Our Heritage

ISSN: 0474-9030

Vol-68-Issue-1-January-2020

Law of Asylum and International Pronouncements

Kinjal Shah[1]

Abstract

International law is the set of rules generally regarded and accepted as binding in relations between states and between nations. It serves as a framework for the practice of stable and organized international relations. International law differs from state- based legal systems in that it is primarily applicable to countries rather than to private citizens. Asylum is a form of protection extended to individuals by the U.S. government. Asylum seekers must prove that they have a well-founded fear of future persecution based on race, religion, nationality, membership in a particular social group, and/or political opinion.

This paper is an attempt by the uthor to discuss the meaning, definition reasons and limitations of the law relating to asylum in the world and international Judicial pronouncement s on them.

Key Words – International Law, Asylum, practice, private citizen and judicial pronouncements.

Meaning of Asylum

The term 'Asylum' is referred to those cases where the territorial States declines to surrender a person to requesting State and provides shelter and protection in its own territory. It is a form of protection for those who fear persecution or who risk torture or an inhuman treatment in their country of origin. Political asylum is a positive situation for one whose life would otherwise be in danger, to live as an exile from one's homeland is not ideal. Asylum may be temporary or permanent. An asylum is an area considered safe and has traditionally taken the form of a church or other religious institution. In contemporary international law, asylum is the protection granted to a foreign citizen by a state against that

[1] LLM Student, Parul university, Vdodara

ISSN: 0474-9030

Vol-68-Issue-1-January-2020

individual's home state[2].

Definitions of Asylum

. According to *Starke*[3],

. The conception of Asylum in International Laws involves two elements, firstly, shelter, which is more than a temporary refuge; and secondly, a degree of active protection on the part of the authorities in control of the territory of the asylum.

. "Asylum is the protection which a state grants on its territory or in some other place under the control of certain of its organs to a person who comes to seek"[3].

. Everyone has the right to seek and to enjoy in other countries Asylum from persecution. This right may not be invoked in the case of prosecution genuinely arising from non political crimes or from acts contrary to the purposes and principles of United Nations[4].

Reasons of Asylum

A state grants asylum to a person for many reasons.

Firstly, it is granted to save a person from the jurisdiction of the local authorities. It is feared that he would not get fair trial, if extradited, because of the differences in the views as to his political or religious activities.

Secondly, a person may be granted asylum on extra legal grounds or humanitarian grounds.

Thirdly, national security also plays an important role in granting asylum. The offender who may be rebel today may become ruler in future date. In that case the relation would be strained if he is extradited[5].

Reasons for denial of Asylum

[2] An introduction to Public International Law by S.K. Verma

[3] *The Institute of International Laws, at its Bath Session in Sept, 1950*

[4] According to *Art. 14 of the Universal Declaration of Human Rights, adopted by General Assembly of United Nation on 10th Dec, 1948*

[5] International Law and Human Right by Dr. H.O. Agarwal

ISSN: 0474-9030

Vol-68-Issue-1-January-2020

. It must be shown that the fear of persecution is "well-founded." Immigration laws and court opinions do not have a bright-line test for determining what is "well-founded,". However, it must be a fear that is something more than mere speculation.

. The second part of the asylum process contemplates that the individual is already in the state or a port of entry. If the person is not in the States or port of entry, he cannot apply for asylum.

. Even if the application qualify and all of the procedural requirements are completed, the application can still be denied based on national safety concerns. The main concern is that those who do not comply with procedural or statutory requirements, or who pose a safety risk, cannot be granted asylum. Some limited exceptions do apply to these situations.

. The other reason for denying asylum: the application must be filed within the prescribed time period after entering the state and the application must be complete[6].

Forms of Asylum

A state may grant asylum to a person in two ways:

Territorial Asylum

Extra-territorial Asylum

***Territorial Asylum*:**

Territorial asylum is granted by a state in its territory. States have an inherent right, as an attribute of their sovereignty, to grant asylum in their territory to all kinds of refugees, including the fugitive offenders, but they are not under a legal obligation to grant asylum to the fugitive. Territorial asylum derives its basis from the territorial supremacy of the state over all persons on its territory. It is not usually granted to ordinary criminals it is designed and employed primarily for the protection of person accused of political offences

[6] Ibid

ISSN: 0474-9030

Vol-68-Issue-1-January-2020

such as desertion, sedition, religious refugees etc. A state refrains from granting asylum to aliens held on a foreign vessel within its territorial waters. But it is very controversial whether a state can grant asylum to prisoners of war detained by it, and who are willing t be repatriated for the fear of the persecution.

"Every state has the right in exercise of its sovereignty, to admit into its territory such persons as it deems advisable without, through the exercise of this right, giving rise to complaint by any other state".[7]

"Asylum granted by the state, in the exercise of its sovereignty, to persons entitled to invoke Art. 14 of the Universal Declaration of Human Right including person struggling against colonialism, shall be respected by other states[8]".

