Refugee law is inherently transnational in subject matter insofar as the focus of the inquiry undertaken in one country is on events in and laws of another country – the country of origin.<sup>6</sup> However, refugee law also reflects a more dynamic form of transnationalism, whereby norms developed and elaborated in one jurisdiction are transferred to another jurisdiction so that courts in one country seek guidance from the jurisprudences of other countries.

This means that advocates must now keep up to date on developments in not just a single jurisdiction but many. This problem is not an abstraction but presents itself every day when a client from County A applies to counsel in Country B (who received legal training in Country C) hoping for resettlement to Country D. Sadly, legal education currently provides too little training in refugee law let alone with respect to its transnationality.

### Governance

This final issue is one of more general concern to the entire refugee regime. The governance of refugee law currently resides with UNHCR under Article 35 of the Refugee Convention and, in turn, effectively with the 76 states which are members of its Executive Committee (and which provide almost all of the voluntary contributions which fund UNHCR's operations). At present UNHCR must both develop refugee law, attempt to secure its application by states and apply it in its own RSD operations. In such a situation, the independence of its interpretations of the Refugee Convention in its RSD decisions cannot be guaranteed. This is exacerbated by the fact that UNHCR generally does not provide written reasons for its decisions in RSD nor does it always disclose all of the evidence upon which it bases its decisions; furthermore, the UNHCR policy-making process is all too often opaque. While UNHCR is working to address these deficiencies (and alternative practices do exist, such as that described by Rachel Levitan in this issue of FMR), the fact that such practices can persist at all is indicative of the problem of having an international agency with legal immunity making such decisions.

The international refugee regime requires reform. That in turn requires dialogue – and dialogue requires partners. Trained refugee counsel, aware of and educated about their transnational position and subject matter, can be one important partner. However, what is vital to the process is the inclusion of the voice of refugees themselves. They are the most important partner – and the most important party in all RSD proceedings.

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1. Mary-Anne Kate 'The provision of protection to asylum-seekers in destination countries', *New Issues in Refugee Research Working Paper No 114*, UNHCR Geneva, May 2005. <http://www.unhcr.org/research/RESEARCH/42846e7f2.pdf>
2. Sean Rehaag 'Troubling Patterns in Canadian Refugee Adjudication', *Ottawa Law Review* Vol 39, 2008; Andrew I Schoenholtz, Philip G Schrag & Jaya Ramji-Nogales 'Refugee Roulette: Disparities in Asylum Adjudication', *Stanford Law Review* Vol 61, 295-412, 2007, online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=983946](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=983946).
3. 'Complementary protection' applies to those in need of protection who do not fit the strict criteria for the grant of refugee status, including individuals whose *refoulement* is barred due to a risk of torture or other severe human rights violations.
4. One study found that refugees who were represented during UNHCR RSD had twice the recognition rate as non-represented refugees. Mike Kagan 'Frontier Justice: Legal Aid and UNHCR Refugee Status Determination in Egypt', *Journal of Refugee Studies* 19:1, March 2006.
5. See <http://www.fahamu.org/srlan/> and [http://www.rsdwatch.org/index\\_files/Page2171.htm](http://www.rsdwatch.org/index_files/Page2171.htm)
6. One crucial element of RSD is the analysis of the extent to which the government of the country of origin is unable or unwilling to offer protection to the applicant; the laws of the country of origin may provide insight into the availability of protection.



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