"The right to seek and to enjoy asylum may not be invoked by any person with respect to whom there are serious reason for considering that he has committed a crime against peace, a war or a crime against humanity".

"it shall rest with the state granting asylum to evaluate the grounds for the grant of asylum".

A general assembly said in Declaration on territorial asylum (1967) that the grant of asylum is a humanitarian act and it cannot be regarded as unfriendly by another state. But states granting asylum shall not permit persons engaged in activities contrary to the purposes and principles of UN. The territorial asylum can be classified into:

- .Political asylum for political defectors,
- .Refugee asylum for those who fear persecution in their own country
- General asylum for those who have deserted their country to seek economic betterment but do not enjoy the status of immigrants[9].

***Extra-Territorial Asylum*:**

[7] Please refer, *Art.1 of the Convention on Territorial Asylum*
[8] Please refer, *Art. 1 of the Declaration on Territorial Asylum in 1967*
[9] J.G. Starke, introduction to international law, 10th ed. 1989. p. 358

ISSN: 0474-9030

Vol-68-Issue-1-January-2020

Asylum granted by state not on its physical territory, but on its notional territory, like in legation and consular premises in the physical territory of another state, and on warships, is called extra territorial asylum.

- *Diplomatic Asylum*: The granting of asylum in the legation (building in which diplomats work) premises is known as diplomatic asylum. It should be granted as a temporary measure to individuals physically in danger. It is an exceptional and controversial measure because it withdraws the offender from the jurisdiction of the territorial state. The Vienna convention on diplomatic privileges and immunities, 1961, contains no provision on the subject although in Art. 41, reference to "special agreement" makes room for bilateral of the right to give asylum to political refugees within the mission premises. But, on the other hand para3 of art. 41 of the convention provides that the premises of mission cannot be used in a manner "incompatible" with the function of the mission. It is also very doubtful if a right of diplomatic asylum is either for political or other offenders is recognized by general international law[10]. Asylum may be granted to individuals in legation premises on the following cases:

- Firstly, as a temporary measure, to individuals physically in danger from mob or from the fear of Govt. it implies that asylum is given to a person whose life has become unsecured. But it is granted as a temporary measure i.e., asylum continues so long the element of fear exists.

- Secondly, it is granted by those states where there is a binding local custom in this regard[10],

- Thirdly, when there is a treaty between the territorial state and the state which is represented by legation concerned.[11]

- The state is not under an obligation to grant asylum to a person in its legation. In the absence of a treaty or custom, the embassy must surrender the person to the prosecuting

[10] .G. Starke, introduction to international law, 10th ed. 1989. p. 358
[11] Macmillam, Manual of Public International law, 1968, p. 409

ISSN: 0474-9030

Vol-68-Issue-1-January-2020

govt. at its request[12]. If the surrender is refused, certain measures may be taken to induce it to do so[13]. Such measures include the surrounding of the embassy by the soldier[14] . Criminals are made even forcibly be taken out of the embassy. but these measures must be justifiable only if the case is an urgent one, and after the envoy has in vain been requested to surrender the refugee[15].however the grant of temporary asylum 'against the violent and disorderly action of irresponsible sections of the population' is a legal right in which, on the grounds of humanity, may be exercised irrespective of treaties. in such cases the authorities of the territorial state are bound to grant protection to the foreign diplomatic mission granting shelter to a person. Oppenheim has rightly stated that with the possible exception to the most compelling considerations of humanity, there is no right to refuse to surrender to the territorial state person who have been granted asylum within diplomatic premises. However, the position is different where the right to grant asylum, and the duty by territorial state to respect it, are expressly recognized in a treaty.

- *Asylum in the premise of international institution*: There is no general right or practice regarding grating asylum in the premises of international institutions and of specialized agencies, even on humanitarian grounds which is clearly evident from the Headquarter Agreement of these institutions. but temporary refuge in extreme cases cannot be ruled out e.g. Najibullah, former president of Afghanistan sought refuge in UN Headquarters in Kabul, later he was killed by Taliban.

- *Asylum on Warships*: the Warships and public vessel enjoy immunity under international law and because of the similarity with the rule that diplomatic

- premises are inviolable, it has been claimed that there exist an analogous right of asylum on board such ships. the diplomatic practice has also, to a great extent, assimilated he position of warships with the status of diplomatic premises in this regard. It is generally held view that an individual, who is not a member of the crew and takes refuge on board a vessel after committing a crime on shore, cannot be arrested by the local authorities and

[12] Oppenheim, op cit., p 1083

[13] Ibid.

[14] Ibid.

[15] Ibid.,p.1084

ISSN: 0474-9030

Vol-68-Issue-1-January-2020

removed from the vessel if the commander of the ship refuses to hand him over[16]. On the other hand, some scholars are of the view that such asylum should be granted only on humanitarian grounds if the life of the individual seeking asylum is threatened.

International Pronouncements on the law of Asylum.

These are the various International cases relating to Asylum decided by various International Courts are below:

1. Colombia vs. Peru [17]

It is a public international law case, decided by the International Court of Justice. The ICJ recognised that the scope of Article 38 of the Statute of the International Court of Justice encompassed bi-lateral and regional international customary norms as well as general customary norms, in much the same way as it encompasses bilateral and multilateral treaties. The Court also clarified that for custom to be definitively proven, it must be continuously and uniformly executed.

Facts

Peru issued an arrest warrant against Victor Raul Haya de la Torre "in respect of the crime of military rebellion" which took place on October 3, 1949, in Peru. 3 months after the rebellion, Torre fled to the Colombian Embassy in Lima, Peru. The Colombian Ambassador confirmed that Torre was granted diplomatic asylum in accordance with Article 2(2) of the Havana Convention on Asylum of 1928 and requested safe passage for Torre to leave Peru. Subsequently, the Ambassador also stated Colombia had qualified Torre as a political refugee in accordance with Article 2 Montevideo Convention on Political Asylum of 1933. Peru refused to accept the unilateral qualification and refused to grant safe passage.

Judgment

[16] Macmillam, Manual of Public International law, 1968, p. 384

[17] Asylum Case (Colombia vs. Peru),[1950] ICJ Rep 266 at 276-78

ISSN: 0474-9030

Vol-68-Issue-1-January-2020

Both submissions of Colombia were rejected by the Court. It was not found that the custom of Asylum was uniformly or continuously executed sufficiently to demonstrate that the custom was of a generally applicable character.

2. ZAT, IAJ, KAM, AAM, MAT, MAJ and LAM vs. Secretary of the State for the Home Department [3518]

Facts:

This case concerned seven applicants from Syria. Four were living in the unofficial camp near Calais known as 'the Jungle'. Three of them were unaccompanied minors and the other was the adult dependent brother of one of them who suffered from mental health problems. The other applicants were their siblings, who had refugee status in the UK.

They argued that the refusal of the Secretary of State for the Home Department (SSHD) to admit them to the UK to be reunited pending the determination of the asylum applications of the first four applicants amounted to a disproportionate interference with their Article 8 ECHR right to family life.

The factual matrix concerned three main issues:

- The conditions at 'the Jungle'

  The Upper Tribunal considered that living conditions at 'the Jungle' were appalling and highly dangerous, referring to a recent order by the Lille Administrative Tribunal and relying on witness statements and reports by humanitarian organisations and volunteers.

- The circumstances of the applicants

  The first four applicants had fled the war in Syria where they had suffered trauma. There was medical evidence diagnosing one of them with PTSD and all with stress disorders. They had each enjoyed family life in Syria with their brothers who were now in the UK. All were desperate to be

[18] JR/15401/2015; JR/154015/2015

ISSN: 0474-9030

Vol-68-Issue-1-January-2020

reunited with their siblings in the UK. None of them had applied for asylum in France.

- The laws, practices and arrangements for processing asylum applications in France and prevailing conditions for the reception and treatment of asylum applicants
- Considering a report by Nils Muiznieks and the AIDA France report of January 2015, the Tribunal noted shortcomings in relation to provision of accommodation and other services and insufficient and inappropriate reception conditions for unaccompanied asylum seeking children in France. It noted that administrative difficulties in making an asylum claim in France may distance children and others from the possibility of family reunion recognised in the CEAS.

Judgment

- The Upper Tribunal ordered the Secretary of the State for the Home Department to immediately admit four vulnerable Syrians from an unofficial migrant camp in France to the United Kingdom in order to be reunited with refugee family members during the examination their asylum application. Although they had not applied asylum in France or been subject to Dublin procedures, the particular circumstances meant that failing to do so would lead to a disproportionate interference with their right to respect for family life.

3. Matondo Adam vs. The Republic of Cyprus [19]

Facts:

The Applicant arrived in Cyprus on 04.02.2005 and filed his asylum application, claiming that he could not return to his country of origin due to fear of prosecution for demonstration in relation to elections in the country.

His application was rejected on 23.04.2012 due to a lack of credibility.

The Applicant's subsequent appeals against the rejection of his asylum claim to the Refugee Reviewing Authority have also been rejected, as well as his request of judical

[19] Matondo Adam, v. The Republic of Cyprus (2015) SCC 555/2015

ISSN: 0474-9030

Vol-68-Issue-1-January-2020

review of that decision.

Subsequently, the Applicant was requested to leave the country immediately and although he was appealing against the asylum decisions, a warrant for detention and deportation was issued against him, due to his alleged irregular stay in Cyprus.

The Applicant is seeking annulment of the detention and deportation orders against him.

Decision & Reasoning:

The judge decided that the steps that led to the decision for deportation were in breach of the procedure followed under Articles 18OD up to 18PTH of the Alien and Migration Law Directive, provisions which implemented the Return Directive. Specifically, the detention was unjustified as it was both lengthy and it was not used in order to facilitate return.

It was held that the appropriate return procedure had not been complied with, as no voluntary departure period had been offered to the Applicant, prior to him being arrested as an irregular immigrant. Only if the correct procedures were complied with, would the deportation be justified.

Also, the deportation order was ill-founded as not enough reasons had been provided for such a decision to justify such a conclusion. To the contrary, the Applicant's detention was repeatedly and unjustifiably extended, while the Applicant was appealing against the detention and deportation decision

4. V.M. vs. Belgium[20]

Facts:

The case relates to a 17 year old Afghan national who arrived in Belgium as an unaccompanied minor. The next day, on 30 November 2015, he applied for asylum in Belgium, by presenting himself to the Immigration Office andsubmitting an asylum claim

[20] [2015] UKSC 59

ISSN: 0474-9030

Vol-68-Issue-1-January-2020

form in writing. He was given a 'convocation' appointment to officially register his claim on 17 December 2015 but was not given the 'Annex 26' document as proof of registration of his asylum claim. As a result, he was not given accommodation by the federal agency for the reception of asylum seekers, Fedasil, and was forced to sleep on the streets.

His lawyer applied on his behalf to the President of the Brussels Labour Tribunal for an order requiring Fedasil and the Belgian state to provide him accommodation adapted to his needs. This was deemed inadmissible on 1 December 2015 as it did not meet the condition of 'absolute necessity', with the court reasoning that the applicant had been able to provide for his own subsistence and accommodation during his three month journey from Afghanistan to Belgium, and he had chosen not to claim asylum in Germany. An appeal was lodged against this decision on 3 December 2015, to the Brussels Labour Court.

Decision and Reasoning:

The Court ordered Fedasil to immediately accommodate the applicant in a reception centre adapted to meet his needs, or face a 125 euro per day fine, to begin from 3 working days of notification of the judgment. The Court did not find it appropriate to condemn the State, given that Fedasil was the agency responsible for accommodating asylum seekers. This is a provisional measure under the Courts powers to urgently intervene and does not definitively rule on the legal situation of the parties.

5. Mandalia vs. the Secretary of the State for the Home Department[21]

Facts:

The appellant, Mr Mandalia, originally from India came to the UK in 2008 in order to

[21] [2015] UKSC 59

ISSN: 0474-9030

Vol-68-Issue-1-January-2020

study. His visa was subsequently extended and was due to expire on 9 February 2012. On 7 February 2012, he submitted an application to the UK.

Border Agency to further extend his visa in order to enable him to study accountancy with the BPP University. Consequently, he applied for a leave to remain in the UK as a Tier 4 (General) Student. The rules referable to this type of application required the application to be accompanied by a bank statement showing that the applicant had held at least £5,400 for a consecutive period of 28 days ending no earlier than a month prior to the date of his application. The application form stipulated the amount that had to be held in the applicant's account for a 28-day period but it provided no direct information as to how the 28 days were calculated. Instead, it referred the applicant to the "specified documents", i.e. the Immigration Rules and the Policy Guidance.

The bank statements provided by the appellant covered 22 out of 28 days required and his application was refused on this ground. This refusal was initially appealed with the First-tier Tribunal (Immigration and Asylum Chamber), followed by an appeal to the Court of Appeal. Both appeals were dismissed.

Decision and Reasoning:

The Supreme Court considered the appellant's appeal against the decision by the defendant Secretary of State, by which his application for a Tier 4 student visa had been rejected, on the ground that the applicant had only provided bank statements covering 22 out of the required 28 days. The court held that the refusal of the appellant's application was unlawful because according to the process instruction the UK Border Agency should not have rejected his application without previously giving the appellant the opportunity to repair the deficit in his evidence.

6. K.K. (a minor) vs. Refugee Appeal Tribunal And Anor. [22]

Facts

[22] K.K. (a minor) V Refugee Appeal Tribunal & Anor. [2015] IEHC 581

ISSN: 0474-9030

Vol-68-Issue-1-January-2020

The Applicant is 15 months old and is a national of the Democratic Republic of Congo (DRC). He was born in Ireland on 3 November 2011. The Applicant's mother previously claimed for asylum based on a fear of 1persecution for her political opinion. This claim failed, due to, predominantly, a negative credibility assessment.

The applicant's mother was diagnosed with HIV/AIDS on arriving in Ireland in 2007. Both the Applicant and his mother are receiving treatment to minimize the risk of transmission of the condition to the Applicant. It will not be clear whether this has been successful until the Applicant is about five years old.

It is argued that the Respondent failed to comply with Regulation 5 of the EC (Eligibility for Protection) Regulations, 2006 as "all relevant facts as they relate to the country of origin" were not considered. There is vast evidence that treatment of HIV/AIDS in DRC is exceptionally difficult to access. Thus it is extremely likely that, if returned to DRC, the Applicant's mother would die. This would leave the applicant without guardianship and living on the street. There is also significant COI to the effect that street children are at risk of exploitation and identification as child witches.

The Applicant's mother's claim for asylum failed based on a negative credibility assessment. Two additional grounds for asylum were brought to the appeal which she failed to mention in her interview. She claimed that her son (the applicant) and she would face persecution based on their ethnicity as members of the Luba tribe and; based on their status as failed asylum seekers. The Respondent dismissed these additional elements as not being well- founded based on her failure to mention them in her initial application.

Furthermore, it is argued that the Applicant's claim for asylum was not given independent consideration but instead was conflated with that of his mother.

Decision and Reasoning:

The High Court initially reiterated that the hearing in front of the Refugee Appeal Tribunal is a *de novo* hearing. Therefore it was held that the Respondent failed in its duty to deal with the two additional elements introduced by the Applicant's mother at the time with respect to her son's claim.

The High Court also condemned the lack of information provided by the Respondent as to the grounding of the decision. It was stated that the

ISSN: 0474-9030

Vol-68-Issue-1-January-2020

Respondent failed to deal substantively with the Applicant's claims apart from claiming that "the Applicant's mother reconstructed her evidence after the interview" (Para. 26).

Further, it appears from the Tribunal's decision that information which the Respondent should not have had access to, was known and actively utilised by the Respondent in the final decision on the Applicant's application. This information was in relation to a decision by the Minister for Justice to deny the Applicant's mother leave to remain on humanitarian grounds. The High Court held that the use of this information jeopardised the independence of the Tribunal and was "absolutely inappropriate"(Para. 30).

The COI was deemed not to have been appropriately considered in relation to claims made by the Applicant. It was held that a minor applicant is entitled to have his or her claims considered with the best interest of the child being the primary consideration. The High Court held that the Respondent failed to do this.

7. Khliafia and Others vs. Italy [23]

Facts

This case relates to three nationals of Tunisia who left, along with others, on makeshift boats aiming to reach Italy during the 'Arab Spring'. The Italian coastguard intercepted their boats and took them to the island of Lampedusa on 17 and 18 September 2011.

They were transferred to the Contrada Imbriacola first reception centre (CSPA) for registration, which they alleged was overcrowded with unacceptable sanitation, inadequate space to sleep, constant police surveillance and no contact with the outside world. The applicants were transferred to a sports complex following an uprising by detainees in which the reception centre was partially destroyed by fire. They managed to escape to the village of Lampedusa, where they participated in demonstrations along with around 1,800 others. They were stopped by police and taken back to the CSPA before being flown to Palermo on 22 September.

They were placed on ships moored at the dock, but confined to overcrowded areas in the

[23] Khlaifia and Others v. Italy (no. 16483/12)

ISSN: 0474-9030

Vol-68-Issue-1-January-2020

restaurant halls, with limited access to the toilets and no information from the authorities, where they allege they were insulted and mistreated by police officers.

After 5-7 days respectively they were taken to Palermo airport in order to be repatriated. They were identified by the Tunisian consul and deported to Tunisia based on a bilateral agreement between the two States. The applicants allege that they were not served with any documents at any time during their stay in Italy.

In the course of these proceedings the Italian government produced a repatriation decree against each applicant in Italian with Arabic translations, in essentially identical terms. The decrees were not signed but stated in handwritten notes that the person concerned had refused to sign and receive a copy.

Following a complaint by anti-racist organisations, a criminal investigation took place into the unlawful arrest of migrants on board the ships and abuse of powers but the judge for preliminary investigations shelved the case in April 2012 without charges being brought.

The applicants complained that they were unlawfully deprived of their liberty, both at the CSPA and on board the ships, in violation of Articles 5(1), 5(2) and 5(4) ECHR. They also argued that the conditions of their detention amounted to inhuman and degrading treatment contrary to Article 3 ECHR. Finally, they submitted that they had been subject to a collective expulsion, in violation of Article 4, Protocol 4 ECHR

Decision and Reasoning:

The Court found that three nationals of Tunisia had been unlawfully detained upon arrival in Italy, first in a reception centre and then on board ships, where they were not provided information and had no opportunity to challenge their detention. In addition, the conditions in the reception centre amounted to inhuman and degrading treatment. Finally, the Court found that the applicants had been subject to collective expulsion, as despite being identified individually and being issued with separate repatriation decrees, their individual circumstances had not been genuinely considered prior to their return to Tunisia.

8. B. L. (Nepal) vs. Refugee Appeals Tribunal, Ireland[24]

[24] B.L. (Nepal) v. Refugee Appeals Tribunal [2015] IEHC 489

ISSN: 0474-9030

Vol-68-Issue-1-January-2020

Facts:

The Applicant is a Nepalese national. He fears persecution based on an imputed political view. His eldest brother was a prominent member of the Maoist rebel group in Nepal and was shot and killed by Government forces. Since then, both the Government and the Maoists have been looking for the Applicant. The Government has a warrant for the Applicant which was posted around his village. The Maoists approached the Applicant and asked him to take his brothers place in their group. The Applicant refused to do as and as a result, the Maoists view the Applicant as a government spy. The Applicant received threats from the Maoists. He then fled Nepal.

The Applicant fled to India where he lived for 6 years with relatives of his wife. He worked for them on their small farm. Though legally allowed to work in India, the Applicant stated he was never given the opportunity to find work outside of the farm. He returned to the border of Nepal a number of times to visit his wife. The Applicant left India as he felt he was a burden on his relatives.

Obtaining a visa to the UK, the applicant lived there for four months. He subsequently left to Ireland and sought asylum there. Following on from Dublin proceedings against the applicant and an oral appeal hearing on the substantive asylum claim before the Refugee Appeals Tribunal, the applicant's claim was rejected on account that the claim lacked detail and, thus, credibility.

Decision and Reasoning:

This Case examines the refusal to grant refugee status to a Nepalese national. The Tribunal failed to provide clear, cogent reasoning for the decision. Documentation and explanations provided by the Applicant were not included in the decision. Unreasonable assumptions were made by the Tribunal including: as the Applicant's wife, children and brother were safely residing in the country of origin, this inferred that the Applicant could do the same; since the applicant spent 6 years living safely in India, he could continue to live there safely. The High Court criticized the procedural approach by the Tribunal and lack of coherent reasoning provided. The High Court granted leave and quashed the Tribunal's decision.

ISSN: 0474-9030

Vol-68-Issue-1-January-2020

9. A.S. vs. Switzerland [25]

Facts:

The applicant, a Syrian national of Kurdish origin, entered Switzerland from Italy and applied for asylum. His asylum request was rejected on the grounds that his fingerprints had already been registered in Greece and Italy and that the latter had accepted to take him back under the Dublin II Regulation. The applicant appealed against that decision, stating that he had been prosecuted, detained and tortured in Syria. He further claimed that this decision was in breach of the Dublin Regulation because Greece was the first Member State he entered and therefore responsible for examining his asylum request. The applicant claimed that if returned to Italy, he would face treatment contrary to Article 3 of the Convention. He further complained under Article 8 of the Convention stating that his removal to Italy would violate his right to family life.

Decision and Reasoning:

The Court raised serious concerns over the capacity of the Italian accommodation facilities for asylum seekers. However, it highlighted that in the case at hand the applicant was not critically ill and that there were no indications that he would not receive appropriate psychological treatment if returned to Italy. Accordingly, the Court found that the present case did not disclose very exceptional circumstances such as in D. v. the United Kingdom and therefore found no violation of Article 3 in case of expulsion.

Turning to the complaint under Article 8, the Court recalled that within the meaning of that Article, there would be no family life between parents and adult children or between adult siblings unless they would demonstrate additional elements of dependence (F.N. v. the United Kingdom). The Court considered that the Swiss authorities had achieved a fair balance between the applicant's interests in family life and the public order interests of the country. Therefore, it found that the implementation of the decision to remove the applicant

[25] A.S. v. Switzerland, Application no. 39350/13, 30 June 2015

ISSN: 0474-9030

Vol-68-Issue-1-January-2020

to Italy would not give rise to a violation of Article 8 of the Convention.

10. J.K. and others vs. Sweden [26]

Facts:

The applicants, Iraqi nationals, are a married couple and their son who applied for asylum in Sweden. The basis of their asylum claim was a fear of persecution by al-Qaeda.

The husband had run a business since the 1990s at an American army camp with exclusively American clients. He survived a murder attempt by al-Qaeda, but was hospitalised for three months. His brother was kidnapped by the group the following year and was threatened due to the applicant's 'collaboration' with the Americans. In 2005, a bomb was placed next to the applicants' house but it was detected and the perpetrator confessed being paid by al-Qaeda to watch the applicants. The family moved to Syria for a number of years during which al-Qaeda destroyed their home and business stocks. They did not seek protection from the domestic authorities as they lacked the ability to protect them and al-Qaeda collaborated with the authorities.

After returning to Baghdad in 2008, their daughter was shot at and killed and business stocks were attacked numerous times. The husband ceased his business activities and the family moved around to avoid detection.

They claimed asylum in Sweden in 2011 which was rejected by the Migration Board of Sweden who found that although their account was credible; after ending collaboration with the Americans in 2008 they were able to live in Baghdad for two years without being victim of any attacks. In addition, they could seek domestic authorities' protection as al-Qaeda infiltration had greatly diminished.

On appeal to the Migration Court, they produced further evidence indicating that a masked terrorist group had come to search for the husband in 2011, that their house had been burned down, and that the Iraqi administration was corrupt and infiltrated by al-Queda.

[26] J.K. and Others v. Sweden, Application no. 59166/12

ISSN: 0474-9030

Vol-68-Issue-1-January-2020

Their appeal was rejected and so was their request for re-examination.

The applicants submitted that their return to Iraq would violate Article 3 ECHR, and interim measures to prevent their deportation were granted under Rule 39 in September 2012.

Decision & Reasoning:

The Court considered the general situation of violence in Iraq, citing various international reports. It found that despite the significant worsening in the situation since the ISIS offensive in northern Iraq in June 2014, none of these reports showed reason to depart from its previous findings that the general situation in Iraq was not so serious as to cause by itself, a violation of Article 3 upon return.

Turning to the specific circumstances of the applicants, it agreed with the Swedish authorities that they had not substantiated allegations of being threatened or persecuted by al-Qaeda after 2008 and also pointed out some credibility issues in their allegations. In view of the fact that the latest substantiated attack against the applicant was in 2008, and that the family had stayed in Baghdad after this without being subject to further threats, it concluded that there was not sufficient evidence to conclude that the applicants would face a real risk of being subjected to treatment contrary to Article 3 of the Convention upon return to Iraq.

11. Mohamad vs. Greece [4427]

Facts:

After being arrested for irregular entry into Greece, the applicant was examined by a FRONTEX officer who erroneously noted his age, declaring that he was an adult. He was ordered to leave the Greek territory on grounds of his irregular entry and the Prosecutor authorised his expulsion to Turkey. This decision was, however, not carried out as the Turkish authorities refused to accept the applicant. Re-confirming the decision to expel the applicant and considering that he would abscond, the Director of the Alexandroupoli police

[27] Mohamad v. Greece (Application no. 70586/11), 11 December 2014

ISSN: 0474-9030

Vol-68-Issue-1-January-2020

placed the applicant in detention at Soufli border post. Notwithstanding that the Greek Council on Refugees notified the Director of the applicant's age, who was in fact under 18, the applicant was kept in detention and supposedly given information as to the reasons for his detention and rights in English. The applicant highlighted that he had neither been given an information brochure nor could understand English.

After rectifying the discrepancy with the applicant's age the police authorities notified the Prosecutor and suspended the expulsion order. Placed in a hospital to undergo examinations the applicant was nonetheless kept in Soufli border post for a period of 5 months. Upon reaching the age of majority the applicant complained of the duration and conditions of his detention, which the President of the Alexandroupoli Administrative Tribunal acceded to. The applicant was later released and given thirty days to the leave the territory, after which the return decision would be enforced if he had not left the country.

Decision & Reasoning:

The European Court of Human Rights (ECtHR) has held that the detention of an unaccompanied minor at Soufli border posts for over 5 months constituted a breach of Article 3 of the ECHR as well as a violation of the right to an effective remedy and the right to liberty and security.

12. **Sharifi and others vs. Italy and Greece**[28]

Facts:

The facts of the case relate to 35 individuals who at different times between 2007 and 2008 had reached Greece and later travelled by boat to Italy. Upon arriving at various Italian ports the boats were intercepted by border guards and immediately refouled to Greece. In both countries the applicants were subjected to violence meted out by the police and crew on the vessels and were not granted the opportunity to lodge asylum applications.

With regards to Italy the applicants were neither given the opportunity to contact lawyers or translators and were provided no information as to their rights. No official translated letter was furnished concerning their return to Greece, instead upon disembarkation in Italy the

[28] Sharifi and Others v Italy and Greece (Application No. 16643/09), 21 October 2014

ISSN: 0474-9030

Vol-68-Issue-1-January-2020

applicants were immediately returned to the boat and sent back to Greece. For the entirety of the journey some applicants were locked in cabins and others in toilets.

In Greece, the applicants were immediately detained and later placed in a make shift camp in Patras where reception conditions were inhumane, with no access to toilets, food or medical assistance. In this regard a request for a rule 39 interim measure was lodged in front of the court after reports that several Afghan nationals in Patras had been expelled to Turkey and later back to Afghanistan. Following on from subsequent correspondence with the Court documenting the closing down of the Patras camp and police violence the Court indicated interim measures with regards to several of the applicants, some of which were nonetheless refouled back to Turkey, Albania or detained in Greek prisons. During the time spent in Greece the applicants advanced that no possibility to contact a lawyer or translator was provided, that they had no access to the asylum procedure or a first instance procedure which had competence to hear their complaints.

Decision & Reasoning:

The case examines allegations of the indiscriminate expulsion of foreign nationals from Italy to Greece who had no access to asylum procedures and who subsequently feared deportation to their countries of origin. In regards to four of the applicants, the Court held that Greece violated Article 13 (right to an effective remedy) and Article 3 (prohibition of inhuman or regarding treatment). It also held that Italy violated Articles 13 and 3 as well as Article 4 of Protocol No. 4 (prohibition of collective expulsion of aliens.)

Conclusion

Inadequate and Lack of Legal Framework

According to statistics released by the United Nations High Commissioner for Refugees (UNHCR) at the end of 2014,around 60 million people were forcibly displaced. While news reports have focused largely on the refugees undertaking perilous journeys across the Mediterranean trying to reach Europe, we in the Indian subcontinent are much closer to the crisis than most of us realise.

ISSN: 0474-9030

Vol-68-Issue-1-January-2020

India has not agreed to any minimum standards for the treatment of refugees, and its policies towards refugees are without UN supervision. Moreover, India has rebuffed efforts from the United Nations High Commissioner for Refugees (UNHCR) and other international aid organizations to monitor and assist the Indian government with its refugee population. The Indian government repeatedly has barred access to many of the large refugee populations in the country's interior; international assistance and - monitoring is occasionally granted for a very small number of refugees living in urban centers. The U.S. Committee for Refugees (USCR) 1998 Country Report on India cited that of the more than 300,000 refugees in India, only 18,500 have received UNHCR protection

India hosts 32,000 refugees fleeing war, violence and severe persecution in countries such as Afghanistan, Myanmar, Somalia, Iraq, etc. This is in addition to the 175,000 long-staying refugees from Tibet and Sri Lanka who have been given asylum over decades. With conflicts around the world having intensified, fresh arrivals of refugees are only expected to increase. While India has historically been humane and generous in its treatment of refugees, it is a matter of surprise that India is yet to enact a coherent and uniform law addressing the issue of asylum. In fact, the term "refugee" finds no mention under domestic law.

Suggestions on the basis of various international rules and regulations prevailing and the following suggestions are made

1. There is need to have a law on Asylum

2. There is *need to establish a specific department which only deals with the issue of Asylum Seekers*

3. There is need to establish of Interstate Forum

4. *There is need an active role of UN*

ISSN: 0474-9030

Vol-68-Issue-1-January-2020

BIBLIOGRAPHY

Books

- *International Law and Human Rights by H.O. Agarwal,*
  In this author basically deals with meaning of Asylum and its relation with International Law and Extradition.
- *An introduction to Public International Law by S.K. Verma,*
- *Public International Law by Mahesh Prasad Tandon and Rajesh Tandon,*
- Year book of International Law Commission,(1960)
- J.G. Starke, introduction to international law, 10th ed. 1989
- J.G. Starke, introduction to international law, 10th ed. 1989
- Macmillam, Manual of Public International law, 1968
- O' Connell, International Law, Vol. 2
- 'International Law' vol. 1, 9th ed. (1992)
- Sieghart, Paul (1983). *The International Law of Human Rights*. Oxford University Press
- International Covenant on Economic, Social and Cultural Rights, Part I, Article 1, Paragraph 3.
- Dr Stephen James, "A Forgotten Right? The Right to Clothing in International Law

Articles

- Asylum as a general principle of Law by Maria Teresa and Gil Bazo in International Journal of Refugee Law.
- Refugee in India by Anantha Chari
- Legal status of Refugees in India by Swananda Banerjee, the paper work mainly deals with the lack of legal framework of Refugee Laws in india.
- It's Time India Had a Refugee Law by Hamsa Vijayaraghavan, Roshni Shanker and Vasudha Reddy

Websites

ISSN: 0474-9030

Vol-68-Issue-1-January-2020

www.google.wikipedia.com

http://www.britannica.com/topic/international-

law http://www.ijrcenter.org/refugee-law/

https://en.wikipedia.org/wiki/Refugee

https://en.wikipedia.org/wiki/Refugee_law

http://ijrl.oxfordjournals.org/

http://infochangeindia.org/

http://www.worldlii.org/

www.CatholicEncyclopediaSanctuary.com

www.borispaul.wordpress.com

www.ijrcenter.org

www.therefugeeproject.org/

www.timesofinida.com

UN resolutions

United Nations General Assembly Resolution 543, 5 February 1952.

United Nations General Assembly Resolution 545, 5 February 1952.